



ITAT ONLINE.ORG
YOUR ONE-STOP RESOURCE FOR ALL ITAT RELATED MATTERS & MORE

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

(Pronounced in the period from January 2017 to December 2017)

By Sunil Moti Lala, Advocate (assisted by CA Tushar Hathiramani)

The Digest contains 2,000 important judgments which were pronounced by Courts and Tribunals in the calendar year 2017.

Of these, there are 1,200 judgements on Transfer Pricing, 109 judgements on International Taxation and 691 judgements on Domestic Taxation.

The author has meticulously and systematically classified the judgments into various categories to enable ease of reference.

The appeal numbers in most cases have been provided so as to enable the judgements to be retrieved from the website of the respective Court or Tribunal.

Transfer Pricing	International Tax	Domestic Tax
➤ International transaction / Specified Domestic Transaction / Associated Enterprise	➤ Royalty / Fees for technical services	➤ Income – Case 1310 to 1329
– International transactions / Specified Domestic Transaction – Case 1 to 8	– Royalty – Case 1201 to 1219	➤ Income from Salary – Case 1330 to 1331
– Associated Enterprise – Case 9 to 18	– Fees for technical services – Case 1220 to 1240	➤ Income from House Property – Case 1332 to 1334
➤ Most Appropriate Method	➤ Permanent Establishment – Case 1241 to 1255	➤ Business Income – Case 1335 to 1351
– Comparable Uncontrolled Price Method – Case 19 to 36	➤ Capital Gains – Case 1256 to 1262	➤ Deductions/ Disallowances
– Cost Plus Method – Case 37 to 38	➤ Independent Personal Services – Case 1263 to 1264	– Section 32 / 32A – Case 1352 to 1368
– Resale Price Method – Case 39 to 50	➤ Salary – Case 1265	– Section 35AB – Case 1369 to 1370
– Transactional Net Margin Method - Case 51 to 81	➤ Withholding tax – Case 1266 to 1277	– Section 35AC – Case 1371
– Revenue / Profit Split Method - Case 82	➤ Foreign Tax Credit – Case 1278 to 1286	– Section 35D – Case 1372
– Any Other Method - Case 83	➤ Shipping Income – Case 1287 to 1291	– Section 36 – Case 1373 to 1381
– Others - Case 84 to 85	➤ Section 44BB – Case 1292 to 1295	– Section 37 – Case 1382 to 1425
➤ Comparability – Inter and Intra Industry	➤ Assessment / Appeals – Case 1296 to 1299	– Section 40A - Case 1426 to 1427
– Engineering Services / Consultancy Services – Case 86 to 89	Others – Case 1300 to 1309	– Section 43B - Case 1428 to 1434
– ITES Sector / Software Development Services - Case 90 to 332		– Section 14A – Case 1435 to 1466
– Investment Advisory Services – Case 333 to 345		– Section 10A / 10B / Chapter VIA ● Section 10A / 10B -Case 1467 to 1479 ● Chapter VIA - Case 1480 to 1516
– Manufacturing - Case 346 to 354		➤ Income from Capital Gains – Cases 1517 to 1573
– Research and Development Services - Case 355 to 358		➤ Income from Other Sources – Case 1574 to 1581
– Sales / Trading - Case 359 to 362		➤ Assessment / Reassessment

		/ Revision / Search
– Support Services - Case 363 to 395		– Assessment – Case 1582 to 1613
– Others – Case 396 to 402		– Re-assessment – Case 1614 to 1680
– General		– Revision – Case 1681 to 1700
Functionality – Case 403 to 425		–Search – Case 1701 to 1738
Data for the year – Case 426 to 442		➤ Withholding Tax – Case 1739 to 1777
• Turnover – Case 443 to 456		➤ Others
• Related Party Transactions – Case 457 to 466		– Appeals – Case 1778 to 1806
• Loss making companies – Case 466 to 469		– Clubbing of income – Case 1807
• Multiple Filters – Case 470 to 485		– Deemed Dividend – Case 1808 to 1815
• Argue own comparables – Case 486 to 489		– Exempt Income / Charitable Trusts – Case 1816 to 1846
• Others – Case 490 to 506		– Interest / Penalty – • Interest - Case 1847 to 1853
➤ Computation / Adjustments		• Penalty – Case 1854 to 1898
– Capacity Utilization Adjustment – Case 507 to 519		- Method of accounting – Case 1899
– Depreciation Adjustment – Case 520 to 525		– Minimum Alternate Tax – Case 1900 to 1904
– Extraordinary expenses – Case 526 to 533		- Refund – Case 1905 to 1908
– Profit Level Indicator – Case 534 to 595		– Set off of losses– Case 1909 to 1917
– Restrict adjustment to AE transactions – Case 596 to 606		– Settlement Commission– Case 1918 to 1921
– Risk Adjustment – Case 607 to 615		– Stay of demand – Case 1922 to 1931
– Segments – Case 616 to 623		– Unexplained income / expenses / investments – Case 1932 to 1975
– Working Capital Adjustment – Case 624 to 636		– Miscellaneous – Case 1976

		to 2000
- +/- 5% adjustment – Case 637 to 643		
-Others – Case 644 to 655		
➤ Specific Transactions		
- Advertisement, Marketing and Promotion expenses – Case 656 to 699		
- Loan – Case 700 to 736		
- Receivables – Case 737 to 764		
- Corporate Guarantee – Case 765 to 791		
- Royalty – Case 792 to 816		
- Management fees / Intra Group Services – Case 817 to 859		
- Reimbursements – Case 860 to 869		
- Share capital / share issue / share transactions – Case 870 to 876		
- Others – Case 877 to 881		
➤ Miscellaneous		
- Appeal – Case 882 to 961		
-Assessment / Reassessment– Case 962 to 1053		
- MAP – Case 1054 to 1077		
- Penalty – Case 1078 1100		
- Stay – Case 1101 to 1175		
- Others – Case 1176 to 1200		

I. Transfer Pricing

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

International transactions / Specified Domestic Transaction

1. The Tribunal, relied on the decision of the co-ordinate bench in the case of the assessee for the earlier year and held that AMP expenditure could not be held to be an international transaction on the basis of probable incidental benefit to the AE absent an agreement for sharing AMP expenditure. It held that the Revenue had to show that there existed an agreement or arrangement or understanding between the assessee and its AE whereby the assessee was obliged to spend excessively on AMP in order to promote the brand of the AE in absence of which the impugned transaction could not be considered as an international transaction under section 92B of the Act.
Thomas Cook (India) Ltd v DCIT – TS-63-ITAT-2017 (Mum) – TP - ITA No.383/Mum/2016
2. The Tribunal, relying on the provisions of section 92B which provides that even an arrangement, understanding or an action in concert having a bearing on the profit income, losses or assets of the enterprises would qualify as international transaction, held that the sharing of cost between Nike India (assessee) and its AE in respect of contract with BCCI for promotion and brand building of Nike was an international transaction noting that the assessee had incurred the expenditure for the promotion of brand Nike since the agreement between brands in the territory enhanced the brand value of NIKE which belonged to the AE of the assessee. In respect of other local AMP expenses the tribunal held that such expenditure cannot be regarded as an independent international transaction as there was no agreement or arrangement in writing or otherwise with the AE.
Nike India Pvt Ltd - TS-1034-ITAT-2016 (Bang)- TP - I.T.{T.P} A. No.232/Bang/2014
3. The Court considering assessee's reliance on Maruti Suzuki HC ruling and other judgments which were not available before TPO, remitted to the file of the TPO the issue relating to existence of international transaction of AMP expenses for fresh consideration
Bacardi India Pvt Ltd-TS-1052-ITAT-2016 (Del)-TP- I.T.A. No. 1197/Del/2016
4. The Court relying on the decision in Sony Ericsson Mobile Communications India Pvt. Ltd [TS-543-HC-2016(DEL)-TP] (wherein it was held that unilateral incurring of AMP expenses does not constitute an international transaction and benefit to AE is incidental only) remitted the AMP issue for comprehensive decision by Tribunal on whether AMP expenditure with regard to the assessee's outbound travel business constituted an international transaction for AY 2009-10 and AY 2010-11 on ground that the Tribunal should have first decided whether in the circumstances of the case, the nature of the AMP reported could lead to the conclusion that there was an international transaction. The Court noting that the LG Electronics [TS-11-ITAT-2013(Del)-TP] Ruling approving the Bright Line Test had been overruled by the Delhi HC in the case of Sony Ericsson Mobile Communications India Pvt Ltd, it further held that every endeavour should not be made to conclude that all transactions reporting AMPs were to be treated as international transactions, the facts of each case would have to be examined for some deliberations. Accordingly, it directed the tribunal to decide whether the reporting of the AMP in regard to the outbound business constituted an international transaction.
LE Passage to India Tour & Travels (p) Ltd & ANR - (2017) 98 CCH 009 (Del) - ITA 368/2016, 369/2016
5. The Tribunal upheld the applicability of provisions of Chapter X on the international transactions entered into by assessee (engaged in production & telecasting of Common Wealth Games 2010) viz. services received from its AE, reimbursement of expenses paid to its AE, availing of equipment on hire and inter-company receivable from its AE. It rejected the assessee's plea that Chapter X provisions were inapplicable to these transactions as no deduction for expenses were claimed as expenses as it followed the cash system of accounting and therefore there was no impact of these transactions on its profit, losses, income or expenses. It concluded that the assessee's transactions with its AEs relating to availing of services, reimbursement of services,

availing equipment on hire and Inter-company receivables fell within the categories of "provision of services", "lease of tangible assets" and "borrowing / lending of money" u/s 92B(1) and that the condition of 'bearing on profit, income and loss' of the assessee only applies to the last category of transactions i.e. "Other transactions". It observed that if the contention of the assessee was to be accepted, then under the cash accounting system, income on interest free advances to AEs would never get recognised any point. It distinguished the following cases relied upon by the assessee viz. Bombay High Court decision in Vodafone India Services Private Limited [TS-308-HC-2014(BOM)-TP] as well as coordinate bench decisions in Bharti Airtel [TS-76-ITAT-2014(DEL)-TP] and Topsgroup Electronic Systems [TS-61-ITAT-2016(Mum)-TP], noting that those cases dealt with transactions falling in "other transaction category" to which condition of impact on profit, Income, loss or assets was relevant.

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

6. The Tribunal, relying on the decision in assessee's own case (wherein considering Bombay HC ruling in Vodafone, it was held that transaction of purchase of shares of AE cannot be regarded as international transaction and cannot be subject matter of investigation u/s 92), held that when the transaction of purchase of shares was held to be outside the purview of the provisions of Sec.92 of the Act, the excess price paid for acquiring shares could not be treated as a deemed loan and an international transaction. Accordingly, it held that the transaction in question was on capital account and determination of ALP in respect of such transactions was outside the purview of Chapter X of the Act and deleted the TP-adjustment in respect of purchase of shares by assessee from its AEs.

TCG Lifesciences Pvt. Ltd (Formerly "TCG Lifesciences Ltd") vs. DCIT- [TS-921-ITAT-2017(Kol)-TP]- I.T.A No. 121/Kol/2016 & 647/Kol/2017 dated 17.11.2017

7. The Tribunal deleted the TP-adjustment for assessee engaged in R&D activities for Honda products in India) for AY 2006-07 and 2007-08. It noted that the TPO had found that assessee was customizing Honda Technology used in 4 & 2 wheelers to suit the requirement of Indian Customer, but benefit of such customized technology earned by the Parent Company from Indian subsidiaries was not shared with the assessee, and thus proposed adjustment. The Tribunal observed that Delhi HC in assessee's own case for AY 2005-06 had restored the matter back to ITAT after categorically mentioning that assessee was not into Core R&D activity. It held that since the Hon'ble High Court for Assessment Year 2005-06 had clearly concluded that the assessee had not carried out any research and development activity, the same could not be taken into account for rendering services as per international transactions. Thus, the Tribunal concluded that the assessee company had not carried out any international transaction. Regarding working capital adjustment notes that HC decision was not available before the TPO and DRP and thus restored the matter to AO/TPO to verify the same

Honda R & D (India) Pvt. Ltd vs. DCIT-TS-1006-ITAT-2017(DEL)-TP - I.T.A .No. 4800/DEL/2010 dated 03.11.2017

8. The Tribunal quashed the reference made by the AO to the TPO under Section 92CA as well as the consequential order passed by the TPO / DRP noting that the transaction in question was that of payment of directors remuneration (transaction under Section 40A(2)(b) which fell under the specified domestic provisions) and held that since transactions under Section 40A(2)(b) of the Act were omitted from the SDT provisions by Finance Act, 2017, the transaction, though pertaining to AY 2013-14 would also no longer fall under the definition of Specified domestic transactions. It held that once the clause was omitted by a subsequent amendment, it would be deemed that the clause was never on the statute. Accordingly, it remitted the assessee's claim of expenditure back to the file of the AO for verification under the normal provisions of the Act.

Texport Overseas Pvt Ltd v DCI - TS-1032-ITAT-2017 (Bang) - TP - IT(TP)A No.1722/Bang/2017

Associated Enterprise

9. The Tribunal held that in the case of public sector companies, even if all or majority of the shareholdings are by the union or state governments, these companies for that reason alone cannot be said to be associated enterprises for the purpose of section 92A. Circular No. 9/76 dated 19-5-1976 issued by the Ministry of Corporate Affairs clarified that for the purpose of section 370 of Companies Act 2013, Companies will not be deemed to be under the same management as the President or the Governor does not hold shares and exercises or controls voting rights as an individual in Govt. Companies. The scope of section 370 (1B), in the Companies Act in force at that point of time, was with respect to the expression 'individual' as against 'person' in the present case, but then the same position, for the detailed reasons set out above, holds good in the present context, i.e. in the context of 'person', as well. If all public sector undertakings were to be treated as Associated Enterprise, the inter se transactions between all the public sector undertakings would be subject to arm's length price determination-something which was seemingly quite incongruous and contrary to the scheme of the transfer pricing legislation. Therefore, PSUs cannot be said to be associated enterprises.
Hazira LNG Private Limited – TS-1027-ITAT-2016 (Ahd) – TP - I.T.A .No. 6856/DEL/2015
10. The Tribunal, relying on the decision in the case of Keihin Panalfa –(381 ITR 407) [wherein it was held that for the purpose of transfer pricing adjustment, the transaction of the assessee with Associated Enterprise outside the country alone had to be taken into consideration and the domestic transaction unless it was a Specified Domestic Transaction, could not be a basis for making any adjustment], reversed DRP's order making entity level adjustment. It held that TP-adjustment has to be made only in respect of transactions with AE after comparing the transaction made by similarly placed company in uncontrolled transaction with non-AEs.
Yongsan Automotive India Pvt. Ltd. vs. ACIT-TS-1046-ITAT-2017(CHNY)-TP /ITA No.357/Mds/2017 dated 16.11.2017
11. The Court relying on the decisions in Orchid Pharma and Page Industries, held that assessee (an Indian partnership firm) and the Belgian entity (shares of which were held by partners' brother and relatives) were not associated enterprises (AEs), as the conditions of section 92A(2) are not fulfilled. The Court, applying the provisions of section 92A(2), held that mere fact of participation of one enterprise in management or control or capital of other enterprise would not make them AEs. While a certain degree of control may actually be exercised by these enterprises over each other, due to relationships of the persons owning these enterprises, that itself was not sufficient to hold the relationship between the two enterprises as 'associated enterprises'.
Veer Gems TS-7-ITAT-2017 (Ahd)-TP - ITA No.1514/Ahd/2012
12. The Tribunal upheld CIT(A)'s order considering 3 companies namely Multitrade Overseas INC, Harris Freeman & Co. LP and Southern Tea LLC as associate enterprise of the assessee, since all the three companies were being controlled and managed by the same shareholders and persons and therefore the condition provided under section 92A(2)b, 92A(2)(j) & 92A(2)(h) were satisfied.
General Commodities Ltd -[TS-1061-ITAT-2016(Bang)-TP - I.T.{T.P} A. Nos.1824 & 1825/Bang/2013
13. The Tribunal upheld the order of the TPO and held that the assessee, engaged in manufacture and selling of generic injectable drugs) had an AE relationship with 2 entities viz. Apotex Corp and Apotex Inc US under section 92A(2)(i) since 20 percent of the assessee's sales were to these 2 entities. It agreed with the ruling of the co-ordinate bench in Orchard Pharma viz. that the term 'influence' used in Section 92A(2)(i) means dominant influence leading to de facto control and held that a person who purchased more than 1/5th of the total sales of the assessee would have a distinctly dominant influence on the pricing and could exercise de facto control and therefore was to be considered as an AE.
Hospira Healthcare India Pvt Ltd – TS-147-ITAT-2017 (CHNY) – TP dated 28.02.2017 - I.T.A. No. 821/Mds/2016
14. The Tribunal relying on the decision in assessee's own case for earlier year [TS-1034-ITAT-2016 (Bang)-TP] held that the sharing of cost between (assessee) Nike India and its AE in respect of

contract with BCCI for promotion and brand building of Nike was 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, it held that the payment of 50% of the cost paid to the BCCI borne by the AE of the assessee was under conscious understanding and agreement between the parties to promote and enhance the brand value of NIKE which belonged to the AE of the assessee, which was within the ambit of the definition of international transaction u/s 92B which provides that even an arrangement, understanding or an action in concert having a bearing on the profit income, losses or assets of the enterprises would qualify as international transaction. Accordingly, it remitted the issue to the file of AO/TPO for the limited purpose of determination of ALP.

Nike India Private Limited vs DCIT-TS-647-ITAT-2017(Bang)-TP-ITA no. 1338/bang/2011 and 1181/bang/2012 dated 04.08.2017

15. The Court upheld the order of the Tribunal and held that for determining whether two parties are Associated enterprises, the conditions laid down in both Section 92A(1) and 92A(2) were to be fulfilled. It held that Section 92A(1) broadly states that two enterprises would be AEs if they have common management, capital or control, but 92A(2) provides practical illustrations to determine whether Section 92A(1) is satisfied. Accordingly, it held that the assessee and a concern from which is purchased rough diamonds viz. Blue Gems were not AEs despite the fact that the two entities were being controlled by the same family or four brothers and their close relatives as none of the conditions provided in Section 92A(2) were satisfied.

Pr. CIT vs. Veer Gems - TS-545-HC-2017(GUJ)-TP - TAX APPEAL NO. 338 of 2017 dated 20.06.2017

Pr. CIT vs. Veer Gems - TS-557-HC-2017(GUJ)-TP - TAX APPEAL NO. 339 of 2017 dated 20.06.2017

16. The Tribunal, relying on the decision in the case of Siro Clinpharm wherein it was held that amendment to Sec 92B was not retrospective at least to the extent pertaining to issuance of corporate guarantee, set aside CIT's revision order u/s 263 treating AO's order as erroneous & prejudicial to Revenue's interest as no TP-adjustment was made in respect of corporate guarantee extended by assessee to subsidiary/AE for AY 2010-11. Noting assessee's submission that corporate guarantee to an associate company was brought within the ambit of international transaction vide Finance Act 2012 (w.r.e.f. April 1, 2012). judicial precedents had held that such corporate guarantee was not an international transaction. Further, Form 3CEB was revised from April 1, 2013 (to cover transactions in the nature of guarantee) and assessee had already filed its tax return on October 8, 2010 (followed by revised return filed on March 30, 2012) for relevant AY 2010-11 i.e. before the amendment was made and before the new Form 3CEB had come into existence. Therefore, it held that when the amendment was brought in by the Finance Act, 2012 and when the Rules were notified on 10th June 2013, the assessee cannot be expected to have reported this transaction as international transaction prior to that. Accordingly, it held that there was no error in the order of the AO causing prejudice to the Revenue.

EIH Ltd vs CIT-TS-609-ITAT-2017(KOL)-TP-ITA No. 530/kol/2015 dated 09.06.2017

17. The Tribunal ruling in favour of the assessee, held that the TP provisions under Chapter X of the Act were not applicable to the assessee's sale and purchase transactions with 2 concerns (viz. Durian Industries and General Woods). It noted that Durian Industries was an Indian Tax Resident incorporated under the Companies Act, 1956 and therefore the transactions with it would not be an international transaction u/s 92B as the section postulates at least one non-resident. In respect of General Woods, the AO sought to treat it as an AE on three counts, - (i) two shareholders of the assessee were also directors/shareholders in General Woods u/s 92A(2) (j), (ii) THE Shareholders were involved in fixing prices of transactions between assessee & General Woods u/s/ 92A(2)(i) (iii) the total purchases made by assessee from both the entities (Durian and General Woods) exceeded 90% of total purchases. The Tribunal held / observed that i) 92A(2)(j) was not applicable as the TPO failed to demonstrate how the test mentioned in the said section was satisfied ii) Section 92A(2)(i) did not apply as the shareholders determined the

purchase and selling prices for and on behalf of the assessee only and not for General Woods and iii) section 92A(2)(h) did not permit aggregation of purchases from different parties for the purpose of testing the limit of 90% prescribed. Accordingly, it held that the lower authorities had erred in considering transactions with Durian and General Woods as international transactions and deleted the TP adjustment.

Elder Exim Pvt Ltd vs DCIT-TS-689-ITAT-2017(Mum)-TP-ITA No.5385/Mum/2014, (A.Y. 2008-09) ITA No.2744/Mum/2014, (A.Y. 2009-10) ITA No.5386/Mum/2014, (A.Y. 2010-11) dated 16.08.2017

18. The Court dismissed Revenue's appeal against Tribunal order holding that assessee and India Gems & Beads were not associated enterprises u/s 92A. The Tribunal had rejected Revenue's contentions that since Smt. Anupama Singh who was sole shareholder of India Gems & Beads Inc. was wife of brother of director in assessee, they were relatives for the purpose of adjustment under ALP and held that referring to the provisions of section 92 and definition provided u/s 2(41), it was abundantly clear that Smt Anupama Singh was not a relative of the director of the assessee company. Accordingly, it held that the transaction between the assessee and India Gems & Beads Inc., USA could not be treated as an international transaction. The Court, held that as sister in law is not associated not relative under the income tax act, the provision of section 92A(2)(m) had been wrongly interpreted by the AO and accordingly upheld Tribunal's order.

CIT vs Jaipur Silver Jewels P Ltd-TS-854-HC-2017(RAJ)-TP D.B. Income Tax Appeal No. 600 / 2011 dated 26.2017

b. ***Most Appropriate Method***

Comparable Uncontrolled Price Method

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

iMedX Information Services Pvt Ltd v ITO – TS-36-ITAT-2017 (Hyd) – TP – ITA No 577/Hyd/2016

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

Polaris Consulting & Services Ltd -TS-2-ITAT-2017(CHNY)-TP - IT(TP)A No.1324/Mum/2014

21. Where the assessee had applied CUP method on the basis of the gross margin earned from availing similar services from third parties but the TPO rejected CUP Method on the ground that assessee had failed to justify similarities between services availed from AEs and non-AEs, and applied TNMM on entity level which was upheld by the CIT(A), the Tribunal remitted transfer pricing issues related to benchmarking of freight & forwarding services availed by the assessee

from its AEs during AY 2009-10 for fresh adjudication on the ground that CIT(A) had not adjudicated issues related to application of most appropriate method (MAM).

Will Loesch India Private Limited - TS-4-ITAT-2017(Mum)-TP - ITA No.6761/Mum/2014

22. Where the assessee's AE had sub-contracted work to the assessee on back to back basis on the price received from the customer i.e. Gas Authority of India Ltd. (GAIL), the Tribunal held that since the transaction between the GAIL and the AE, was an independent and uncontrolled transaction. It was an appropriate CUP for benchmarking of provision of project management services to AEs.

Tractebel Engineering Pvt Ltd vs DCIT- TS-958-ITAT-2017(DEL)-TP - ITA No. 1078/Del/2014 dated 23.11.2017

23. The Tribunal upheld the application of the CUP method adopted by the assessee in benchmarking its transactions in relation to provision of medical transcription services by relying on the decision of the Tribunal in ACIT v Ckar Systems Pvt Ltd as the assessee in that case was in the same line of business as the assessee in the instant case. It rejected the TPOs rejection of the CUP method and adoption of TNMM whereby he aggregated the medical transcription services with the software development services. Consequently, the Tribunal remitted the matter to the AO / TPO for redoing the benchmarking exercise afresh on the basis of CUP method.

iMedX Information Services Pvt Ltd v ITO – TS-36-ITAT-2017 (Hyd) – TP ITA No. 577/Hyd/2016 ITA No.617/Hyd/2016 dated 18.01.2017

24. Where the assessee, a cigarette manufacturer, had benchmarked its transaction of payment for purchase of tobacco leaf paid to its AE under CUP by comparing the AE price with third party quotes and the TPO rightly rejected the quote and applied TNMM by selecting two comparables and making an upward addition of Rs.12.46 crore, the Tribunal held that the TPO erred in applying TNMM as the comparable companies were not functionally comparable, the cost figures of the comparables taken by the TPO did not match with their financials, the TPO had erred in considering the total costs of the assessee without restricting it to the AE related costs. Also, since the TPO had not examined the contentions of the assessee on the application of the CUP method, it remitted the matter to the TPO for fresh consideration.

JT International (India) vs DCIT – TS-107-ITAT-2017 (Hyd) – TP I.T.A. No. 422/HYD/2014 dated 17.02.2017

25. Where during the assessment proceedings, the assessee had adopted the CPM as the MAM and the TPO had proposed an upward adjustment by rejecting the adjustments claimed by the assessee to the cost and sale price of unrelated party transactions and subsequently, during the appellate proceedings, the assessee proposed to change the MAM to CUP due to availability of data not previously available, which was accepted by the CIT(A), the Tribunal dismissed the appeal of the Revenue and held that if at the time of TPO study, details were not available with the assessee to apply the CUP method, there was no restriction on the assessee for re-computing ALP by applying CUP, if during the course of assessment / appellate proceedings, the relevant data came in its possession of the assessee.

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

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

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

27. The Tribunal, following co-ordinate bench's ruling in assessee's own case for AY 2008-09 which had in-turn relied on its findings for AY 2007-08 upheld TPO's adoption of internal CUP over assessee's TNMM for benchmarking export of finished goods to AE.
Henkel Adhesives Technologies India Pvt. Ltd vs DCIT-TS-988-ITAT-2017(PUN)-TP dated 24.11.2017
28. The Tribunal remitted the benchmarking of the royalty and fees for technical services transactions undertaken by the assessee back to the TPO for fresh adjudication. It noted that the assessee had benchmarked the said transactions on an aggregate basis which was rejected by the TPO who sought to apply CUP to benchmark the transactions on a standalone basis. However, it observed that as per the CUP method the price of the international transaction was to be benchmarked but the TPO had benchmarked the same by comparing the ratio of royalty / FTS to sales of the comparables which did not satisfy the mandate of CUP. It noted that the Delhi High Court in Gruner India Pvt Ltd – TS-1049-HC-2016 (Del) – TP did not approve of TNMM for benchmarking such transactions and had remitted the issue of aggregation v segregation back to the file of the TPO in view of the decisions of Sony Ericsson and Magneti Marelli. Accordingly, it also remitted the issue back to the TPO.
TS Tech Sun India Pvt Ltd – TS-1030-ITAT-2017 (Del) – TP - ITA No.1943/Del/2017 dated 13.12.2017
29. The assessee had purchased raw materials from its AE during AY 2012-13 and adopted the CUP method as the most appropriate method by considering the purchase price (of the said raw material) of the AE. It filed the invoice relating to its purchase from AE and the back to back invoice copies relating to AE purchasing from third party as comparable. However, TPO rejected CUP method used by assessee on the basis that assessee had not given any evidence to support the applicability of CUP method and adopted TNMM as MAM, which was upheld by the DRP. On appeal, the Tribunal held that assessee had not substantiated that the AE had not derived any benefit or mark up on the price charged by the vendor for supply of material to it (AE). It held that unless the assessee filed full details of financial statement to show that the assessee's AE had not derived any benefit, it was not possible to apply the CUP method." Thus, it remitted the issue regarding application of CUP vs. TNMM back to AO to see whether AE derived any benefit or mark up on the price charged by its vendor for supply of raw materials to assessee's AE, which it had sold to assessee.
Enfinity Solar Solutions Pvt. Ltd. vs. ACIT - TS-301-ITAT-2017(CHNY)-TP - I.T.A.No.208/Mds./2017 - 03-04-2017
30. The assessee was engaged in the business of rendering software development services to its Associated Enterprises (AEs) and non AEs and adopted the internal CUP to justify the price of its international transactions, which was rejected by the TPO, who adopted TNMM and selected 13 external comparables, 6 of which were rejected by the DRP as they had turnover in excess of Rs. 200 crore. Noting that the AO had not complied with the DRP's direction for exclusion of the 6 comparable and that neither the TPO nor DRP had assigned any reason as to why CUP was not most appropriate method. The Tribunal remitted the matter back to AO for de novo consideration of assessee's submissions after affording assessee due opportunity of being heard.
KMG Infotech Ltd. Vs DCIT - TS-312-ITAT-2017(Bang)-TP - IT(TP)A No.286/Bang/2016 dated 04/04/2017
31. The Tribunal, following the decision of the coordinate bench in assessee's own case for AY 2011-12 accepted assessee's adoption of CUP method over TNMM for benchmarking medical transcription services for AY 2012-13. It noted that the Tribunal for the earlier AY had accepted assessee's reliance on the decision in the case of Ckar Systems Pvt. Ltd [TS-694-ITAT-2012(HYD)-TP] and had upheld the adoption of CUP method as the most appropriate method as assessee and Ckar were in the same line of business i.e. medical transcription services. The

Tribunal in the case of Ckar Systems had held that if the comparables considered by assessee were not connected either to the assessee or its holding company, and all information/data relating to its transactions were available, the TPO was not justified in rejecting the computation of ALP made by the assessee by applying CUP method. Noting that there was no factual difference between earlier year and this year, it held that review of the earlier year order was not within the purview of the Tribunal.

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

32. Noting that the services rendered by the assessee to AE were the same as those rendered by AE to independent enterprises, the Tribunal upheld the deletion of TP-adjustment in respect of back to back software development services rendered by the assessee to US-AE which were benchmarked by the assessee using services rendered by AE to independent customers as comparable under CUP. Rejecting Revenue's contention that there was difference in FAR between assessee and AE, it held that since the transaction was exactly the same, there could not be any occasion for the FAR of the transaction to be different. Further, it also disagreed with TPO's contention that where a more reliable method viz TNMM was available, then there was no need to adopt CUP especially when reliable data of the comparable cases were not available for ascertaining the man hourly charges for identical or near identical services in an uncontrolled transaction or by an independent enterprise. It observed that the distinction drawn by the TPO on the basis of FAR of the enterprise rather than the transaction was not tenable and perfect CUP inputs were available in the form of back to back transactions.
- DCIT vs Calance Software Pvt Ltd-TS-451-ITAT-2017(DEL)-TP- ITA No.5023/Del/2012 dated 04.04.2017***
33. The Tribunal upheld CIT(A)'s order deleting TP-adjustment on account of international transaction of royalty payment by assessee to its AE for AY 2011-12. The assessee had adopted TNMM as MAM with operating profit margin as the profit level indicator. The TPO rejected TNMM as MAM and made an adjustment to the arm's length by applying CUP method. The TPO contended that the assessee had not been able to justify the payment of royalty during the year on the sale of offset ink as well as gravure ink and thus made an adjustment as per the provisions of section 92CA of the Act. CIT(A) relying on the Tribunals decision in the assessee's own case for AY 2007-08 and 2008-09 had held that products manufactured by assessee were developed from continuous technology support provided by AE and therefore deleted the royalty adjustment. The Tribunal held that the cost benefit test worked out by TPO was not based on proper appreciation of facts and thus held that the choice of CUP method was unjustified.
- ACIT vs Sakata Inx (India) Ltd-TS-505-ITAT-2017(JPR)-TP-ITA No 1035/JP/2016 dated 24.04.2017***
34. The assessee provided two types of broking services to related as well as unrelated parties viz., Delivery Verses payment (DVP) and direct custodian settlement (DCS) and benchmarked these international transactions using TNMM as MAM. Since an internal CUP was available, the TPO rejected TNMM and applied CUP. However, it rejected assessee's contention that it had incurred lower cost in providing broking services to related parties than to unrelated parties and accordingly adjustment for additional cost incurred in transaction with unrelated parties was to be allowed to the assessee. The CIT(A) observed that there were substantial differences between the functions undertaken and risks assumed by assessee while providing broking to related and unrelated parties, the TPO ought to have granted adjustment sought by the assessee for additional cost incurred for unrelated parties and accordingly deleted the adjustment. Tribunal upheld the order of CIT(A). The Court observed that CIT(A) and Tribunal had rightly accepted the accepted the differences in functions performed and the risk undertaken by the assessee w.r.t the transaction between related and unrelated parties and accordingly it held that where the rates charged by the assessee to related parties and unrelated parties were not the same, CUP method could be used after making adjustments to the rate charged by the assessee to related and unrelated parties.
- J P Morgan India Pvt Ltd-TS-568-HC-2017(BOM)-TP-ITA No 1599 of 2014 dated 07.07.2017***

35. Assessee's group company had acquired controlling interest in HS Penta (engaged in manufacture of automotive cylinders) and post the acquisition transferred the business to the assessee so as to take advantage of lower costs and bigger markets in India. The TPO adopting WDV as the CUP sought to reduce the ALP value of assets purchased and rejected the contention of the assessee that since production commenced immediately, the impact of purchase of assets was factored into the operating profits. The Tribunal rejected both contentions and held that WDV was not reflective of fair market value and that capital costs could not be imputed with reference to profits. Noting that at the time of purchase of controlling interest of HS Penta, the assessee's group company had valued the shares of HS Penta, which was based on the value of the assets and liabilities, it held that the value of assets therein would be an appropriate CUP since the acquisition was an independent uncontrolled transaction and that there was hardly any time lag between the acquisition and subsequent transfer to India. Accordingly, it remitted the matter to the AO for fresh determination based on such valuation.

Interpump Hydraulics Pvt Ltd – TS-621-ITAT-2017 (CHNY) – TP-ITA no. 459/mds/2017 dated 30.06.2017

36. Where the assessee had adopted quotation prices of various companies as CUP for benchmarking its import/export transactions with the AE and the TPO/AO rejected it on the ground that such quotations were subject to negotiation and could not be regarded as comparable uncontrolled transaction, the Tribunal relying on the decision of the Gujarat High Court in the case of Adani Wilmer [363 ITR 338] held that in terms of Rule 10D(3), price publications could be adopted if the same were authentic and reliable. However, noting that this judgment was not available at the time when CIT(A) passed the impugned order; the Tribunal restored the matter back to AO/TPO for fresh decision and directed the assessee to establish that the quotations which were taken for CUP were authentic and reliable and if so to take CUP as the MAM, else adopt TNMM as the MAM and decide the issue afresh.

British Engines (India) Pvt. Ltd vs. DCIT-TS-915-ITAT-2017(bang)-TP IT(TP)A No.340/Bang/2014 dated 27.10.2017

Cost Plus Method

37. Tribunal upheld CIT(A) order deleting TP-adjustments in respect of export of manufactured steel items to its AE and receipt of commission from AE. In respect of export transaction, the TPO had applied CUP method over assessee's cost plus method(CPM) on the basis of small sales made by assessee of similar components, which was rejected by CIT(A). Noting that the TPO had accepted CPM in the subsequent AYs 2008-09 to 2010-11, the Tribunal held that there was no merit in the order of TPO applying CUP method to benchmark the international transaction and accordingly, upheld the order of CIT(A). Further, in respect of commission, the TPO had applied internal rate of return for benchmarking, however, CIT(A) had upheld assessee's CUP method. Relying on the decision in the assessee's own case for AYs 2006-07 to 2010-11, wherein the TPO had applied CUP method from AYs 2006-07 to 2010-11, the Tribunal upheld CIT(A)'s order deleting TP adjustment for the same.

DCIT vs Thyssenkrupp Electrical Steel India Pvt Ltd-TS-567-ITAT-2017(PUN)-TP-ITA No. 2005/PUN/2014 dated 06.04.2017

38. Where the TPO made an adjustment by adopting the Cost Plus method as the most appropriate method (as opposed to TNMM adopted by the assessee) to benchmark the assessee's international transaction viz. sale of formulations & hospital products by the assessee to its Kenya based AE back to AO for AY 2004-05, noting that the Tribunal in the prior assessment years had remitted the issue back to the CIT(A), the Tribunal remitted the issue to the file of AO for fresh adjudication. It further held that even though the Tribunal had remanded ALP-issue to CIT(A) in preceding years, it was the Assessing Officer who needed to re-adjudicate to avoid multiplicity of proceedings before the assessing authority and the CIT(A)

Cadila Pharmaceuticals Ltd. vs. DCIT-TS-715-ITAT-2017(AHD)-TP-ITA No. 1117/ahd/2012 & 848/ahd/2016 dated 11.09.2017

Resale Price Method

39. The Tribunal rejected the application of the CUP method as the MAM adopted by the assessee in relation to its international transaction viz. import of crystal and crystal components from its AEs by adopting the sales made by it to its group companies as an internal comparable, observing that the import transactions consisted of two things viz. Crystal goods and Crystal components which were aggregated and shown as one international transaction but the sale transactions used as comparable only pertained to Crystal components. It held that functional similarity was a sine qua non for adopting CUP method and if the goods in the international transactions do not exactly match with the goods in comparable uncontrolled transactions then the method was inapplicable. Therefore, it upheld the TPO's rejection of the CUP method. As regards, the application of TNMM, as adopted by the TPO, it held that the same was incorrect noting that the TPO had taken Swarovski Korea and Swarovski Singapore as comparable when these parties were AEs of the assessee itself and could not be considered as comparable uncontrolled transactions. It also held that the balance 19 companies selected by the TPO were not good comparables being foreign companies operating in different lines of business and that the computation of PLI was also faulted as the TPO had averaged the PLI of comparables by taking gross margins in the case of few companies and net margins in the case of the balance. Accordingly, it rejected the application of TNMM as well. Referring to Rule 10B(1)(b), the Tribunal observed that RPM was the MAM as it was applicable where a property was purchased from an AE and resold as such without any value addition and the assessee in the instant case sold the Crystal components imported from its AEs without any value addition. It accordingly remitted the matter to the TPO to benchmark the transactions as per RPM.
Swarovski India Pvt Ltd v ACIT – TS-94-ITAT-2017 (Del) – TP - ITA No.5621/Del/2014 dated 10.02.2017
Swarovski India Pvt Ltd v ACIT – TS-91-ITAT-2017 (Del) – TP - ITA No.5622/Del/2014 & ITA No.5497/Del/2014 dated 10.02.2017
40. The Tribunal, relying on ITAT decisions in Mattel Toys [TS-159-ITAT-2013(Mum)-TP], Luxottica India Eyeware [TS-375-ITAT-2014(DEL)-TP], (which was upheld by jurisdictional HC [TS-532-HC-2015(DEL)-TP]), and OSI Systems [TS-396-ITAT-2015(HYD)-TP] applied the Resale Price Method (RPM) as the most appropriate method (MAM) in case of assessee engaged in reselling liquor, perfumes, confectionary, tobacco etc. in the duty free shops set up at Delhi Airport. It held that where there was no dispute on the fact that the assessee was purchasing finished products from the AEs for the purpose of reselling to unrelated parties without any value addition, under normal circumstances, the most appropriate method to bench mark the arm's length price of such transaction in terms of 10B was the RPM and that the TPO was not justified in rejecting the RPM method and applying TNMM on the ground that the gross profit margin computation of comparables was not produced by assessee. It concluded that the TPO should have made an effort to bench mark the transaction under RPM instead of rejecting it on flimsy grounds and straight away proceeding to apply TNMM. Accordingly, it directed AO/TPO to examine assessee's benchmarking under RPM in an objective way, leaving it open to the AO/TPO to call for necessary / relevant information relating to gross profit margin of comparables from assessee, or to independently proceed for selection of comparables under RPM after obtaining the information.
Airport Retail P. Ltd. (formerly known as Alpha Future Airport Retail P. Ltd.) vs JCIT - TS-118-ITAT-2017(Mum)-TP - ITA no. 158/Mum./2014 & ITA no. 1762/Mum./2014 dated 17.01.2017
41. For benchmarking assessee-distributor's international transaction of purchase of finished cosmetic goods for AYs 2009-10 to 2011-12 Modi Care Ltd had been selected as a standalone comparable under Resale Price Method (RPM). Referring to Rule 10B(1)(b), the Tribunal stated that though product comparability was less decisive while using RPM (as opposed to CUP method), wherever the gross margins were demonstrated to be impacted either with incomparable activities; functions; accounting practices; product dissimilarities; etc. necessary adjustments ought to be made. Accordingly, noting that Modi Care Ltd had advertising spend, franchisee income, different product mix, different accounting policies and Revenue recognition

policies, higher discounts and rebates, etc, the Tribunal directed the TPO to look into claim of adjustments required to be made to consider Modi Care Ltd.

Oriflame India Pvt. Ltd vs. ACIT- TS-236-ITAT-2017(DEL)-TP- I.T.A .No.-960/Del/2014, 184/Del/2016 & 271/Del/2016 dated 24.03.2017

42. The Tribunal held that Resale Price Method (RPM) was the Most Appropriate Method (MAM) for benchmarking international transactions in case of assessee performing distribution functions in respect of earth moving equipment for AY 2008-09. Relying on provisions of Rule 10B(1)(b), OECD Guidelines as well as decision of the Tribunal in Mattel Toys [TS-159-ITAT-2013(Mum)-TP], it observed that under RPM, focus was more on similar nature of properties / services rather than similarity of products. Noting that the assessee was performing the function of normal distributor and purchased goods were resold without any value addition, the Tribunal upheld the CIT(A) order's accepting RPM as MAM. It opined that the TPO, while rejecting RPM and adopting TNMM as MAM, had merely relied on OECD Guidelines which highlighted strengths and weaknesses of RPM, without analyzing the actual facts of the case and the FAR analysis vis-a-vis the comparables. Further, it also upheld the CIT(A)'s rejection of comparable selected by TPO viz. 'T&I Global Limited' noting that it was engaged in manufacturing machinery and thus incomparable with assessee performing purely distribution function. Accordingly, it dismissed the Revenue's appeal.

ACIT Vs Kobelco Construction Equipment India Limited - TS-299-ITAT-2017(DEL)-TP - ITA No.6401/Del/2012 dated 17.04.2017

43. The Tribunal held that the Resale Price Method (RPM) was the Most Appropriate Method (MAM) for benchmarking the transactions of the assessee, engaged in distribution of 'medical equipment' and 'automotive equipment' manufactured by its Japanese parent company in India as opposed to TNMM adopted by the TPO. Noting that the assessee was performing pure distribution function and was re-selling the finished goods manufactured by its AE without any value addition, the Tribunal accepted assessee's RPM, relying on Rule 10B(1)(b) as well as decision of the Tribunal in Mattel Toys [TS-159-ITAT-2013(Mum)-TP]. It rejected TPO/DRP's reasoning that assessee being a full-fledged/full-risk distributor performing a host of functions, RPM was not representative of the correct gross profit margin. It further held that the Revenue had also not brought any evidence on record to prove that the other comparables were not functionally comparable to the assessee. As regards Revenue's objection regarding huge variation in gross profit margin of the two products distributed by assessee, the Tribunal directed the TPO to examine assessee's submission that as per separate gross profit margin working for both items, assessee's margin was higher than that of comparables.

Horiba India Pvt. Ltd. Vs DCIT - TS-300-ITAT-2017(DEL)-TP - ITA No.-6638/Del/2015

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

Socomec Innovative Power Solutions Pvt. Ltd. vs. DCIT - TS-359-ITAT-2017(CHNY)-TP - I.T.A.Nos.617/Mds./2015 dated 26-04-2017

45. The Tribunal held that where the assessee was engaged in purchase of finished goods from its AE without any value additions, the most appropriate method for benchmarking the international transactions was the Resale price method. It held that the TPOs reasoning to adopt TNMM i.e that comparability could be compromised under TNMM which provides for broad comparability as opposed to higher degree of similarity under the other methods was invalid.

ACIT vs Akzo Nobel Car Refinishes India Pvt. Ltd-TS-661-2017(DEL)-TP-ITA No. 1925/del/2011 and ITA No. 6482/del/2012 dated 04.08.2017

46. Where assessee bought products from AE and resold them without further processing, the Tribunal, relying on the decision in the case of Tektronix India P Ltd [ITA No. 1334/bang/2010 dated 31st October 2012], held that RPM was the most appropriate method. It also relied on the case of Frigoglass India Pvt. Ltd. [TS-112-ITAT-2014(DEL)-TP] and Bose Corporation India Pvt. Ltd which upheld Resale Price Method as the most appropriate method in case of a distributor. This view was further fortified by OSI Systems Pvt. Ltd ruling wherein all the aforementioned rulings were considered before deciding in favour of RPM in case of distribution activity. The Tribunal opined that it was a settled position in law that in case of distribution activity, there could not be any value addition to the product in question, even when selling and marketing expenses were borne by assessee. Noting that Revenue did not dispute that assessee was into distribution activity, it held that in such cases, Resale Price Method was the most appropriate method and accordingly reversed the decision given by the TPO/DRP of using TNMM as the most appropriate method for the transaction under consideration.
Fresenius Kabi India Private Limited vs DCIT-TS-625-ITAT-2017(PUN)-TP-ITA No.235/pun/2013 dated 16.06.2017
47. The Tribunal, following co-ordinate bench ruling in assessee's case for 3 years, remitted ALP-determination of assessee's international transaction of purchase of finished cosmetic goods under Resale Price method (RPM). Noting that the assessee was engaged in trading of goods without any value addition and the assessee had been consistently applying RPM as MAM which had been accepted by Tribunal in the preceding years, the Tribunal rejected assessee's argument to switch over from RPM to TNMM. Further, relying on the decision in the case of Keihin Penalfa Ltd [TS-474-HC-2015(DEL)-TP] it admitted assessee's additional grounds and held that TP adjustment should be limited to the international transactions alone and accordingly directed the AO/TPO to determine the ALP of the international transaction after providing a reasonable opportunity of being heard to the assessee.
Oriflame India Pvt Ltd vs ACIT-TS-673-ITAT-2017(DEL)-TP-ITA No.328/Del/2017 dated 13.06.2017
48. Where in the set aside proceedings for AY 2007-08 the TPO had accepted RPM as MAM and the coordinate bench in assessee's case for AY 2007-08 had remitted the issue of rejection of RPM as MAM to the file of AO, the Tribunal dismissed appeal and upheld the DRP order directing the AO/TPO to consider RPM over TPO's TNMM for benchmarking assessee's international transaction of purchase and sale of food supplements and healthcare products for AY 2009-10.
DCIT vs Tianjin Tianshi India Pvt Ltd-TS-837-ITAT-2017(DEL)-TP dated 13.10.2017
49. Where the assessee had applied RPM as the most appropriate method for benchmarking its international transactions but the TPO rejected it and adopted TNMM as the MAM, the Court held that mere disagreement between the assessee and Revenue or amongst the Revenue authorities vis-à-vis application of a method for determining ALP would not constitute a question of law unless the aggrieved party is able to demonstrate that application of a certain method had led to distortion or prejudice. Further, noting that the TPO in subsequent year had accepted RPM as the MAM, it dismissed Revenue's appeal.
Pr.CIT vs McCain Foods India Pvt Ltd-TS-885-HC-2017(DEL)-TP- ITA No. 965/2017 dated 13.11.2017
50. Where the assessee purchased goods from AEs and sold them to third parties in India without any further processing or value addition, the Tribunal reiterating the settled position in law that when there is no value addition by assessee, RPM should be adopted as MAM, accepted assessee's adoption of RPM as MAM as against TNMM adopted by TPO. Further, noting that the factual position was similar to that of AY 2012-13 wherein the TPO accepted the application of RPM as the MAM, the Tribunal following the principle of consistency, directed the TPO to carry out a fresh comparability analysis for selecting comparable companies under RPM.
Avnet India Pvt. Ltd vs DCIT-TS-982-ITAT-2017(Bang)-TP dated 29.11.2017

Transactional Net Margin Method

51. The Tribunal deleted the TP addition in the case of the assessee, engaged in the business of manufacture and sale of tea and held that the functions assets and risks of the two segments in which the assessee operated viz. private sales and auction sales, were incomparable as in the private sales the assessee was a mere facilitator assuming minimal risks and in the auction sales it performed significant functions and bore all associated risks. Thus, it rejected the approach of the TPO in aggregating all the AE related transactions of the assessee viz. AE related private and AE related auction sales and comparing it with the margin of Non-AE auction sales. Accordingly, since the benchmarking adopted by the assessee at first i.e. entity level comparison with other comparable companies engaged in the tea business, was at ALP, the Tribunal deleted the adjustment made by the TPO.

Tata Global Beverages Ltd v DCIT – TS-48-ITAT-2017 (Kol) – TP I.T.A No.511/Kol/2010 I.T.A No.2105/Kol/2010 dated 03.02.2017

52. The Tribunal, relying on its own order in the assessee's own case for a prior AY, rejected the CUP applied by the assessee while benchmarking its international transactions of 'export of polyester films' to AE's in UK and US by comparing it with Non-AE transactions in Asia, Africa Middle East etc. It held that CUP could not be applied due to difference in geography and other economical factors associated with AEs in a developed market (US and UK) vis-a-vis Non-AEs in developing markets (Asia, Africa, Middle-East etc) and therefore rejected the assessee's approach of benchmarking AE transactions based on price charged to Non-AE customers in India as well as TPO's approach of comparing the same with average Non-AE price on exports to countries in Asia, Latin America. Thus, it held that TNMM was the most appropriate method and remitted matter to TPO for carrying out benchmarking analysis under TNMM.

Garware Polyester Ltd v DCIT – TS-34-ITAT-2017 (Mum) – TP - I.T.A. No. 6169/Mum/2011 I.T.A. No. 6541/Mum/2011 dated 18.01.2017

53. The Tribunal rejected TPO's selection of external TNMM as the most appropriate method (MAM) for benchmarking of assessee's international transaction of sale of tea to AEs and directed the adoption of internal CPM as MAM. The Tribunal, noting that the assessee had adopted internal CPM for export of tea and export of PP Bags and PP Geo fabric while adopting internal TNMM for export of packaging material and other transactions which was accepted by TPO for AY 2007-08 to 2010-11, held that the TPO erred in taking a different stand in the year under appeal in spite of the similar facts prevailing in the current year when compared to the earlier years and accordingly allowed assessee's appeal.

Madhu Jayanti International Ltd vs. DCIT-TS-1069-ITAT-2017(Kol)-TP I.T.A No. 214/Kol/2016 dated 01.12.2017

54. The Tribunal held that where the TPO had adopted TNMM as the most appropriate method and the assessee had rendered similar services to both the AEs and non-AEs, and the non-AE transactions satisfied the internal TNMM, the Assessing Officer ought to have considered them for determining ALP. Accordingly, it remitted the issue back to the file of AO and consider internal TNMM where services rendered by the assessee were similar to both AEs and non-AEs.

Satyam Venture Engg. Services (P) Ltd vs Dy.CIT-TS-1072-ITAT-2017(Hyd)-TP ITA No. 1464/Hyd/2014 dated 29.12.2017

55. The Tribunal rejected the TPO's CUP as well as assessee's TNMM for benchmarking assessee's international transaction i.e. manufacture and sale of drugs to AEs in contract manufacturing segment for AY 2012-13 and set aside Rs. 55 Cr TP-adjustment remitting the issue back to TPO for fresh consideration.

It held that the data used by the TPO under CUP (retail prices of products in CIMS database) was not appropriate as (i) such data related to different year (FY 2015-16), (ii) there was a lack of details of the products sold by assessee and comparable products used for benchmarking (iii) the TPO only considered one price despite wide fluctuation in the prices charged for the same product by different manufacturers (iv) that the CIMS data related to full-fledged manufacturers

as against the assessee which was a contract manufacturer. Further it noted that the TPO had scaled down the retail prices arrived at from the CIMS data using a factor of 39.6% in order to arrive at ex-factory price, taking assistance from the pricing policy of Organization of Pharmaceutical Producers, whereas such policy was only applicable to prices charged for products sold in India whereas assessee exported products to its foreign AEs. Accordingly, it held that the CUP method as applied by the TPO was not appropriate.

It also rejected the assessee's benchmarking under TNMM, noting significant difference in sales price charged to different AEs for similar product despite cost of production being more or less similar and held that the 4 comparables selected by the assessee could not be selected as comparable as they were full-fledged manufacturers whereas the assessee was engaged in contract manufacturing. Accordingly, it remitted the issue to the file of the TPO for the purpose of carrying out a fresh benchmarking exercise under TNMM by selecting comparables engaged in contract manufacturing.

Tevapharm India Pvt. Ltd vs Addl CIT – TS-151-ITAT-2017 (Del) – TP ITA No.6707/Del/2016 dated 06.03.2017

56. The Tribunal allowed assessee's appeal and directed the TPO to consider assessee's claim for application of internal TNMM for benchmarking its AE transactions, noting that the TPO had applied external TNMM which was upheld by DRP, rejecting Internal TNMM without considering that the assessee had substantial transactions with unrelated parties and that the OP/OC of its transactions with AE was in the range of 17.93% and 20.35% as against 9.76% for transactions with unrelated parties, thereby warranting no TP-adjustment. Accordingly, it restored the issue to the file of TPO for fresh consideration.

Xchanging Solutions Ltd vs DCIT - TS-87-ITAT-2017(Bang)-TP - IT (TP) A No.1385 (Bang) 2011 dated 11-01-2017

57. Where the assessee had purchased cotton bales from various factories in India and sold the same to its Associated Enterprises (AEs) as well as to Non-AEs in the domestic market and the TPO had applied internal TNMM to benchmark the international transaction as opposed to the external TNMM adopted by the assessee (wherein the assessee had selected 2 comparable transactions) and made an addition of Rs. 10.8 crore as the margin from AE transactions was -11.91 percent as opposed to the 4.32 percent earned from Non-AE transactions, the Tribunal held that since it was an undisputed fact that an internal uncontrolled comparable price was available in the assessee's case, preference was to be given to Internal TNMM as the comparison was more reliable. It dismissed the submission of the assessee that it had entered into forward contract for purchase of cotton bale from domestic market and sale to AE at pre-determined price but due to default on the part of the vendors, it had to purchase cotton bales from local market as per the prevailing market to supply to AE at lower rates agreed between the parties as per the forward contract and that the loss suffered on account of default of forward purchase contract was extraordinary in nature. It observed that the concept of a forward contract was to hedge the future price fluctuations on the basis of a pre-agreed price when parties were dealing independently without any mutual interest and since the assessee had entered into forward contract with its AE, it held that the such agreement did not serve the very purpose of entering into a forward contract because a loss to either of the party would not be a gain to the other party. Further, it held that that even if assessee had purchased cotton bales from market at a higher price, the sale price to the AE at a lower rate and that too lower than the sale price to the non-AE clearly manifested the internal arrangements of the related party to supply the cotton bales to the AE at a price which was lower than the purchase price of the assessee. Accordingly, it upheld the TPO's addition.

Dhanya Agroindustrial Pvt. Ltd. Vs DCIT - TS-168-ITAT-2017(Bang)-TP- I.T.(T.P) A. No.161/Bang/2016 dated 08.03.2017

58. Where, for the purpose of benchmarking the international transactions of the assessee viz. export of internal combustion ('IC') engines by the assessee to its AEs, the TPO applied internal TNMM by taking the transactions with domestic parties as comparable, to which the assessee objected stating that there could be no comparison between IC engines sold in domestic market

and those exported by assessee outside India due to functional differences in the products sold under both segments and also due to variance in the gross margins between the 2 segments, the Tribunal relying on its decision for a prior year held that since the assessee failed to demonstrate material variation in the margins of each product type its plea that the two were functionally different could not be accepted. It also observed that unless the assessee demonstrated, with relevant facts, as to why it earned lower profits while exporting to AEs, the assessee's argument on this ground could not be considered. Further, it held that comparing of gross margins as done by the TPO was not envisaged under the IT Rules and that net profit of controlled transactions had to be compared with net profit of uncontrolled transactions. Accordingly, it directed the AO to re-compute the adjustment based on differences in the net profit margins between sales to AEs and sales in domestic market.

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

59. The Tribunal, relying on its order for the earlier year [TS-650-ITAT-2015 (Mum) – TP], remitted the issue of benchmarking the export of finished goods by the assessee to its AEs to the file of the AO /TPO, since the CIT(A) failed to follow the mechanism laid down in the TP provisions to determine ALP. It also accepted the assessee's grievance that for benchmarking the export transactions, the TPO ought to have used TNMM as the most appropriate method as opposed to CUP. Accordingly, it directed the AO / TPO to conduct a fresh analysis under the TNMM method.

ACIT v Strides Acrolabs Ltd - TS-294-ITAT-2017(Mum)-TP - /I.T.A. No.6528/Mum/2010 dated 31/03/2017

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

Caterpillar India Pvt. Ltd vs. ACIT - TS-302-ITAT-2017(CHNY)-TP - ITA 204 & 365/12 dated 05.04.2017

61. Assessee received a sum of Rs. 79.35 crores as proceeds against the export/sale of TV programmes and films to its AE i.e. ATL and benchmarked the international transaction by applying Transaction Net Margin Method (TNMM), with Profit Level Indicator (PLI) of operating profit/operating cost (OP/OC) which was determined at 56.36%. Since the margin of selected comparables was 0.13%, assessee claimed its transaction to be at arm's length price. The TPO rejected TNMM and selected Resale Price Method (RPM) as most appropriate method (MAM). Selecting ATL as the tested party he attributed 90% of its gross profits to assessee and made consequent adjustment. The Tribunal, noting that the transactions of ATL were with its 100% subsidiaries Zee TV-USA and Asia TV-UK, it held that since the comparable transactions adopted by the TPO were not between unrelated parties and hence could not be considered as uncontrolled transactions. It held that Rule 10B(1)(b)(i) provides that price under RPM refers to the price at which the property purchased by the enterprise from an AE is re-sold or provided to an 'unrelated enterprise' or in other words an independent entity and since the comparable transactions adopted by the TPO were with related enterprises, it held that the action of the TPO in selecting RPM as MAM was wholly inappropriate and wrong. Accordingly, it deleted the TP addition.

Zee Entertainment Enterprises Ltd vs ACIT -TS-382-ITAT-2017(Mum)-TP ITA No.3406/Mum/2014 dated 05.05.2017

62. The Tribunal following the co-ordinate bench ruling in assessee's own case in AY 2006-07 & 2008-09 upheld the DRP's order accepting assessee's selection of TNMM as MAM over TPO's selection of CUP method for benchmarking imports and exports from AE for AY 2010-11. It held that once net margin of assessee was higher than the net margins of its comparable, all international transactions of assessee were at ALP. Accordingly, it dismissed the Revenue's appeal.

Amphenol Interconnect (I) Pvt Ltd vs DCIT- TS-393-ITAT-2017(PUN)-TP ITA No.477/PUN/2015 dated 12.05.2017

63. The Tribunal set aside DRP's order rejecting internal TNMM as most appropriate method for benchmarking import/export transactions of assessee engaged in the manufacture of studded jewellery for AY 2011-12. It held that the TPO/DRP had arrived at hollow and unsubstantiated observations without any concrete material or irrefutable reasoning for rejecting assessee's segmental accounts. It further rejected DRP's conclusion regarding difference in FAR of Non-AE segment pertaining to the local sales in India and held that the assessee itself had specifically categorized and earmarked such Non-AE segment pertaining to local sales in India as 'uncomparable' and had conducted the analysis based on the Non – AE segment pertaining to export sales.

S.B.&T Designs Ltd vs ACIT [TS-404-ITAT-2017(MUM)-TP- ITA No. 5189/MUM/2015 dated 03.05.2017

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

GE BE Pvt Ltd vs DCIT -TS -373-ITAT-2017(Bang)-TP- - I.T.(T.P) A. No.1291/Bang/2012 dated 13.04.2017

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

Dell International Services India Pvt Ltd vs ACIT [TS-443-ITAT-2017(Bang)-TP] - I.T. {T.P} A. No.699/Bang/2009 dated 21.04.2017

66. The Tribunal deleted TP adjustment of Rs. 612.03 crores in respect of sale of Pantoprazole tablets by assessee (Indian Pharma company engaged in manufacturing of bulk drugs as well as formulation products) to AE (SPG BVI). The TPO/CIT(A) had rejected TNMM adopted by assessee on the ground that the assessee was not merely a contract manufacturer but performed substantial functions and accordingly applied PSM on the basis that respective functions between assessee and AE could not be distinctly ascertained. Noting that the assessee performed only one simple function of manufacturing the tablets without providing any other significant unique contribution, the Tribunal held that as per OECD guidelines the profit split method was not appropriate for benchmarking. Further, it held that the conditions for applicability of PSM i.e. transfer of unique intangibles & interrelated multiple transactions were both missing in present case. Accordingly, it deleted the TP-adjustment.

Sun Pharmaceuticals Industries Ltd vs ACIT-TS-596-ITAT-2017(Ahd)-TP-ITA No.3297 & 3420/AHD/2014 dated 16.06.2017

67. Where the assessee had adopted the CUP method to benchmark its purchase and sale transactions from its AEs and the trade discount granted to the AE on account of prepayment (which was accepted by the TPO / DRP) and had also applied TNMM to corroborate the same, which was rejected by the TPO / DRP and the assessee appealed before Tribunal challenging the said rejection, the Tribunal held that once CUP was applied as the MAM it was irrational for the assessee to choose to apply TNMM to substantiate the benchmarking of the transactions. Accordingly, it dismissed the appeal of the assessee challenging the rejection of TNMM.

Cargill Foods India Limited vs ACIT-TS-541-ITAT-2017(PUN)-TP-ITA No. 1557/PUN/2011 dated 21.04.2017

68. The Court, allowing assessee's appeal, reversed Tribunal order remitting ALP determination in respect of assessee's import of raw materials, components and semi-finished goods in manufacturing segment (class I transactions) and also for assessee's class II transactions in respect of import of finished goods in trading segment. It held that on a plain reading of the order of CIT(A), it was apparent that it agreed that transactions both in class I and Class II segments had to be benchmarked by applying TNMM and therefore it was factually incorrect on part of the Tribunal to observe the contrary. Referring to a compilation of the orders passed by TPO for subsequent AYs 2007-08 to 2010-11, the Court held that there was factually no change in the classification or the nature of international transactions undertaken or the functional profile of the Assessee and thus rejected Revenue's contention that the Court should proceed on the assumption that assessee had changed his business profile and functions. Further, it held that in the absence of any change in assessee's business profile there was no need to uphold the Tribunal order remitting the matter to the TPO / AO or Tribunal for a fresh consideration as remitting the matter back would be a sheer waste of time, serving no purpose. **Accordingly, it set aside the order of Tribunal and affirmed the order of CIT(A).**

Rayban Sun Optics India Ltd vs CIT-TS-597-HC-2017(DEL)-TP-ITA NO. 889/2016 & CM APPL. 45967/2016 dated 11.07.2017

69. The assessee provided sales support services and liaisoning services to its AEs with regard to the exports and imports of the commodities from its AE to / from India and benchmarked the international transaction adopting TNMM as MAM, which was rejected by TPO and recharacterized the service and commission activities of the assessee as trading segment. On appeal, the Tribunal observed that in assessee's own case for AY 2007-08 and 2008-09 had ruled on identical issues which were decided in favour of assessee. ITAT deleted the adjustment relying on Li & Fung HC ruling [TS-346-HC-2013(DEL)-TP]. In that case, it was held that computation of the operating profit margin by increasing the cost of the sales leads to an arbitrary adjustment of assessee's income and that such alteration resides plainly outside the Rules and the provisions of the Act. ITAT upheld assessee's international transactions computed by using TNMM as MAM and Berry Ratio as PLI. The High Court dismissed Revenue's appeal on the ground that no substantial question of law arose. Accordingly, the Revenue filed a SLP before the Apex Court which was admitted.

Pr. CIT vs Mitsui and India Pvt Ltd-TS-602-SC-2017-TP-ITA No. 788/2016 dated 28.02.2017

70. The Tribunal observing that the international transaction of imports from AE had a direct bearing on the export of goods to AE as the price of exports to AE was impacted by import price, held that when the transactions were multiple and inter-related then if a particular transaction out of the composite transactions could not be tested under CUP then it was not proper to apply separate methods for determining the ALP for each of the transaction. Further, noting that TPO had first applied TNMM on assessee's entire turnover to propose TP-adjustment on import transaction which was subsequently set-off against adjustment on export transaction (determined based on internal-CUP), it upheld CIT(A)'s adoption of TNMM for benchmarking assessee's import and export transactions and dismissed the Revenue's appeal.
ACIT vs Gates India (P) Ltd-TS-649-ITAT-2017(DEL)-TP-ITA No. 75/del/2011 dated 31.07.2017
71. Noting that the domestic transaction with non-AE was entirely different (including geographical difference) from the international transaction, the Tribunal rejected internal TNMM adopted by assessee to benchmark provision of telecommunication networking services to AE for AYs 2009-10 to 2011-12 and held that entity level results comprising of international transactions and domestic transactions could not be considered for the purpose of testing the price of the international transactions. Further, it held that CUP was the most appropriate method since, prior to assessee's incorporation, AE was availing networking services directly from Tata Communications but post incorporation, assessee became the lease holder of the network owned by Tata Communications & started raising bills to AE.
Cable & Wireless Networks India Pvt. Ltd vs. DCIT-TS-616-ITAT-2017(Bang)-TP-IT(TP)A no. 1549/bang/2014, 401 and 402/bang/2017 dated 12.07.2017
72. The Tribunal, allowed Revenue's appeal and held that the assessee was not justified in benchmarking the purchase price of raw materials acquired from its AE under CUP by comparing the price charged by the AE to independent third parties in Europe as the market conditions of Europe and India were not similar and had different regulatory norms for pollution caused by automobiles. Accordingly, it upheld AO/TPO's approach of adopting TNMM and benchmarking the profit margins with the other comparables in India having similar market conditions.
DCIT vs Ecocat India Pvt Ltd-TS-722-ITAT-2017(DEL)-TP-ITA No. 847/Del/2012 dated 15.09.2017
73. The Tribunal, noting assessee's submission that once TNMM at entity level was applied and accepted by TPO and the items of expenditure formed part of the operating expenditure, no separate adjustment on account of specific items of expense was required, remitted the TP-adjustment in respect of selling commission and network charges paid by assessee to its AE to the file of AO directing it to delete the TP adjustment on account of these two items if it formed part of operating expenditure.
Mphasis Ltd vs. Addl. CIT-TS-745-ITAT-2017(bang)-TP-ITA No. 242/bang/2014 dated 09.08.2017
74. Noting that the department had accepted TNMM as the most appropriate method in the subsequent year for benchmarking the assessee's international transaction of provision of software services to its AE and the facts prevalent in the impugned & subsequent year were the same, the Tribunal upheld the order of the CIT(A)/DRP accepting assessee's adoption of TNMM over TPO's adoption of PSM as the most appropriate method and accordingly dismissed Revenue's appeal.
DCIT vs Target Sourcing Services India Pvt Ltd-TS-720-ITAT-2017(DEL)-TP-ITA.No.457/Del./2014 dated 13.09.2017
75. Where the assessee claimed that it had bought raw materials as per AE's pre-determined price list which it contended that was used for selling to third party buyers also but could not establish that the same price list was applicable for third party exports with evidence, the Tribunal rejected adoption of CUP method as MAM for benchmarking inter alia import of raw

material/consumables/machinery by assessee and held that TPO was justified in adopting TNMM as MAM. It rejected assessee's contention that u/s 92F(ii), ALP could be worked out on the basis of price applied or proposed to be applied and held that rule 10B(1) provided for price charged or paid and not for proposed price and since the assessee was unable to substantiate its claim that the same list was used for third party buyers also, it dismissed the assessee's appeal.

Yazaki India Limited (Formerly Known as Tata Yazaki AutoComp Ltd) vs. ACIT-TS-774-ITAT-2017(PUN)-TP ITA No.886/PUN/2014 dated 11.09.2017

76. 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 for AY 2006-07.

GE BE P Ltd v DCIT-TS-803-ITAT-2017(bang)-TP- IT (TP) A No.1143 (Bang) 2011 dated 28.09.2017

77. The Court affirmed Tribunal's acceptance of assessee's TNMM over TPO's RPM as MAM for benchmarking international transaction in case of assessee (engaged in the travel and tourism business) i.e. customer handling and data management services for AY 2005-06 and held that the difference of opinion as to the appropriateness of one or the other methods, could not per se be a ground for interference unless the appropriateness of the method was shown to be contrary to the Rules especially Rules 10B and 10C. Accordingly, it held that no question of law arose and dismissed Revenue's appeal.

Pr. CIT vs. Makemy Trip India Pvt Ltd vs. ACIT-TS-871-HC-2017(DEL)-TP ITA 881/2017 dated 07.11.2017

78. The Apex Court dismissed the SLP filed by the Revenue against order of the High Court wherein it was held that where TNMM had been accepted as the most appropriate method to benchmark all of the assessee's transactions i.e import of raw materials, sub-assemblies and components, payment of royalty, payment of software and purchase of fixed assets barring the payment of technical fee, adoption of a different method viz., CUP would lead to chaos in benchmarking as it could lead to adoption of more than 2 methods for determination of ALP within a single year.

DCIT vs Magnetti Marelli Powertrain India Pvt Ltd-TS-860-SC-2017-TP SLP No. 15244/2017 dated

79. The assessee had entered into a Services Agreement dated April 1, 2010 with its AE (Gamesa Corporation Technologies SA) for availing certain services (legal, administrative, human resources, finance, business development etc). The assessee adopted TNMM as the MAM consequent to which the transaction was at ALP. However, the TPO adopted CUP as MAM and determined the ALP of the impugned transaction at NIL and made addition of the entire amount paid by the assessee for the aforesaid transaction. The Tribunal, relying on the decision in the case of Magneti Marelli and Air Liquid Engineering held that where the assessee had adopted TNMM for benchmarking its profits, adoption of CUP solely for evaluating management fee would be detrimental to the interest of revenue and assessee. Further, relying on the decision in the case of Merck Ltd [TS-143-ITAT-2016(Mum)-TP, it rejected TPO's determination of NIL ALP on the ground that the assessee had substantiated underlying benefit as well as rendition of service. Accordingly, it allowed assessee's appeal.

Siemens Gamesa Renewable Power Pvt Ltd vs DCIT-TS-927-ITAT-2017(CHNY)-TP-ITA No.1420 and 376/mds/2017 dated 13.11.2017

80. The assessee providing software development services to its AEs benchmarked its transactions under TNMM which was rejected by the TPO who selected CUP as the MAM and adopted the average industry hourly rates as comparable and made an addition. The CIT(A) struck down the application of CUP as the MAM and proceeding under TNMM, selected a list of comparables as

adopted in the case of Sun Microsystems India P. Ltd. for the same AY which led to partial relief to the assessee. The Tribunal held that TP comparability analysis has to be carried out for each taxpayer, for each assessment year to decide the Most Appropriate Method to be adopted, the filters to be applied and the comparable companies to be selected and therefore held that it was not appropriate for the CIT(A) to merely quote a particular judicial pronouncement in order to decide the MAM to be adopted or to cite another to decide the final set of comparable companies. Noting that the functions of the assessee (software development) and that of the taxpayer in the decision relied on by the CIT(A) (ITES) differed, it remitted the entire TP issue to the file of the TPO for fresh adjudication. Further, it held that the TPO erred in selecting CUP as the MAM as the TPO failed to provide any reasoning as to why the TNMM adopted by the assessee was incorrect.

Infineon Technologies India Private Limited vs ACIT-TS-899-ITAT-2017(Bang)-TP dated 03.11.2017

81. The Tribunal allowed the assessee's appeal and held that the TNMM and not 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 Transmission (India) Pvt. Ltd vs ACIT-TS-928-ITAT-2017(HYD)-TP dated 24.10.2017

Revenue / Profit Split Method

82. The assessee followed Revenue split method as prescribed by the Group's Global Transfer Pricing Policy for benchmarking the provision of investment banking services to AE and computed its share as at 0.56% of the total investment banking division revenue. The TPO/CIT(A) rejected the method on the basis that Revenue split method was unacceptable in Indian jurisprudence and applied TNMM on entity level to arrive at TP adjustment of Rs. 33.10 crore. The Tribunal, observing that the assessee could not make effective representations before the lower authorities due to extraordinary situation faced by the assessee owing to collapse of the Lehman group, accepted the assessee's prayer for another opportunity to present necessary evidences and to justify its adoption of Revenue split method by placing reliance on Rule 10AB (other method for determination of ALP). Accordingly, it remitted the matter to the file of the AO/TPO for denovo assessment proceeding in the interest of justice.

Lehman Brothers Securities Pvt Ltd vs DCIT-TS-999-ITAT-2017(Mum)-TP- I.T.A. No.4574/Mum/2012 dated 12.12.2017

Any Other Method

83. Where the assessee (specialised in scientific and technical journals) paid a sum to its AE towards cost contribution for costs incurred by a Swiss based fellow subsidiary, the allocation of which was based on the number of articles and subscriptions of the assessee and the same was benchmarked under 'any other method' which was brought into force during the impugned AY, as opposed to TNMM adopted by the AO (and also used in prior years by the assessee), the Court held that the Tribunal erred in holding that the assessee had not satisfied the onus of justifying the change in method and in remitting the matter back to the file of the TPO for reverification and held that the Tribunal should have determined the applicability of the other method itself. Accordingly, it remitted the matter to the Tribunal for adjudication.

Springer (India) Pvt Ltd v ACIT – TS-1062-HC-2017 (Del) – TP - ITA 1148/2017 dated 15.12.2017

Others

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

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

85. The Tribunal, upheld the DRP order permitting assessee's use of separate methods to benchmark sale of spares and component transaction after bifurcating it into 3 categories based on their applications for AY 2010-11. Noting that bifurcated category (A) represented sale of spare parts to third party as well as AEs for vehicles made by assessee, category (B) represented sourcing of components required sourcing by overseas AE for the manufacture of 2 or 3 wheelers, and category (C) represented sourcing by overseas AE for the manufacture of 4 wheelers. It distinguished category (A) from (B) and (C) relying on Tribunal's ruling in assessee's own case in AY 2006-07 wherein it was held that the nature of transactions in category (A) effectuated by the assessee to its AE abroad as well as third party distributors involve supply of servicing spares and are purely in the realm of after-sale distribution resulting in higher margins while category (B) and (C) transactions were are akin to logistics support service providers.

DCIT vs. Piaggio Vehicles Pvt. Ltd-TS-953-ITAT-2017(PUN)-TP ITA No.573/PUN/2015 dated 24.11.2017

C. Comparability– Inter and Intra Industry

Engineering Services / Consultancy services

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

Flour Daniel India Pvt Ltd - TS-20-ITAT-2017-(Del)-TP - ITA No. 5493/Del/2010

87. The Tribunal held that in Transfer Pricing proceedings, a company performing similar functions could not be rejected as a comparable on the ground that it had higher proportion of material cost in total operating cost. It further held that a company rendering consultancy services in the

field of Marine infrastructure, Industrial infrastructure, renewable energy etc. could be accepted as comparable on account of functional similarity with the assessee rendering engineering services in various industries such as oil and gas, environment, infrastructure and marine terminal.

Saipem India Project Ltd - [2017] 77 taxmann.com 17 (Chennai - Trib.) - IT APPEAL NO. 401 (MDS.) OF 2016

88. The Tribunal held that the assessee engaged in providing application engineering services was comparable to Ace Software Exports Ltd considering that the company was held to be functionally comparable to the assessee in the preceding year and that the Revenue had failed to show change in functionality in the present year and that its operating margins did not reflect it to be persistently loss making concern.

It dismissed the contention of the assessee for the exclusion of Vardan Projects Ltd on ground of higher margins of 96.33%, stating that assessee had failed to prove that there was any functional dissimilarity between the assessee and the said company or that the high profit margins did not reflect the normal business condition.

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

ITES Sector / Software Development Services

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

Comverse Network Systems India v ACIT – TS-33-ITAT-2017 (Del) – TP - ITA No. 6334/Del/2012

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

Ad CIT v CA India Technologies Pvt Ltd – TS-39-ITAT-2017 (Mum) – TP - ITA No.17/Mum/2012

91. The Tribunal relying on Delhi HC's decision in Chryscapital Investment Advisors admitted assessee's additional ground for inclusion of two companies (i.e CG-VAK and Microgenetics Systems Ltd engaged in the business of rendering IT enabled services) in the list of comparables for benchmarking provision of IT enabled services provided by assessee to its AEs during AY 2009-10. It remitted the entire issue to AO/TPO for examining inclusion or otherwise of two

comparables in accordance with the settled principles of comparability and also directed the assessee to justify before AO/TPO as to why these companies were not included in its TP study report originally and to demonstrate comparability of FAR of these comparables.

Vaidor Capital India Pvt Ltd - TS-1050-ITAT-2016- (Del)-TP- ITA No. 1979/Del./2014

92. 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 - ITA-264-2016 (O&M)

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

Tesco Hindustan Service Centre (P.) Ltd – (2017) 77 taxmann.com 48 (Bangalore - Trib.) - IT (TP) APPEAL NO. 1285 (BANG.) OF 2011

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

Novell Software Development (Ind.) Pvt Ltd - TS-1044-ITAT-2016(Bang)-TP - IT (TP) A No. 1483 (Bang) 2010

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

Metric Stream Infotech -TS-1065-ITAT-2016(Bang)-TP- IT(TP)A 216/Bang/14

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

e4e Business Solutions India Pvt Ltd - TS-13-ITAT-2017(Bang)-TP - I.T (TP).A No.1397/Bang/2016

97. Where the Assessee was engaged in the business of software development and providing IT enables services, the Tribunal accepted assessee's contention to exclude 3 comparables in the software development segment viz Infosys Technologies Ltd (giant risk taking company with

huge intangibles), KALS Information System Ltd (engaged in executing end to end software development projects through entire value chain of software development cycle) and Tata Elxsi Ltd (engaged in providing integrated hardware and package software solutions) and 3 comparables in the ITeS segment viz. Coral Hub Ltd (outsources its work), Triton Corporation Ltd (financial irregularities committed by directors) and Maple eSolutions Ltd (financial irregularities) on the ground of functional dissimilarity, outsourcing of work, turnover of intangibles, unreliable financials, etc. Further, it observed that while computing working capital adjustment for software development services and ITeS, TPO had considered sundry debtors, creditors, inventory at consolidated entity level and held that TPO should have taken relevant standalone balances only and remitted the matter for deciding afresh by providing an opportunity of being heard to the assessee.

Ut Starcom Inc (India Branch) - TS-1063-ITAT-2016(DEL)-TP - ITA No.5848/Del./2011

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

Evaluesserve.com Pvt Ltd - TS-1060-ITAT-2016(DEL)-TP - I.T.A. No. 5270/Del/2012

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

Carraro Technologies India Pvt Ltd -TS-1058-ITAT-2016(PUN)-TP - ITA No. 2189/PN/2013

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

Hyundai Motor India Engineering Private Limited - TS-1057-ITAT-2016(HYD)-TP - ITA No 128/Hyd/2016

101. The Tribunal rejected assessee's use of data relating to past 2 years in case of comparables due to assessee's failure to give a valid reason in light of provisions of section 10B(4). The Tribunal further, allowed assessee's ground for exclusion of 9 comparables on grounds of functional dissimilarity as engaged in software product development, failed 25% employee cost filter and KPO services and 8 comparables on applying Rs 1200 cr Turnover filter relying on the ground that the guidance note of ICAI on Transfer Pricing states that a transaction entered into by a Rs.1000 crores company cannot be compared with the transaction entered into by a Rs.10 crores company. It also remitted to the file of the TPO the comparability of one company for verification of extraordinary events by way of amalgamation during the year.

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

102. The Tribunal following precedent excluded 5 comparables on grounds of functional dissimilarity, ownership of intangibles, extraordinary event during the year affecting profitability and non-availability of segmental data. Further, it also remitted to the file of the TPO the calculation of

working capital adjustment considering assessee's claim about incorrect average receivables adopted by the TPO.

BA Continuum India Private Limited -TS-1023-ITAT-2016(HYD)-TP - I.T.A. No. 1143/HYD/2014

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

AY 2009-10

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

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

AY 2008-09

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

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

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

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

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

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

105. The Tribunal held that the assessee engaged in providing software development services could not be compared to Infosys Ltd, Larsen & Toubro Infotech Ltd, Mindtree Ltd, Persistent Systems Ltd, Spry Resources having turnover Rs. 33083 crores, Rs. 23685533 crores, 12558 crores, 8427.4 and Rs. 37074498 crores respectively as they failed the turnover filter of 10 times the assessee's turnover of Rs. 51.99 crores.

Further, it remitted the comparability of Genesys International Corpn. Ltd to the file of the DRP in the absence of availability of annual report or a ruling pertaining to the relevant AY.

Mindteck (India) Ltd vs DCIT- [TS-533-ITAT-2017(Bang)-TP]- IT(TP)A No.1834/B/16 dated 24.03.2017

106. Where the assessee had contested comparability of the 8 companies citing various reasons like functional dissimilarity, loss making comparables, failing employee cost filter, significant RPT etc, the Tribunal reiterating the principles of comparability, economic adjustments, RPT, current year vs. multiple year data, segmentation vs. aggregation etc. by relying on various landmark judicial precedents, remitted the comparability of 8 comparables to the file of AO/TPO for fresh adjudication **as the factual matrix had to be tested in respect of all the comparables.**
MWH India Pvt. Ltd vs. DCIT-TS-951-ITAT-2017(Mum)-TP ITA No. 792/MUM/2013 dated 27.10.2017
107. The Tribunal held that the assessee engaged in the business of providing software development services to its AE could not be compared to:
- Bodhtree Consulting Ltd as it was engaged in the business of software product and providing end to end web solutions software consultancy and design and development of software using latest technology.
 - Infosys Technologies Ltd as it owned significant intangible and had huge revenues from software products and the segmental details were not available.
 - Persistent Software Ltd as it was engaged in product designing services and into software product development which was not functionally comparable with software developer assessee.
 - Tata Elxsi Ltd as it was engaged in business of software development services which comprised of embedded product design services, industrial design and engineering services and visual computing labs and system integration services segment and the segmental breakup was not available.
 - Sonata Software Ltd as it had an RPT filter of 33.39% and therefore failed the 15% RPT filter applied by TPO.
- Sterling Commerce Solutions India Private Ltd vs. DCIT-TS-969-ITAT-2017(Bang)-TP IT(TP)A No.309/Bang/2014 dated 27.10.2017***
108. The Tribunal held that the assessee engaged in the business of providing software development and marketing support services to its AE could not be compared to:
- Accentia technologies Ltd as it was engaged in providing services in the areas of Transcription, Coding, Billing, and Collections. Further, it had Offshore Development Centers (ODCs) in different cities of the country and 3000 trained professionals as compared to the 12 of the assessee and therefore was not comparable to the assessee.
 - Crossdomain Solutions Pvt Ltd as it was an insurance KPO company and payroll KPO which were high end KPO services.
 - Infosys BPO Limited as it had carried out re-organization of its subsidiaries and engaged in transferring shares, liquidation of entities and merge. Further, its turnover was 55 times of assessee's turnover.
- UT Starcom Inc. vs. DDIT-TS-976-ITAT-2017(DEL)-TP ITA No.1829/Del./2014 dated 25.11.2017***
109. The Tribunal held that the assessee engaged in providing ITES services to its AE could not be compared to:
- Accentia Technologies Ltd as it was engaged in providing services of medical transcription, was not at all comparable to the back-office support services provided by the assessee.
 - Jeevan Softtech Ltd as it was engaged in medical writing, clinical data management, biostatistics and other services and therefore functionally dissimilar to the assessee.
 - Fortune Infotech Ltd as it had its own unique web based software through which it provided services to its customers and therefore could not be compared to the assessee.
 - In respect of the Software segment, it excluded Infosys Ltd as it had a huge brand value, intangibles.
- Principal Global Services Pvt. Ltd vs. DCIT-TS-970-ITAT-2017(PUN)-TP ITA No.323/PUN/2015 dated 29.11.2017***

110. The Tribunal remitted the following comparables to the file of TPO for fresh consideration in respect of assessee engaged in providing software development services:
- Larsen and Turbo as the issue of insufficient segmental details, lack of clarity on whether the cost of bought out items of sale related to services/products, and the nature of sub-contracting expenses incurred by the company had not been examined by lower authorities,
 - Persistent Systems Ltd, as the Annual Report that the company stated that it was into software products, services, and innovation and no analysis of the operational segments was done by the lower authorities to compute margin of one segment only.
- Microsoft Research Lab India Pvt. Ltd. vs. DCIT-TS-994-ITAT-2017(Bang)-TP dated 03.11.2017***
111. The Tribunal held that the assessee engaged in the business of providing software development services to its AE could not be compared to:
- Acropetal Technologies Ltd as it was engaged in provision of high end healthcare services and developed & owned intellectual property providing it a substantial competitive advantage to this company, leading to higher profitability.
 - Infosys Ltd as it was a giant company with high risk profile and therefore could not be compared to the assessee a captive service provider.
 - Larsen and Turbo Infotech Ltd as it was engaged in software development services and software products and segmental details were not available.
 - Mindtree Limited as it was undertaking R&D activity and owned IPRs.
 - Further, it remitted Sonata Software Limited to the file of TPO to verify whether company earned 100% of its revenue from export of software development and related services.
- Agilis Information Technologies International Pvt. Ltd. (Now known as Infogix International Pvt. Ltd.) vs. ACIT -TS- 995-ITAT-2017(DEL)-TP dated 15.11.2017***
112. The Tribunal held that the assessee engaged in the business of providing software development services to its AE could not be compared to:
- Infosys Ltd as it had huge brand, turnover and was a leading product in the banking industry. Further, it was engaged in significant R&D. Further, it remitted Bodhtree Consulting Ltd to the file of TPO directing it to establish how the difference in accounting policy wherein it recognized revenue when software was developed and billed from assessee's cost plus model impacted the profitability. It also remitted Sonata Software Ltd to the file of TPO directing it to verify the RPT percentage and exclude it if the RPT is more than 25%.
- Freescale Semiconductor India Pvt. Ltd vs DCIT-983-ITAT-2017(DEL)-TP - ITA No. 2589/Del/2015 dated 07.12.2017***
113. The Tribunal held that the assessee engaged in the business of providing software development services to its AE could not be compared to:
- Flextronics Software Ltd, Satyam Computer Services Ltd and Infosys Technologies Ltd as they had a turnover of more than 200 crores.
 - Sankhya Infotech Ltd as it was engaged in providing software development services as well as software products and did not have segmental results and therefore could not be compared to the assessee.
 - Further, it remitted Bodhtree Consulting Ltd to verify the RPT % and exclude it if it was more than 15%.
- Dell International Services India Private Ltd vs DCIT-TS-965-ITAT-2017(Bang)-TP IT(TP)A Nos. 85 & 1026/B/14, 1838/B/13 & CO No.21/B/16 dated 13.10.2017***
114. The Tribunal held that the assessee engaged in the business of providing software development services to its AE could not be compared to:
- Infosys Technologies Ltd as it owned significant intangibles and had huge revenue from software products and the breakup of revenue from services and products was not available.
 - KALS Information System Ltd as it was also engaged in software products and was not purely software development provider and adequate segmental results were not available.

- Persistent System Ltd as it was engaged in the business of product development, software product document and product design and no segmental details were available.
- Celestial Biolabs Ltd as it was engaged in the clinical research and manufacture of bio-products business and therefore functionally dissimilar.
- Avani Cimcon Technologies Ltd as it was also engaged software development and sale of software products and no segmental details were available.
- E-Zest Solutions Ltd as it was engaged in providing product development services and high end technical services which were under category of KPO services.
- Wipro Ltd as it owned intellectual property in the form of registered patents and was a full fledged risk bearing company and owned proprietary software.
- Tata Elxsi Ltd Flextronics Software Systems Ltd as they were engaged in providing development services and high end KPO services

Infinera India Pvt Ltd vs ITO-TS- 980-ITAT-2017(Bang)-TP- IT(TP)A No.1096/Bang/2011 dated 27.10.2017

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

- Infosys Technologies Ltd as it owned significant intangibles and earned huge revenues from software products and breakup of revenue from software services and software products was not available.
- KALS Information Systems Ltd as it was engaged in developing software products.
- Persistent Systems Ltd as it was engaged in product development and product design services and segmental details were not available.
- Quintegra Solutions Ltd as it was engaged in business of proprietary software products.
- Tata Elxsi Ltd as it was engaged in product designing services and not purely software development services.
- Thirdware Solutions as it was engaged in product development and earned revenue from sale of licenses and subscription, however, segmental details were not available.
- Wipro Ltd as it was engaged in software development services and product development and segmental details were unavailable.
- Lucid software Ltd as it was engaged in development of software products.

DCIT vs Verisign Services India Pvt Ltd-TS- 1081-ITAT-2017(Bang)-TP dated 25.10.2017 - I.T.(T.P) A. No.1230/Bang/2013

116. The Court upheld the exclusion of the following companies in the case of assessee engaged in software development, specifically in healthcare claims adjudication and bio-pharmaceutical services:

- E-Infochips and Infinite Data Systems as they were engaged in providing high end technology driven services and therefore were entirely different from assessee's software development services.
- Accentia Technologies as it operated in multiple locations throughout the globe in healthcare receivable cycle management and also into legal process outsourcing and high -end software service delivery and therefore functionally dissimilar to the assessee.
- TCS E-serve ltd and TCS E-Serve International Ltd as it had high brand value and drew profitability upward and therefore could not be compared to the assessee.
- Further, regarding comparability of I-Gate Global Solutions, considering Tribunal's observations that the company's functioning was similar to that of the assessee, the Court framed question of law as to whether the Tribunal erred in holding that I-Gate Global solutions Limited underwent significant change in its profitability in view of the amalgamation undergone, having regard to the report and materials on record and the circumstances of the present case.

CSR Technology (India) Pvt. Ltd vs ACIT-TS-1071-ITAT-2017(DEL)-TP - ITA No.1895/Del./2017 dated 14.12.2017

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

- Infosys Limited as it was giant risk-taking company, owing intangibles was engaged in development and sale of software products for which segmental details were unavailable.
- Zylog Systems Limited as it was engaged in providing onsite services, specialized in providing software products and solutions and earned revenue from consulting, licensing fee, as well as from software products and solutions and therefore functionally dissimilar to the assessee.
- Persistent Systems & Solutions Ltd. as it was dealing in software products in outsourcing of software product development.
- E-Zest Solutions Ltd as it was engaged in providing diverse services like BPO, product engineering, software product development and KPO.
- Acropetal Technologies Ltd. as it was engaged in IP led product development, engineering design services, healthcare services.

Alcatel-Lucent India Ltd vs. ACIT-TS-1005-ITAT-2017(DEL)-TP-I.T.A .No. 1112/DEL/2017 (A.Y 2012-13) & S. A No. 142/Del/2017 dated 03.11.2017

118. The Tribunal held that the assessee engaged in the business of providing IT enabled services to its AE could not be compared to:

- Eclerx Services Ltd as it was engaged in providing high end KPO services and there was an extra-ordinary event of amalgamation impacting its profits.
- Infosys BPO Ltd as it had acquired 100% voting interest in another entity which was a strategic sourcing and category management service provider having an impact on its profits. Further, it was a giant company having huge brand value and intangibles.
- TCS E-serve Ltd as it was engaged in providing financial services to help its customers achieve their business objectives by providing innovative best in class services. Further, its operations included delivering core business processing services, analytics and insights (KPO) and support services for both data and voice process.

It remitted Excel Infoways Ltd. to the file of TPO to verify the details provided by the comparable u/s 133(6) vis-à-vis the financial details. Further, it also remitted CG-VAK Software exports Ltd, Datamatics Services Ltd and Calibre Point Solutions Ltd to the file of TPO for verification of its compatibility with the assessee.

Exevo India Pvt. Ltd (Now MA KS Solutions (India Pvt. Ltd) vs. DCIT-TS-1007-ITAT-2017(DEL)-TP I.T.A. No.20/Del/2017 dated 30.11.2017

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

- Coral Hubs Ltd as it had a different accounting period i.e comprising of 15 months and therefore could not be taken as a comparable.
Further, it included Cades Digitech Private Limited as it was into engineering design services and considered it comparable to the assessee.

DCIT vs. Applied Micro Circuits India Pvt. Ltd-TS-1013-ITAT-2017(PUN)-TP ITA No.1250/PUN/2015 dated 24.11.2017

120. The Tribunal held that the assessee engaged in the business of providing data processing/ITES to its AE could not be compared to:

- Accentia Technologies Ltd as it was engaged in providing KPO services, operating in the healthcare industry, and owning proprietary software products such as instacare, instascribe, instaweb.
- TCS E-serve Ltd as it had significant intangibles and had substantially increased operating profits post acquisition.
- Infosys BPO Ltd as it was engaged in high end integrated services and therefore was functionally dissimilar to the assessee.

Omniglobe Information Technologies (India) Pvt. Ltd vs. ITO-TS-1025-ITAT-2017(DEL)-TP ITA No.1003/Del/2016 dated 06.11.2017

121. The Tribunal held that the assessee engaged in the business of providing software development services to its AE could not be compared to:
- Bodhtree Consulting Limited as it was engaged in providing open and end-to-end web solutions, software consultancy and design and development of software solutions using latest technology and therefore not comparable to the assessee.
 - Further, it restored Tata Elxsi and Infosys BPO to the file of TPO to verify the functional similarity vis a vis the assessee.
- Narus Networks Pvt. Ltd vs. DCIT-TS-1047-ITAT-2017(bang)-TP-i.T. (T.P) A. No.1631/Bang/2014 dated 23.11.2017**
122. The Tribunal held that the assessee engaged in providing back office support services to its AE could not be compared to Accentia Technologies Ltd as it had an extraordinary event of merger during the year which impacted its profits. Further, it remitted the R Systems International Ltd Infosys BPO, TCS E-serve Ltd to the file of TPO to examine the functional comparability afresh.
- Outsource Partners International Pvt. Ltd. vs. DCIT-TS-1021-ITAT-2017(Bang)-TP ITA No.443/Bang/2016 2011-12dated 31.10.2017**
123. The Tribunal held that the assessee engaged in the business of providing business process outsourcing services to its AE could not be compared to:
- Accentia Technologies Ltd as it had an extraordinary event of amalgamation during the year leading to a growth of 150% in the relevant year compared to the previous year showing that it had an impact on the company's profitability.
 - Eclerx Limited as it was engaged in providing KPO services and had 1500 domain specialized employees.
 - Maple Esolutions Ltd as its directors were under serious indictment for fraud.
- DCIT vs. Everest Business Advisory India (P) Ltd vs DCIT-TS-1038-ITAT-2017(DEL)-TP ITA No.41/Del./2013 dated 15.12.2017**
124. The Tribunal held that the assessee engaged in the business of providing ITES services to its AE could not be compared to:
- Caliber Business Solutions Ltd as it had a different financial year ending than the assessee.
 - Datamatics Financial Services Ltd as it was engaged in the business of registration and share transfer work and ITES, but there was no segmental information available in the Annual report of the company.
 - ICRA Techno Analytics Ltd as it was engaged in various high end functions but no segmental details were available.
 - Infosys BPO Limited as it was engaged in a variety of verticals like Banking, Communication, Media and Entertainment, Manufacturing, Retail and Energy, had diversified activities, IPRs and tremendous brand value.
 - Further, it remitted the Accentia and TCS E-Serve to the file of TPO to determine the functional comparability vis-à-vis the assessee.
- e4e Business Solutions India Pvt. Ltd. vs. ITO-TS-977-ITAT-2017(bang)-TP IT(TP)A No.451/Bang/2017 dated 03.11.2017**
125. The Tribunal held that the assessee engaged in the business of providing software development services to its AE could not be compared to:
- Infosys Limited as it was earning revenue from both software services and products and was also the owner of various brands earning huge amount on account of brand.
 - Persistent Systems Ltd as it was into product development and was also deriving income from product sales as well as royalty and segmental information was not available.
- Tektronix (India) P Ltd (Formerly Tektronix Engineering Development (India) P. Ltd) vs. ITO-TS-964-ITAT-2017(DEL)-TP I.T(TP)A No.293/Bang/2014 dated 27.10.2017**
126. The Tribunal held that the assessee engaged in providing software development services to its AE could not be compared to:

- Accel Transmatics Limited as it was engaged in the services in the form of ACCEL IT and ACCEL animation services for 2D and 3D animation and therefore functionally dissimilar to the assessee.
- Avani Cimcon Technologies Limited as it was engaged in the business of software products and earned unusually high profit margin and therefore could not be compared to the assessee.
- Celestial Labs Limited as it was engaged in clinical research and manufacture of software products and therefore functionally incomparable to the assessee.
- KALS Infosystems Ltd as it was engaged in development of software products as well as providing training and thus functionally dissimilar to the assessee.
- Infosys Technologies Limited as it had significant intangibles and huge revenue from software products with no segmental breakup.
- Ishir Infotech Limited as it had outsourced its main activity and therefore had a different business model than the assessee.
- Lucid Software Ltd as it was engaged in the development of software products and therefore functionally dissimilar to the assessee.
- Wipro Limited and Tata Elxsi Ltd as it owned intellectual property and significant R&D activity, brand value.
- E-Zest Solutions Limited as it was engaged in rendering product development and high end technical services which were in the nature of KPO services.
- Persistent Systems Ltd as it was engaged in software development and software products and no segmental details were available.
- Quintegra Solutions Limited as it was engaged in developing proprietary software products and owning intangibles.

Yodlee Infotech Pvt. Ltd vs DCIT-TS- 1077-ITAR-2017(Bang)-TP IT(TP) No. 1138/Bang/2011 dated 15.12.2017

127. The Tribunal considering assessee's submission that DRP's order was very cryptic as he included Bodhtree consulting by only stating that the TPO made elaborate discussion regarding the comparability of entities engaged in providing software development services with entities engaged in development of software products, remitted the comparability of Bodhtree Consulting to the file of DRP for fresh consideration.

Sonus Networks India Pvt Ltd vs DCIT-TS-1076-ITAT-2017(Bang)-TP (IT(TP) A No. 193/Bang/2014 dated 01.12.2017)

128. The Tribunal held that the assessee engaged in providing software development services for AY 2006-07 could not be compared to:-

- Aztech Software Ltd, Geometric Ltd (seg.) and Megasoft Ltd (seg) having RPT of 17.78%, 19.34% and 17.08% respectively as it failed the RPT filter of 15% applied by TPO. Further, Megasoft was engaged in the business of which was functionally dissimilar to the assessee.
- iGate Global Solutions Ltd (seg), Infosys Ltd, Mindtree Consulting Ltd, Persistent Systems Ltd, Sasken Communication Ltd, Tata Elxsi Ltd and Flextronics Software Ltd having turnover of Rs. 527.91 crores, Rs. 9028, Rs. 448.79 crores, Rs. 209.18 crores, Rs. 240.03 crores, Rs. 188.81 crores and 595.12 crores respectively as it failed the turnover filter of 10 times the assessee's turnover of Rs. 16.97 crores.
- Lucid Software Ltd having turnover of Rs. 1.02 crores as it failed the turnover filter of 1/10th of assessee's turnover of Rs.16.97 crores
- KALS Info Systems Ltd as it was engaged in the business of sale of products and training which was functionally dissimilar to the assessee.

Further, for AY 2007-08, the Tribunal held that the assessee could not be compare to:

- Geometric Ltd and Ishir Infotech Ltd having RPT of 19.98% and 21.97% as it failed the RPT filter of 15% applied by TPO.
- Flextronics SW Systems Ltd, iGate Global Solutions Ltd, Infosys Tech Ltd, Mindtree Ltd, Persistent Systems Ltd, Sasken Commn. Tech Ltd, Tata Elxsi Ltd having turnover of Rs. 848.66 cr, Rs. 747.27 cr, 13149 cr, 590.35 cr, 293.75 cr, 343.57 cr, 262.58 cr and 9616 cr

respectively could not be compared to the assessee having turnover of Rs.22.06 crores as it failed the turnover filter of 10 times the assessee's turnover.

- KALS Information Systems Ltd, Lucid Software Ltd and Megasoft Solutions Ltd having turnover of Rs, 2 crores, 1.70 crores and 1.85 crores could not be compared to the assessee as it failed the turnover filter of 1/10th of assessee's turnover of Rs. 22.06 crores.
- Accel Transmatics Ltd as it was engaged in providing services in the form of ACCEL IT and ACCEL animation services for 2D and 3D animation.
- Avani Cimcon Technologies Ltd as it was engaged in the business of software development and development of software products and segmental details were unavailable.
- Celestial Labs ltd as it was engaged in clinical research and manufacture of bio products and other products and thus functionally dissimilar to the assessee.
- E-zest Solutions as it was engaged in the business of rendering product development services and high end technical services (KPO services) and thus functionally different from the assessee.
- Helios Matheson Information Tech. Ltd as it was engaged in the business of application software and thus functionally dissimilar to the assessee.
- Thidware solutions Ltd as it was engaged in the business of product development and earned revenue from sale of licenses and subscription.
- Quintegra Solutions Ltd as it was engaged in the business of developing proprietary software products and owned intangibles.

Aspect Technology Centre India Pvt. Ltd vs ITO-TS-518-ITAT-2017(Bang)-TP-IT(TP)A No. 1252(bang)2011 and IT(TP)A no.1391(bang) dated 02.05.2017

129. The Tribunal held that assessee engaged in the business of IT Support services segment could not be compared to:

- Bodhtree Consulting Ltd, Eclerx Services Ltd and Moldtek Technologies ltd as the said companies were engaged in KPO services therefore functionally dissimilar to the assessee.
- Infosys BPO Ltd and Wipro ltd as they had huge brand value and therefore could not be compared to the assessee.
- Informed Technologies India Ltd and Caliber Pint Business Solutions Ltd as they had an RPT to sales ratio of 15.93% and 15.44% which failed the 15% RPT filter adopted by TPO.
- Triton Corporation Ltd and Maple Esolutions Ltd as the promoters of the two companies were involved in fraud for earlier years and therefore the financial results could not be relied on.
- Iservices India Pvt ltd and Apex Advanced Tech Pvt Ltd as they were engaged in the business of providing data creation services and therefore functionally dissimilar to the assessee.

In respect of Software segment, it held that the assessee could not be compared to:

- Accel Transmatic Ltd as it was engaged in design, development and manufacture of multifunction management system and ticket vending system as well as providing training in hardware and networking, enterprise system management and software services for 2D/3D animations and therefore functionally dissimilar to the assessee.
- Avani Cimcon tech Ltd as it was engaged in business of software products and therefore functionally dissimilar to the assessee.
- Celestial Labs ltd as it was engaged in clinical research and manufacture of software products and therefore functionally dissimilar to the assessee.
- KALS Information Systems ltd as it was engaged in development of software products as well as providing training and therefore not functionally comparable to the assessee.
- E-Zest Solutions ltd as it was product development and high end KPO technical services.
- Thirdware Solutions Ltd and Persistent Systems ltd as they were engaged in software product development and therefore functionally dissimilar to the assessee.
- Helios & Matheson Information Technology Ltd as it was engaged in development and sale of software products.
- Infosys Technologies Ltd as it owned significant intangibles and had huge revenues from software products with no segment break-up available.

- Wipro Ltd as it owned intellectual property and therefore could not be compared to the assessee.
- Tata Elxsi Ltd as it had significant R&D activity, brand value and therefore could not be compared to the assessee.
- Lucid Software Ltd as it was engaged in development of software products.
- Flextronics Software Systems Ltd as it was engaged in software development services as well as software products and segmental details were unavailable.

Mphasis Ltd vs ACIT-TS-562-ITAT-2017(BANG)-TP-ITA No. 14/bang/2012 dated 19.05.2017

130. The Tribunal remitted the selection of comparables for assessee being a captive software development company to the file of AO/TPO with the direction to apply 10 times turnover filter observing that 10 times turnover filter was a more just filter. Further, in view of the consistent view taken by the Tribunal that in normal circumstances, RPT tolerance range should not exceed 15%, it directed the TPO to apply 15% RPT filter instead of 25% applied by TPO.

Microchip Technology (India) Pvt Ltd vs ACIT- [TS-535-ITAT-2017(Bang)-TP]- IT(T.P) A No.1586/Bang/2012 dated 03.05.2017

131. The Tribunal held that the assessee engaged in providing software development services was not comparable to:-

- KALS Information Systems Ltd as it was engaged in the business of consultancy, information provider and general insurance provider and thus functionally dissimilar to the assessee.
- Bodhtree Consulting Ltd as it was engaged in providing KPO services and therefore functionally dissimilar to the assessee.
- Tata Elxsi Ltd as it was engaged in the business of providing KPO services
- Persistent Systems Ltd as it was engaged in development of software products.
- Sasken Communications Tech Ltd as it owned IPR and also had branded products.
- Akshay Software Technologies Limited as its turnover was only Rs. 12.23 crores therefore failing the turnover filter of 1/10th of assessee turnover of Rs. 239 crores.

Further, it remitted the comparability of L&T Infotech Limited to the AO/TPO with a direction to verify the RPT %.

DCIT vs ABB Global Services Pvt Ltd-TS-501-ITAT-2017(Bang)-TP-IT(TP)A No.49 and 97/B/2014 dated 05.05.2017

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

- Avani Cimcon Technologies Ltd as it was engaged in development of software products and segmental details were not available.
- Celestial Labs Ltd as it was primarily engaged in clinical research and manufacture of bio and other products and therefore functionally dissimilar to the assessee.
- KALS Information Systems Ltd as it was engaged in the business of software product development and therefore functionally dissimilar to the assessee.
- Accel Transmatic as it was engaged in providing ACCEL IT and ACCEL Animation services which was functionally dissimilar to the assessee.
- Lucid Software Limited as it was engaged in the business of software development services and development of software products and segmental details were unavailable.
- Infosys Technologies Ltd as it was an IT service giant and assumed all risks while the assessee assumed limited risk.
- Wipro Ltd as it was a global IT company and 67% of its sales related to products which were sold at premium resulting in higher profitability.
- Tata Elxsi Limited as it was engaged in the development of niche product and development services which was functionally dissimilar to the assessee.
- E-Zest Solutions Ltd as it was engaged in rendering product development services and high end technical services which were basically KPO services.
- Thirdware Solutions Ltd as it earned revenue from sale of licenses and therefore was not comparable to the assessee.
- Geometric Software Ltd having RPT 19.98% as it failed the RPT filter of 15% applied by TPO.

- Ishir Infotech Limited having RPT 21.97% as it failed the RPT filter of 15% applied by TPO.
- Helios & Matheson Information Technology Ltd as it was engaged in the business of development and sale of software products and thus functionally dissimilar to the assessee.
- Persistent System Ltd as it was engaged in the business of product development and product design services and segmental details were unavailable.

Tavant Technologies India Pvt Ltd vs DCIT-TS-488-ITAT-2017(Bang)-TP-IT(TP)A No.292/bang/2014 and 1592/bang/2012 dated 31.05.2017

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

- Foursoft Limited as it was engaged in the business of software products and thus functionally dissimilar to the assessee.
- Thirdware Solution Ltd as it failed the 75% revenue filter of ITeS segment applied by TPO.
- Tata Elxsi Ltd as it was engaged in providing product design services and thus functionally dissimilar to the assessee.

Further, it included Flextronics Ltd which was wrongly excluded by TPO as 85% of the revenue was earned from software development services.

JCIT vs Winphoria Networks India Pvt Ltd-TS-513-ITAT-2017(Bang)-TP dated 24.05.2017

134. The Tribunal held that the assessee engaged in the business of providing IT enabled services to its AE/overseas group company could not be compared to:-

- Vishal Information Technologies Ltd as it outsourced majority of its work and thus had a completely different business model than the assessee.
- Mold Tek Technologies Ltd as it was engaged in providing structural engineering services and during the year, it had also entered into an extraordinary transaction of amalgamation.
- Accentia Technologies Ltd as it had a different revenue model comprising of Medical transcription coding and software which was functionally dissimilar to the assessee. And segmental details were unavailable.
- E-clerx Services Ltd as it was engaged in providing KPO services which was functionally dissimilar to the assessee.
- Bodhtree Consulting Ltd as it was engaged in providing open and end to end web solutions, software consultancy, design and development of solution and segmental details were unavailable.
- Informed Technologies India Ltd as it had a high profit margin of 34.71% for AY 2007-08 compared to losses for earlier year and therefore had an abnormal business trend.
- HCL Comnet Services Ltd as it followed a different accounting year compared to the assessee.
- Infosys BPO Ltd as it was engaged in CRM, finance and accounting, knowledge services, order management and procurement and human resources for various vertical business undertaking and thus functionally dissimilar to the assessee.
- Wipro Ltd as the company's revenue from ITeS segment was Rs 979 crores as compared to assessee's 55.94 lacs.

American Express (India) Pvt Ltd vs DCIT-TS-551-ITAT-2017(del)-TP-dated 07.06.2017

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

- Avani Cimcon technologies Ltd as it was engaged in the business of software product development and thus functionally dissimilar to the assessee.
- Celestial Labs Ltd as it was engaged in the business of product development in the field of biotech and pharmaceuticals and therefore functionally dissimilar to the assessee.
- E-Zest Solutions Ltd as it was rendering product development services and high-end services which would qualify as KPO services which were functionally dissimilar to the assessee.
- Infosys Technologies Ltd as it had a huge brand influence, ownership of IP, intangibles and huge revenues from software products.

- KALS Information systems ltd was engaged in the business of development of software products as well as provision of training services. Further, the information obtained by the TPO u/s 133(6) was contrary to the annual report.
- Persistent Systems ltd as it was engaged in product development and product design services and segmental data were not available.
- Quintegra Solutions ltd as it was engaged in product engineering services which was functionally dissimilar to the software development service provided by the assessee. Further, it was engaged in proprietary software product and had substantial R&D activity resulting in creation of IPRs.
- Tata Elxsi Ltd as it was engaged in product development and design services and not purely software development services.
- Thirdware Solutions ltd as it derived revenue from sale of software products and was thus functionally dissimilar to the assessee.
- Wipro Ltd as it owned IPR, intangibles and was engaged both in software development and sale of product without segmental bifurcation.
- Lucid Software ltd was engaged in development of software products and thus was functionally dissimilar to the assessee.

DCIT vs Century Link Technologies India Pvt. Ltd- [TS-555-ITAT-2017(Bang)-TP]- IT(TP)A No. 292/8an9/2013 & CO No. 48/Bang/2016 dated 09.06.2017

136. The Tribunal held that the assessee engaged in the business of rendering software development services could not be compared to Infosys ltd as it was a giant company owning intangibles and had huge turnover.

Mercedes-Benz Research & Development India Private Limited(Formerly Daimler Chrysler Research & Technology India Pvt.Ltd vs ACIT-TS-529-ITAT-2017 dated 28.04.2017

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

- Bodhtree Consulting Ltd as it was a software product company and therefore functionally dissimilar to the assessee.
- Tata Elxsi Limited having turnover of Rs 378.43 crores as it failed the turnover filter of 10 times the assessee's turnover of Rs. 25.80 crores.
- Infosys Technologies Limited having turnover of Rs. 20264crores as it failed the turnover filter of 10 times the assessee's turnover of Rs. 25.80 crores.
- Persistent systems ltd having turnover of Rs. 519.69 crores as it failed the turnover filter of 10 times the assessee's turnover of Rs. 25.80 crores.
- KALS Information Systems ltd having turnover of Rs. 2.14 crores as it failed turnover filter of 10 times the assessee's turnover of Rs. 25.80 crores.
- Sasken Communication technologies ltd having turnover of Rs. 405.31 crores as it failed turnover filter of 10 times the assessee's turnover of Rs. 25.80 crores.
- Zylog Systems Ltd having turnover of Rs. 734.80 crores as it failed turnover filter of 10 times the assessee's turnover of Rs. 25.80 crores.
- Mindtree Ltd having turnover of Rs. 793.22 crores as it failed turnover filter of 10 times the assessee's turnover of Rs. 25.80 crores
- Larsen & Toubro Infotech Ltd having turnover of Rs. 1950.8 crores turnover filter of 10 times the assessee's turnover of Rs 25.80 crores.

ITO vs CSR India P ltd-TS-570-ITAT-2017(Bang)-TP-IT(TP)A.58 & 241 Bang/2014 dated 06.04.2017

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

- Acropetal Technologies Ltd as it failed the Revenue filter of 75% applied by TPO.
- E-Zest Solutions Ltd as it was engaged in providing KPO services which was functionally dissimilar to the assessee.
- E-infochips ltd as it earned revenue from software development and software products and segmental details were unavailable.
- Infosys Ltd as it had huge brand value, intangibles and thus not comparable to the assessee.

- Persistent Systems Solutions Ltd as it was engaged in diversified activities like licensing of products, royalty on sale of products as well as income from maintenance of contract etc and therefore functionally dissimilar to the assessee.
- Persistent Systems Ltd as it was engaged in diversified activities like licensing of products, royalty on sale of products as well as income from maintenance of contracts and thus functionally dissimilar to the assessee.
- Sasken Communications Technologies Ltd as it was engaged in software development and software products and segmental details were not available.
- Akshay Software Technologies Ltd as it was engaged in development of software and software products and segmental details were unavailable.

Further, it remitted the comparability of LGS Global Ltd to the file of AO/TPO for fresh consideration since the information obtained u/s 133(6) was different from what was given in the annual report.

DCIT vs LSI India Research Pvt Ltd-TS-571-ITAT-2017(bang)-TP dated 16.06.2017

139. The Tribunal held that the assessee engaged in the business of software development and quality assurance programme working on cutting edge technology could not be compared to:

- Bodhtree Consulting Ltd as it was engaged in development of software products and therefore functionally dissimilar to the assessee.
- Tata Elxsi Ltd as it was engaged in providing services such as embedded product design services, industrial design and engineering services and visual computing labs and system integration services segment and therefore functionally dissimilar to the assessee.
- Persistent systems Ltd as it was engaged in product designing services and development of software products and thus functionally dissimilar to the assessee.
- Infosys Tech. Ltd as the company was a giant in the area of software and assumed all risks leading to higher profits whereas assessee was a captive unit and assumed only limited risk.

Further, it held that the assessee's ITES segment could not be compared to:-

- Infosys BPO Ltd as the company had an extraordinary development of amalgamation during the year. Further, it was not engaged in direct activity of BPO but provided management services to BPO.

AOL Online India P Ltd-TS-583-ITAT-2017(Bang)-TP dated 09.06.2017

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

- Acropetal Technologies Ltd as its income from information technology services was Rs. 81.40 crores out of total income of Rs. 141.65 crores which was less than the 75% revenue filter applied by TPO.
- E-Infochips Ltd as it was engaged in the business of providing software development services, hardware maintenance, information technology and consultancy services which was functionally dissimilar to the assessee. Further, sale of products constituted 15% of total revenue and segmental details were unavailable.
- LGS Global Limited as it was engaged in providing software development services to financial and banking industry which was functionally dissimilar to the assessee.
- CG-VAK Software & Exports Limited as it was engaged in providing software development services to financial and banking industry which was functionally dissimilar to the assessee.

ACIT vs. Marvell India Pvt. Ltd-TS-592-ITAT-2017(Bang)-TP-IT(TP)A No. 384/bang/2016 and 471/bang/2016 dated 28.06.2017

141. Where the assessee had initially decided not to contest the addition proposed in the assessment order, but subsequently filed an appeal considering the fact that not filing an appeal before the Tribunal would prejudice its tax related matters pending adjudication before different forums for other years, the Tribunal condoned a delay of 148 days in filing appeal by assessee and held that, the issue permeated through all the years and if on account of one year, the adverse finding for that year should not prejudice the assessee's claim for other years. Further, noting that KALS information's software development expenditure included software consumption from inventory, it held that since it had inventory, it earned revenue from products and therefore excluded the

company from the comparables while benchmarking the international transaction of the assessee **who was engaged in the business of software development services.**

Aircom International (India) Pvt. Ltd vs. DCIT-TS-399-ITAT-2017(DEL)-TP-ITA No.4403/Del/2012 dated 19.05.2017

142. The Tribunal held that the assessee engaged in the business of developing **software** and exporting software services could not be compared to :

- ICRA Techno Analytics Ltd as it was engaged in diversified activities of software development, consultancy, engineering services, web development and hosting and thus functionally dissimilar to the assessee.
- Infosys Ltd as it had a huge brand value, owned intangible assets and was engaged in diversified activities.
- Kals Information Systems Ltd as it had inventories in its balance sheet and was engaged in software products and therefore could not be compared with a pure software development service provider.
- Persistent Systems Ltd as it was engaged in diversified activities, earned income from outsourcing product development and its segmental details were unavailable.
- Sasken Communication Technologies as the company earned revenue from 3 segments- software services, software products and other services but segmental data and particularly operating margins were not available.
- Tata Elxsi as it was engaged in diversified activities of product design and innovation and thus functionally dissimilar to the assessee.
- Persistent Systems & Solutions Ltd as it earned its entire revenue from sale of software services and products and thus functionally dissimilar to the assessee engaged in software development services.
- Larsen & Toubro Ltd as it earned its entire revenue from software products and thus was functionally dissimilar to the assessee. Further, it had an RPT of 18.66% and failed the 15% RPT filter applied by TPO.

Further, noting that the DRP had suo motu applied a new onsite **revenue** filter while rejecting the comparable, the Tribunal held that the new filter should be adopted without any discrimination to all comparables and accordingly, it remanded the comparability of R S Software (India) Ltd to the file of TPO.

DCIT vs ACI Worldwide Solutions P. Ltd (formerly known as Visual Web Solutions P. Ltd-TS-614-ITAT-2017(Bang)-TP-IT(TP)A no 262/bang/2015 dated 26.06.2017

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

- FCS Software Ltd as it was engaged in the business of software development and IT Consulting services and segmental results were unavailable.
- Infosys Technologies Ltd as it was a software giant and had huge turnover.
- L&T Infotech as it was engaged in software products and had high turnover.

DCIT vs Exfo Electro Optical Engg India Pvt. Ltd-TS-648-ITAT-2017-ITA No. 1347/PUN/2015 dated 07.07.2017

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

- E-Infochips Limited as it was engaged in the business of software development, hardware maintenance, information technology, consultancy and therefore was functionally dissimilar to the assessee.
- Sasken Communications as it earned revenue both from software products and services as against the assessee who provided only software services.
- E-zest Solution Limited as it was engaged in providing KPO services and therefore was functionally dissimilar to the assessee.
- Acropetal Technologies Limited having revenue from ITES of 56% as it failed the 75% revenue filter applied by TPO.

- L&T Infotech Limited as it failed the 15% RPT filter applied by TPO.
- Persistent System & Solution Ltd and Persistent Systems Ltd as it was engaged in diversified activities and earned revenue from licensing of products, royalty on sale of products as well as income from maintenance contract and therefore was functionally dissimilar to the assessee.

• Tata Elxsi Ltd as it failed the 75% export filter applied by TPO.

Further, in respect of sales and marketing support services, it held that the assessee could not be compared to:

- Asian Business Exhibition and Conferences limited as it was engaged in the organization of exhibitions and events as well as conducting conferences on behalf of the various clients for their various products and businesses vis-à-vis assessee which was a sales and marketing services to its AE.
- ICC International Agencies Limited as it derived income from trading activity and also maintained inventories and therefore was functionally dissimilar to the assessee.

Electronic Imaging India Pvt. Ltd vs DCIT-TS-659-ITAT-2017(Bang)-TP-ITA No. 1506/BANG/2015 dated 14.06.2017

145. The Tribunal held that the assessee engaged in the business of providing information technology enabled service (ITeS) could not be compared to:

- Accentia Technologies Limited as it was engaged in the business of providing high end medical transcription services & had substantial income from coding, therefore functionally dissimilar to the assessee.
- Microland Limited as thus it failed the 75% revenue filter applied by TPO, as its revenue from ITeS segment was only 20% of the company's total revenue.
- E4e Healthcare Business Services Pvt Ltd as the company had an outstanding on account of forward contracts of USD 11.85 million and therefore the forward contract had influenced the margins of the company. Further, there was huge difference in the amount of bad debts written off in the earlier years in comparison to the year under consideration.

Further, it included Microgenetic Systems Limited as it satisfied the employee cost filter applied by TPO and accordingly directed the AO/TPO to include the comparable.

Capital One Services India Pvt Ltd vs DCIT-TS-629-ITAT-2017(Bang)-TP-IT(TP)A No. 276/bang/2016 dated 28.06.2017

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

- Infosys BPO Ltd as it was engaged in the business of providing end to end outsourcing service, provider and therefore was functionally dissimilar to the assessee.
- Acropetal Technologies Ltd as it was engaged in providing high end knowledge processing services and therefore functionally dissimilar to the assessee.

Further, it remanded the comparability of Accentia Technologies Ltd to the file of TPO with a direction to examine the master service agreement of the assessee with its AE and compare the functions performed by the assessee with that of the comparable.

Zyme Solutions P. Ltd vs ACIT-TS-633-ITAT-2017(Bang)-TP- IT(TP)A No. 85/bang/2016 dated 26.07.2017

147. The Court, relying on the decision in assessee's own case for AY 2008-09 upheld the exclusion of Infosys Technologies Ltd, KALS information Systems, Wipro Ltd, Accentia technologies, Coral Hub and Eclerx Services and HCL Comnet Systems & Services on ground that (a) the companies were either functionally dissimilar to the assessee engaged in providing software development services (SDS), IT enabled services (ITES) and Market support services (MSS) or (b) the aforesaid companies had revenue from software products/KPO services for which no separate segments were available or (c) they owned branded/proprietary products or (d) their RPT to Sales exceeded the RPT filter of 15% applied by the TPO.

Pr. CIT Vs Avaya India Pvt. Ltd-TS-612-HC-2017(DEL)-TP-ITA no. 473/2017 dated 16.05.2017

148. The Tribunal held that Infosys BPO which had huge brand value, goodwill, huge economies of scale and wide geographical disposal of customers, could not be compared to the assessee, a captive service provider engaged in providing software development services. Further, it remitted the comparability of TCS Eserve, BNR Udyog Ltd and Jindal Intellicom Ltd to the file of DRP to decide the issue of availability of segmental data after affording an adequate opportunity of being heard to the assessee.

Indegene Pvt. Ltd (formerly known as Indegene Life Systems Pvt. Ltd) vs ACIT-TS-645-ITAT-2017(Bang)-TP-IT(TP)A no. 591/B/17 dated 02.08.2017

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

- Infosys Ltd as it was giant in the area of development of software having high profits.
- Tata Elxsi Ltd as it was engaged in the development of niche product and development services which was entirely different from pure software development company.

Further, it rejected assessee's plea to exclude the following companies as comparables:

- Aztec Software Systems Ltd and Megasoft Ltd on the ground that they had RPT in excess of 15% i.e., 17.78% and 18% as it satisfied the 25% RPT filter applied by TPO. It held that the assessee had not brought any evidence or reasons on record justifying application of 15% filter as against 25% applied by TPO.
- KALS Infosystems Ltd as it earned 75% of revenue from software services and therefore the assessee's contention that it was engaged in development of application software (software products) and training was not invalid.
- Accel Transmatics Ltd as it was engaged in both software products as well as software services and segmental details were clearly available contrary to assessee's claims.

Synopsys (India) Pvt. Ltd vs ACIT-TS-641-ITAT-2017(Bang)-TP-ITA No. 1169/bang/2010 dated 07.07.2017

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

- FCS Software Ltd as it had high turnover and it owned intangibles.
- Infosys Technologies Ltd as it was engaged in software products and had brand influence.

ACIT vs Synechron Technologies Pvt. Ltd-TS-646-ITAT-2017(PUN)-TP ITA No.536/PUN/2015 dated 16.06.2017

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

- Tata Elxsi Ltd as it was engaged in software development, product design services, innovative design engineering services and visual computing labs and therefore functionally dissimilar to the assessee.
- Infosys Ltd as it was a giant company engaged in software development and software product, owned intangibles and had huge revenue from software products.
- Persistent Systems as it was engaged in software products and services and segmental details were not available.

NMS Communications Pvt Ltd vs DCIT-TS-652-ITAT-2017(Bang)-TP-ITA No. 267/bang/2014 dated 14.07.2017

152. The Tribunal, in respect of assessee engaged in the business of software development, remitted the comparability of the following companies to the file of AO/TPO:

- Flextronics Ltd, iGate Global Solutions Ltd, Infosys Technologies Ltd, Mindtree Ltd, Persistent Systems, Sasken Communication technologies Ltd, Tata Elxsi Ltd, Wipro Ltd to decide whether turnover/size of the comparables affected their price/margins.
- KALS Information Ltd to verify whether the company was engaged in the business of product development and earned income from training/brand name.

Further, it held that the assessee could not be compared to:

- Celestial Biolabs Ltd as it was not a pure software development company and was engaged in research and development.
- Avani Cimcom Technologies Ltd as it was engaged in software services and products and segmental details were unavailable.
- Saksoft Ltd as it had RPT of 16% which failed the 15% RPT filter applied by TPO.

ITO vs Radisys India P. Ltd-TS-662-ITAT-2017(Bang)-TP-IT(TP)A no. 615/bang/2013 dated 24.08.2017

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

- Avani Cincom Technologies as it was engaged in providing software development and consulting IT services and therefore functionally dissimilar to the assessee.
- Bodhtree Consulting Ltd as the revenue recognition policy followed by it was different from the assessee.
- Infosys Technologies Ltd as it was a giant company in terms of risk profile, number of employees and ownership of brand.
- KALS Information Systems Ltd as it was engaged in providing software development as well as training services and accordingly was functionally dissimilar to the assessee.
- Persistent Systems Ltd as it was engaged in licensing of products.
- Quintegra Solutions Ltd as it had copyrights of Rs. 2.71 crores which was used in its business which made it functionally dissimilar to the assessee.
- Tata Elxsi as it was engaged in providing integrated hardware and packaged software solutions and innovation design and engineering solutions and therefore functionally dissimilar to the assessee.
- Thirdware Solutions Ltd as the company earned income from export of software products from SEZ/STPI units apart from sale of license.
- Wipro Ltd as it was operating as a full-fledged risk-taking entity and engaged in providing technology infrastructure services, testing services, package implementation and accordingly functionally dissimilar to the assessee.
- Akshay Software Technologies Ltd as it was engaged in sale of products and accordingly functionally dissimilar to the assessee.

Aircorn International India Pvt. Ltd vs DyCIT (2017) 50 CCH 280 (DEL Trib.)-ITA no. 6402/del/2012 dated 02.08.2017

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

- Acropetal Technologies Ltd as the revenue from IT services was Rs. 81.40 crores i.e. less than 75% of the total revenue of Rs. 141.65 crores.
- E-Infochips Ltd as it was engaged in the business of providing software development services and sale of software products and also held inventories. Further segmental details were unavailable.
- Infosys Ltd as it was engaged in the production of software products such as Finacle, I-smart etc and the company also incurred substantial expenditure on R&D, owned intangibles/patents and had tremendous brand value.
- ICRA Techno Analytics Ltd as it was engaged in the business of providing software development, consultancy, licensing and sub-licensing, annual maintenance charges for software support and accordingly was functionally dissimilar to the assessee.

Zynga Game Network India Pvt Ltd vs. ACIT-TS-640-ITAT-2017(bang)-TP-IT(TP)A No. 360/bang//2016 dated 12.07.2017

155. The Tribunal remitted the comparability of the following companies while benchmarking the international transaction of the assessee engaged in the business of providing ITeS:

- Vishal Information Technologies Ltd as the assessee had not objected for its exclusion before TPO/CIT(A).

- Wipro BPO Ltd as the CIT(A) had failed to comment on the functional dissimilarities raised by assessee.
 - Tricom India Ltd as though the assessee itself had selected the comparable, it had now sought its exclusion on the ground of functional dissimilarity, huge R&D activities and, abnormal growth and extraordinary events.
- Global e-Business Operations Pvt. Ltd vs DCIT-TS-654-ITAT-2017(BANG)-TP-IT(TP)A no. 297/bang/2014 dated 26.07.2017**
156. The Tribunal, while benchmarking the international transactions of the assessee i.e provision of software consulting services to its AE, allowed Revenue's plea for inclusion of the following companies:
- Exensys Software Solutions Ltd, iGate Global Solutions and Flextronics Ltd, L&T Infotech and Satyam Infotech Ltd as they would not be excluded merely because they earned/suffered abnormal profits/abnormal losses.
 - Bodhtree Consulting Ltd since it had only one segment of software development , therefore functionally comparable and could not be excluded merely on the ground of wide fluctuations in the margin.
- DCIT vs. Oracle Solutions Services (India) Pvt. Ltd-TS-663-ITAT-2017(bang)-TP-IT(TP)A No. 880/bang/2013 dated 09.08.2017**
157. The Tribunal held that the assessee engaged in the business of providing software design and development services could not be compared to:
- Tata Elxsi Limited as the company was functionally dissimilar to the assessee as it was not engaged solely in the business of software development services but also embedded product design, industrial services and engineering services which was functionally dissimilar to the assessee.
 - Infosys Ltd as it was a product company owning significant inventory, intangibles and had earned brand related profits and thus was functionally dissimilar to the assessee.
- JCIT vs Rambus Chip Technologies (India) Pvt Ltd-TS-635-ITAT-2017(Bang)-TP- IT(TP)A No. 1091/BANG/2016 dated 28.07.2017**
158. The Tribunal excluded E-clerx services Ltd as a comparable while benchmarking the transactions of the assessee (provision of ITeS to its AE), noting that the business model of Eclerx was significantly different as it incurred more than 26% of the total employees and job work cost on outsourcing which was significantly different from the business model of the assessee.
- Ariba India Pvt Ltd vs DCIT-TS-750-ITAT-2017(DEL)-TP-ITA No. 5201/del/2012 dated 25.09.2017**
159. The Tribunal held that the assessee engaged in the business of providing ITeS and Software development services to its AE could not be compared to:
- Microgenetics Systems Ltd as it outsourced its business activity and therefore was functionally dissimilar to the assessee
 - Infosys BPO Ltd as it was a giant company having brand value, diversified activity and therefore functionally dissimilar to the assessee.
 - Eclerx Services Ltd as it was a part of the group of a large conglomerate and had huge turnover with global brands, operating on a large scale with lakhs of employees and therefore was functionally dissimilar to the assessee.
 - TCS E-serve Ltd as it provides technology services involving software testing, verification and validation of software at the time of implementation and data centre management and therefore functionally dissimilar to the services provided by the assessee.
 - Cosmic Global Ltd as it had a different working model as upto 41% of its expenses were incurred on sub-contracting which had a significant effect on margins.
- Avineon India P Ltd vs DCIT-TS-679-ITAT-2017(HYD)-TP dated 07.07.2017**
160. The Tribunal held that the assessee rendering software development services and Marketing support services to its AE could not be compared to

- Avani Cincom Technologies as it was engaged in the business of providing consulting IT services and therefore functionally dissimilar to the assessee.
- Bodhtree Consulting Ltd as it was engaged in providing end-to-end solutions and consultancy services and therefore was functionally dissimilar to the assessee. Further, it recognized revenue based on software developed and billed to clients as against assessee who recognized revenue over the contracted period of development on cost plus basis.
- Infosys Technologies Ltd as it was engaged in the business of providing services IT consulting and a giant un terms of risk profile, nature of services, number of employees, ownership of branded products and branded products and brand related profits etc vis-à-vis a captive unit providing software development services without any IP rights.
- KALS Information Systems Ltd as the annual report of the company showed that it was engaged in the business of providing software development services and software products. Further, it was also engaged in providing training to software professionals online and therefore was functionally dissimilar to the assessee.
- Persistent Systems Ltd as the company had developed software Products in the area of identity management contractors and therefore was functionally dissimilar to the assessee.
- Quintegra Solutions Ltd as it was utilizing its own software for providing software development services whereas the assessee did not have any software to be used in rendering software development services.
- Tata Elxsi as it offered integrated hardware and packaged software solutions which was functionally dissimilar to the assessee.
- Thirdware Solutions Ltd as it earned majority of the revenue from exports from SEZ/STPI units and sale of license making it incomparable to the assessee.
- Wipro Ltd as it was a full-fledged risk-taking entity and was engaged in providing technology infrastructure services, testing services, package implementation and had more than 82000 employees as well as its own R&D centre, making it functionally dissimilar to the assessee.
- Akshay Software Technologies Ltd as it was engaged in sale of products which was functionally dissimilar to the assessee.
- Nihar Info Global Ltd as it earned revenue from sale of products and therefore functionally dissimilar to the assessee.
- VMF Softtech as it had outsourced its work and therefore functionally dissimilar to the assessee.

Aircom International (India) Pvt Ltd vs DCIT-TS-671-ITAT-2017(DEL)-TP-ITA No. 6402/del/2012 dated 02.08.2017

161. The Tribunal held that the assessee engaged in the business of providing IT enabled services/business processing services to its AE could not be compared to:
- Infosys BPO Ltd as it had high brand value and turnover associated with the Infosys brand rendering it incomparable to the assessee.
 - Accentia Technologies Ltd as it had an extraordinary event of amalgamation with IQ group of companies which had an impact on the financial results of the company.
 - E-Clerx Services Ltd as it was engaged in KPO services and therefore was functionally dissimilar to the assessee.

Further, it remitted the comparability of Jeevan Softech Limited to the file of AO/TPO to work out its correct margins and include it in the list of comparables for benchmarking.

DCIT vs BNY Mellon International Operations (India) Pvt. Ltd-TS-769-ITAT-2017(PUN)-TP ITA No.303/PUN/2015 dated 27.09.2017

162. The Tribunal held that FCS Software India engaged in development of products & sale of products could not be compared to assessee engaged in software development services. Further, it observed that FCS Software was also engaged in **imparting** education to corporate companies and institutions of central and state government and accordingly, upheld CIT(A)'s exclusion of FCS on grounds of functional dissimilarity.

DCIT vs Barclays Technology Centre India Pvt Ltd-TS-770-ITAT-2017(PUN)-TP-ITA No. 1251 / PUN /2015 dated 29.09.2017

163. The Tribunal held that the assessee engaged in the business of providing software development and quality analysis services could not be compared to:
- Infosys Ltd as it was a giant company having huge turnover, brand value, significant AMP expenditure and therefore was incomparable to the assessee.
 - KALS Info Systems Limited as it earned revenue from software services and software products for which segmental details were unavailable, rendering it functionally dissimilar to the assessee
 - Tata Elxsi Ltd as it was engaged in development of specialized/niche products and therefore functionally dissimilar to the assessee.

Mentor Graphics (India) Private Limited vs DCIT-TS-799-ITAT-2017(DEL)-TP ITA No. 2587/Del/2014 dated 27.09.2017

164. The Tribunal held that the assessee engaged in the business of providing software development services to its (AEs) could not be compared to:
- Infosys Ltd as it was engaged in providing end to end solutions encompassing technical, consulting, design, development, reengineering, maintenance, systems integration and package evaluation and implementation.
 - KALS Info Systems Ltd as it was engaged in software development services and software products and segmental details were unavailable.
 - Tata Elxsi Ltd as it was engaged in niche product and development services and therefore functionally dissimilar to the assessee.
 - Accel Transmatics ltd as it was engaged in the services in the form of training services in hardware and networking, enterprise system management, embedded system, VLSI designs, CAD/CAM/BPO and animation services for 2D and 3D animation.

Sykes Enterprises (India) Pvt Ltd vs ACIT-TS-798-ITAT-2017(BANG)-TP IT(TP)A No.1291/Bang/2010 dated 01.09.2017

165. The Tribunal allowed assessee's appeal seeking exclusion of Wipro technologies as a comparable for benchmarking software development services for AY 2010-11. Relying on the decision in the case of Open Solutions and Saxo held that since Wipro had acquired all Citi Group interests by virtue of Master Services Agreement (MSA), it would make subsequent rendition of services by this company to Citi Group fall within the ambit of deemed international transaction and fail the RPT filter as entire revenue of this company would be on account of RPT rendering it incomparable to the assessee. Accordingly, it directed the exclusion of this company from the final list of comparables.

Agnity India Technologies Pvt Ltd vs DCIT-TS-778-ITAT-2017(DEL)-TP ITA No.955/Del./2015 dated 20.09.2017

166. The Tribunal held that the assessee engaged in providing software development services to its AEs could not be compared to:
- ICRA Techno Analytics Ltd as it had an RPT of 20.94% and failed the 15% RPT filter applied by TPO.
 - Infosys ltd as it was engaged in providing end to end business solutions that leverage cutting edge technology. Further, it had huge brand value and intangibles as well as its high bargaining power rendering it incomparable to the assessee.
 - KALS Information Systems Ltd as it was engaged in the business of software products and could therefore could not be compared to a pure software development service provider.
 - L&T Infotech as it earned 49% of its revenue from on-site software services and had an RPT of 18.66% failing the 15% RPT filter.
 - Persistent Systems Limited as was engaged in diversified activities and earning revenue from various activities including licensing of products, royalty on sale of products as well as income from maintenance contract, etc.
 - Sasken Communication Technology Ltd as it earned revenue from 3 segments and the segmental operating margins were not available.
 - Tata Elxsi Limited as it earned revenue from software development services as well as product and segmental data was not available.

Further, it remitted the comparability of Mindtree Ltd to the file of TPO/AO to consider the functional comparability vis-à-vis the assessee.

Softtek India Pvt Ltd vs. DCIT-TS-844-ITAT-2017-TP I.T. (T.P) A. No.396/Bang/2015 dated 31.08.2017

167. The Tribunal remitted the TP-issue relating to assessee's international transactions **viz., provision of** software development services to its AE to the file of CIT(A) for fresh consideration. The TPO had rejected the assessee's **application of** cost plus method (CPM) as **most appropriate method** assessee had failed to substantiate how the requirements for applying CPM had been fulfilled and applied TNMM as it was more tolerant to functional differences between enterprises. Noting that the assessee had not given any basis or detail regarding the comparables before the TPO for which he was left with no other alternative and considered TNMM as the most appropriate method to take care of functional differences, it remitted the matter to the file of CIT(A) for fresh adjudication.

DCIT vs. Vedaris Technology Pvt. Ltd-TS-768-ITAT-2017(DEL)-TP ITA No.166/Del/2011 dated 29.09.2017

168. The Tribunal held that the assessee engaged in the business of providing IT and ITes could not be compared to:

- Accentia Technologies Ltd as it had an extraordinary event during the year and therefore was incomparable to the assessee.
- E-clerx Services Ltd as it was engaged in providing complete business solutions in the nature of high end services and therefore was functionally dissimilar to the assessee.
- Infosys BPO as it had benefit of market value as well as brand value and enjoyed benefits of scale and market leadership.

ACIT vs. Mindteck (India) Ltd-TS-784-ITAT-2017(Bang)-TP 426/Bang/2015 2010-11 dated 27.09.2017

169. The Tribunal held that the assessee engaged in the business of providing ITes and Software development services to its AE could not be compared to:

- Microgenetics Systems Ltd as it was incurring expenses for the purpose of outsourcing activity and therefore was functionally dissimilar to the assessee
- Infosys BPO Ltd as it was a giant company having brand value, diversified activity and therefore was functionally dissimilar to the assessee.
- TCS E-serve Ltd as it provided technology services involving software testing, verification and validation of software at the time of implementation and data centre management
- Cosmic Global Ltd had a different working model and expenses upto 41% were on sub-contracting which had a significant effect on margins.

Avineon India P Ltd vs DCIT-TS-679-ITAT-2017(HYD)-TP dated 07.07.2017

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

- Avani Cimcon Technologies Ltd as it was engaged in providing software development services and software products and segmental details were unavailable.
- Celestial Biolabs Ltd as it was engaged in product development in the field of biotech and pharmaceuticals rendering it functionally dissimilar to the assessee.
- E-zest Solutions Ltd it was engaged in rendering product development and KPO services and therefore was functionally dissimilar to the assessee.
- Infosys Technologies Ltd as it had substantial brand value, owned intellectual property right and was a market leader in software development activities.
- KALS Information Systems Ltd as it was engaged in development of software products and also provision of training services rendering it functionally dissimilar to the assessee.
- Lucid Software Ltd as it was engaged in software products and therefore could not be compared to the assessee.
- Persistent Systems Ltd as it was engaged in product development and product design services and segmental details were unavailable.

- Quintegra Solutions Ltd as it was engaged in product engineering services and therefore functionally dissimilar to the assessee.
- Softsole India Ltd as it had an RPT of 17.98% failing the 15% RPT filter applied by TPO.
- Tata Elxsi Ltd as it was engaged in product designing services and not pure software development services rendering it functionally incomparable to the assessee.
- Thirdware Solutions Ltd as it was engaged in software development services and earned revenue from sale of licenses and subscription and therefore was functionally dissimilar to the assessee.
- Wipro Ltd as it owned IPR, intangibles and was also engaged in software development services and software products and segmental details were unavailable.

ABB Global Industries & Services Limited vs ACIT-TS-816-ITAT-2017(BANG)-TP IT(TP)A No.1612/Bang/2012 dated 24.08.2017

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

- Bodhtree Consulting Ltd as it was engaged in providing open and end to end web solutions software consultancy and design and development of software using latest technology and therefore was functionally dissimilar to the assessee.

Further, it remitted the comparability of FCS Software Solutions Ltd and Thinksoft global services Ltd to the file of TPO, directing it to examine the benefit of working capital adjustment and include it in the final list of comparables.

Ariba Technologies India Pvt. Vs ITO-TS-831-ITAT-2017(bang)-TP IT(TP)A No.1592/Bang/2014 dated 11.10.2017

172. The Tribunal held that assessee engaged in providing software development services could not be compared to:

- Bodhtree Consulting Ltd as it had fluctuating margins and followed a different revenue recognition model i.e a fixed price model.
- Infosys Technologies Ltd as its brand value was much higher than the brand value of the assessee company
- Further, the Tribunal included the following as comparables :
- TATA Elxsi Ltd as functions of both the assessee as well as of this company were broadly comparable. It opined that when TNMM is used as the MAM (Most Appropriate Method), the functions need not be identical and a broad similarity, would suffice for the purpose of selecting a comparable.
- Persistent Systems Ltd. as it was functionally similar to the assessee
- Larsen & Toubro Infotech Ltd., it rejected assessee's plea for exclusion of the company on the ground that the related party transactions in the case of this company was more than 15% accepting Revenue's contention that 25% RPT filter had been consistently applied by the Tribunal in various cases.

Tribunal remitted back to the file of AO, FCS Software Solutions & Think Soft Global Services Limited for the limited purpose of verification of the nature of core activity and availability of segmental data and Sasken Communication Technologies Ltd to AO for computation of margins.

CAE Simulation Technologies Pvt Ltd [TS-796-ITAT-2017(Bang)-TP] I.T(TP).A. NQ. 10Q/Bang/2()14 dated 01.09.2017

173. The Court dismissed Revenue's appeal challenging ITAT's exclusion of comparables for assessee providing software development services to AE for AY 2007-08. The Tribunal had relied on Hewlett Packard India Global Soft ruling (wherein identical set of comparables were considered) and opined that since the functional profile of the assessee was identical to that of Hewlett Packard India, no different conclusions on comparables could have been arrived at. The Court, noting that the Tribunal had extracted its previous ruling in Hewlett Packard India Global Soft which contained analysis of each of the 16 comparables that were **subject matter of the present appeal**, rejected the Revenue contention that without fresh determination as to the identical set of the comparable entities taken into account in Hewlett Packard India Global Soft,

the Tribunal could not have 'blindly' followed its previous rule. It held that the Tribunal had clearly communicated and carried out a functional and factual analysis in the present case and therefore no substantial question of law arose.

Pr. CIT vs. ST Microelectronics Pvt. Ltd.-TS-850-HC-2017(DEL)-TP dated 30.10.2017

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

- Bodhtree Consulting Ltd as it was engaged in providing end to end web solutions, off shore data management, software consultancy and design and development of software using latest technology rendering it functionally dissimilar to the assessee.
- Infosys Ltd as it was a giant company owing huge intangibles. Further, it earned income from software services as well as software products without adequate segmental results and was therefore functionally dissimilar to the assessee.

Celstream Technologies Pvt. Ltd vs. DCIT-TS-853-ITAT-2017 dated 29.07.2017

175. The Tribunal held that the assessee engaged in the business of providing software development services to its AEs could not be compared to:

- Exensys Software Solutions Ltd as it had abnormal profits on account of extra ordinary event of amalgamation and non-availability of segmental results.
- Thirdware Solutions Ltd as it was engaged in providing software development services as well as software products and segmental details were unavailable.
- Sankhya Infotech Ltd as it was engaged in the business of development of software products and services and training, and segmental results were unavailable.
- Bodhtree Consultancy Ltd as it had an RPT of 24.68% failing the 15% RPT filter applied by TPO.
- Geometric Software Solutions Ltd as it was engaged in providing software development services as well as software products and segmental details were unavailable.
- Foursoft Ltd as it was engaged in product development and ownership of products such as LS etrans and 4S elog and therefore was functionally dissimilar to the assessee.

SAP Labs India Private Ltd vs Addl.CIT-TS-855-ITAT-2017(bang)-TP dated 22.09.2017

176. The Tribunal held that the assessee engaged in the business of providing software development services to its AEs could not be compared to:

- E-Infochips Bangalore Ltd as it was engaged in product and semiconductor engineering services having 500 products for key verticals like aerospace and defence, security and surveillance, consumer devises, medical devices, retail and e-commerce and software technology and it was a Member of Indian Electronics and Semiconductor Association (IESA).
- Infinite Data Systems Pvt Ltd. as it was engaged in providing solutions that encompass technical consulting, design and development of software, maintenance, systems integration, implementation, testing and infrastructure management services.

Further, in respect of the ITES segment, it excluded TCS E-Serve International Ltd as it had volatile profit margin, super-normal growth of 173% in revenue and was an industry giant as against the assessee which was a captive service provider rendering back-end support services to its AE.

Stryker Global Technology Center Private Limited vs. DCIT-TS-863-ITAT-2017(DEL)-TP-ITA No.6866/Del./2014 dated 13.10.2017

177. The Tribunal held that the assessee engaged in providing ITES services to its AE could not be compared to:

- Eclerx Services Ltd as it was rendering different set of services such as data analytics, computer added simulations to global clients and therefore was functionally dissimilar to the assessee.
- TCS e-Serve Ltd as it was involved in high end services like transaction processing, technical services involving software testing, verification and validation of software at the time of implementation and management activities rendering it functionally dissimilar to the assessee.

Further, it remitted the comparability of R Systems International Ltd to the file of TPO directing the assessee to provide relevant information and TPO to verify the same and if found appropriate include the same.

BT e-Serv (India) Pvt Ltd vs ITO-TS-949-ITAT-2017(DEL)-TP dated 30.10.2017

178. The Tribunal accepting Revenue's plea, included Exencys Software Solutions, Flextronics Software Systems, iGate Global Solutions Ltd, Infosys Technologies Ltd (which were excluded by the CIT(A) on the ground that they did not satisfy the Turnover filter of Rs. 1-200 crores) and held that the a company cannot be excluded only on the ground of turnover filter. While the assessee conceded to the application of the Turnover filter during the hearing before the Tribunal and contested the exclusion of the comparables based on functionality, the Tribunal noting that the plea of the assessee had not been taken before the TPO dismissed the assessee's contention.

ITO vs Infinera India Pvt Ltd-TS-866-ITAT-2017(Bang)-TP IT(TP)A No.599/Bang/2013 dated 13.10.2017

179. The Tribunal held that the assessee engaged in providing IT and ITES services to its AE could not be compared to:

- Exensys Software Solutions Limited as it had an extraordinary event of amalgamation in the relevant year leading to increase in income.
- Infosys Limited as it had a hybrid business model of supplying products and providing services to its customers
- Thirdware Solutions Limited as it earned revenue from subscriptions and no segmental data was available between the product and service segment.
- Vishal Technologies Limited as it outsourced most of its business and its employee cost was 25% of total cost vis-à-vis 1.36% of the assessee.
- Wipro BPO Solutions Limited as it was a market leader and element of brand value was associated with it and therefore could not be compared with the assessee.
- Maple E-Solutions Limited as its financial results were not reliable.

ACIT vs. Tata Consultancy Services Ltd. (formerly TCS Business Transformation Solutions Ltd.)-TS-842-ITAT-2017(MUM)-TP ITA No. 6648/Mum/2012 dated 18.10.2017

180. The Tribunal held that the assessee engaged in providing ITES services to its AE could not be compared to:

- Accentia Technologies Ltd as it was engaged in providing KPO services, was a product development company which held significant IPRs and its segmental information was not available.
- Acropetal Technologies Ltd as it was engaged in providing high end engineering design services rendering it functionally dissimilar to the assessee.

Further, it remitted the comparability of i) Jeevan Scientific Technology Ltd to verify whether the income from BPO operations was less than 1 cr in which case the company was to be excluded, ii) Infosys BPO to examine the functional comparability and iii) ICRA Online Ltd for the limited purpose of computation of margin to the file of TPO.

Novo Nordisk India Pvt. Ltd vs. DCIT-TS-879-ITAT-2017 IT(TP)A No.247/Bang/2016 dated 31.08.2017

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

- Infosys Limited as it was a giant company in terms of risk profile, nature of services, number of employees, ownership of branded proprietary products, expenditure on R&D rendering it incomparable to the assessee.
- Tata Elxsi as it was engaged in product design services, innovation design engineering services and visual computing labs and had specialized and niche domain of software products/ services and therefore was functionally dissimilar to the assessee.
- Persistent Systems Ltd as it was dealing in software products and earned its income both from software services and products.

- Thirdware Solutions Ltd as it earned revenue from subscription as well as sale of license rendering it functionally incomparable to the assessee.

NEC Technologies India Ltd (formerly known as NEC HCL Systems Technologies Ltd) vs DCIT-TS-887-ITAT-2017(DEL)-TP ITA No.1102/Del./2015 dated 27.10.2017

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

- Bodhtree Consulting Ltd as it was engaged in providing open and end to end web solutions software consultancy and design and development of software using latest technology and therefore functionally dissimilar to the assessee.
- KALS Information Systems Ltd as it was providing services in the field of consultancy, information provider and general insurance sector rendering it functionally incomparable to the assessee.

Further, it included Thinksoft Global Services and FCS Software Solutions Ltd in the list of comparables as they were functionally similar to the assessee..

NI Systems (India) Pvt. Ltd vs. DCIT-TS-900-ITAT-2017(Bang)-TP-ITA No. 1337/bang/2014 dated 10.11.2017

183. The Tribunal held that the assessee engaged in providing ITES services to its AE could not be compared to:

- FCS Software Ltd as its revenue from software services comprised of 42% of the total revenue
- Eclerx Services Limited as it was engaged in providing KPO services rendering it functionally dissimilar to the assessee.
- Accentia Technologies Limited as it had extraordinary event of amalgamation/merger during the year which had an impact on its profits.
- Infosys BPO Ltd as it was a giant company and deals with variety of functions and integrated services and was differentiated by huge brand value and scale of operation.

DCIT vs. PTC Software (India) Pvt. Ltd-TS-914-ITAT-2017(PUN)-TP- ITA No.572/PUN/2015 dated 27.10.2017

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

- Larsen and Turbo Infotech as it was engaged in the sale of products apart from rendering software development services and segmental details were unavailable
- Persistent Systems as it was engaged in product development, product design and analysis services rendering it functionally dissimilar to the assessee.
- Persistent Systems Solutions Ltd as its net profit for the relevant year increased by 247% and turnover increased by 184%.
- Sasken Communication Technologies as it had significant intangibles in the form of sasken branded products and exceptional year of operation.
- Wipro technologies as it was engaged in providing program management, third party data security, quality assurance and business process management services and that the company is a product company rendering it functionally dissimilar to the assessee.

Agilis Information Technologies Interntional Pvt. Ltd. (Now known as Infogix International Pvt. Ltd.) Vs ITO -TS-894-ITAT-2017(DEL)-TP-ITA No. 1063 / del / 2016 dated 13.11.2017

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

- Bodhtree Consulting Ltd as it was engaged in the business of software products and was engaged in providing open & end to end web solutions software consultancy and design & development of software using latest technology and therefore was functionally dissimilar to the assessee.

- Persistent Systems Ltd as it was engaged in product designing services and into software product development rendering it functionally dissimilar to the assessee.
- L&T Infotech and Sasken Communications Technologies Limited as they had a turnover of more than 200 crores as compared to the assessee of Rs. 111.60 crores.
- Infosys Ltd as it was a giant company in the area of software and it assumed all risks leading to higher profits rendering it incomparable to the assessee.
- KALS Information systems Ltd as it was engaged in the development of software products and services and segmental details were unavailable.
- Tata Elxsi Limited as it was engaged in providing embedded product design services, industrial design and engineering services and visual computing labs and system integration services segment and therefore was functionally dissimilar to the assessee.

DyCIT vs Sterling Commerce Solutions India Pvt. Ltd.-TS-920-ITAT-2017(BANG)-TP- ITA No. 186/Bang/2014 dated 31.10.2017

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

- KALS Information Systems as it was engaged in software development services and software products and segmental details were unavailable.
- Bodhtree Consulting Co. as it was engaged in the business of software products and in providing open & end to end web solutions software consultancy and design & development of software using latest technology rendering it functionally dissimilar to the assessee.

Sling Media Pvt. Ltd vs Deputy Commissioner of Income Tax- TS-917-ITAT-2017(bang)-TP-ITA No 253/Bang/2014 dated 27.10.2017

British Marine PLC -India Branch [TS-908-ITAT-2017(Mum)-TP dated 27.10.2017

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

- Sasken Communication Technologies Ltd, SQL Star International Ltd, Space Computer and Systems Ltd as it had a wage/sales ratio of 61.85%, 27.61% and 22.99% respectively and failed the 30% to 60% range of the employee cost filter applied by the TPO.

Avaya India Private Limited vs. DCIT-TS-944-ITAT-2017(Bang)-TP ITA No.1420/Del/2014 dated 30.11.2017

188. The Tribunal held that the assessee engaged in providing ITES services to its AE could not be compared to:

- Accentia technologies Ltd as it was engaged in (i) Healthcare Receivables Cycle Management (HRCM) and (ii) development of software products for Business Processing Outsourcing (BPO) and segmental details were unavailable.
- Cosmic Global Limited as it earned revenue from 3 segments Viz., medical transcription, translation services and accounts BPO segment and segmental details were unavailable. Further, it had an abnormal growth of 106%.
- Eclerx Services Limited as it was a KPO providing data analytics and data process solutions to global enterprise clients and had significant intangibles to the tune of 7.24% and it was also engaged in providing sales and marketing support services to leading global manufacturing, retail, travel and leisure companies and therefore functionally dissimilar to the assessee.

NCS Pearson India Private Limited vs. ACIT-TS-868-ITAT-2017(DEL)-TP ITA No.2556/Del./2014 dated 25.10.2017

189. Where the Tribunal had while adjudicating comparables in respect of assessee engaged in the business of providing IT Enabled services to its AE excluded a) Eclerx on the ground that it provided high value financial services relating to consultancy business and solution testing and web content management and web analytics, (b) ICRA techno Analytics on the ground that it was engaged in processing and providing software development and consultancy and engineering services/web development services. (c) TCS E-serve as it had high brand value impacting its profitability and (d) Accentia Technologies Pvt Ltd as it was engaged providing in

KPO services in the healthcare sector, the Court held that the Tribunal's findings were reasonable and accordingly dismissed revenue's appeal.

Pr.CIT vs B.C Management Services Pvt Ltd-TS-948-HC-2017(DEL)-TP-ITA no.1064/2017 and CM no. 43177/2017 dated 28.11.2017

190. Where the CIT(A) had while considering the remand report from the TPO in respect of assessee engaged in software development services excluded Infotech Enterprises Ltd and Subex Systems Ltd as it had substantially high proportion of related party transaction i.e 45.03% and 31.86% respectively, the Tribunal upheld that order of CIT(A) and dismissed Revenue's appeal by holding that since the order of the CIT(A) was detailed and reasoned, there was no need to interfere with the same.

DCIT vs Transwitch India Pvt Ltd-TS-895-ITAT-2017(DEL)-TP - I.T.A .No. 4375/DEL/2011 dated 06.11.2017

191. The Tribunal held that the assessee engaged in the business of providing human resource related services, payroll processing services, training and performance system data entry to its AE could not be compared to:

- TCS e-Serve Ltd as it had significant brand influence which affected the profitability.
- Infosys BPO Ltd as it had brand value and incurred substantial selling and marketing expenditure. Further, there was an event of acquisition in the relevant year and therefore, it could not be compared to the assessee.
- Excel Infoways Ltd as there was contradiction in the facts or data sourced from annual report and as per information gathered u/s 133(6).

Baxter India Pvt Ltd vs ACIT-TS-694-ITAT-2017(DEL)-TP-ITA No. 6158/del/2016 dated 24.08.2017

192. Where the Revenue filed an appeal before the High Court after a delay of 430 days, the Court refused to condone the delay and dismissed its appeal against Tribunal's order excluding 'Coral Hub Ltd', Infosys BPO and Wipro BPO from the list of comparables for ITeS provider. Following the decisions in the case of Rampgreen Solutions (P) Ltd [TS-387-HC-2015(DEL)-TP], Pentair Water India (P) Ltd [TS-566-HC-2015(BOM)-TP] and Agnity India Technologies Pvt. Ltd [TS-189-HC-2013(DEL)-TP] wherein exclusion of the comparables [Coral Hub (since its business model was based on outsourcing, Infosys BPO & Wipro BPO as it had huge turnover, economies of scale and brand value)] was upheld, it held that no substantial question of law arose and accordingly dismissed the department's appeal.

Pr.CIT vs New River Software Services Pvt. Ltd-TS-672-HC-2017(DEL)-TP-ITA No. 924/2016 dated 22.08.2017

193. The Court dismissed Revenue's appeal challenging Tribunal order on comparables selection dismissing Revenue's contention that the Tribunal order was perverse and incomplete as it dealt with only one of the several grounds considered by DRP in support of its conclusion. It noted that the Tribunal had directed inclusion of one loss making comparable which was functionally similar to the assessee and exclusion of 2 comparables on ground of functional differences and had given detailed reasons in support of its conclusion. Further, it noted that the memorandum of appeal filed by Revenue and the questions of law raised for its consideration did not mention a specific plea that the Tribunal order was perverse and observed that the ground of perversity was not to be casually urged and was to be supported by a proper pleading which again has to be on the basis of a detailed study of the impugned order of the Tribunal pointing out to High Court in what manner the Tribunal's conclusions can be said to be perverse, which was not done in the instant case. Accordingly, it held that no substantial question of law arose.

Pr.CIT vs Sojitz India Pvt Ltd-TS-704-HC-2017 (DEL)-TP-ITA No. 742/2017 dated 04.09.2017

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

- Bodhtree Consulting Limited as it was engaged in IT consulting and product engineering service and had a wide array of business activities like data warehousing and data management and therefore was functionally dissimilar to the assessee.

- Infosys Technologies Ltd as it had mega operations and significant assets and brand value and full-fledged risk-taking company and therefore was not comparable to the assessee.

Further, it remitted the comparability of Sonata Software Limited and Gold Stone Technologies Ltd to the file of TPO to determine the RPT percentage and segmental details.

Further, in respect of the ITES segment, the Tribunal held that assessee providing IT back office support services comprising of UNIX/windows administration and support, internal helpdesk services could not be compared to:

- Accentia Technologies Ltd as it was engaged in medical transcription, billing and collections, income from coding etc and segmental information for each stream was unavailable.
- E-Clerx Services Ltd as it was engaged in providing KPO services and had outsourced substantial work to third parties.
- Vishal Info Tech as it outsourcing charges of 90.57% which reflected that it had a different business model and it was also engaged in e-publishing services which was a KPO business model rendering it functionally dissimilar to the assessee.

Cadence Design Systems (India) Pvt Ltd vs DCIT-TS-716-ITAT-2017(DEL)-TP-ITA No. 2074/del/2014 dated 04.09.2017

195. The Tribunal held that the assessee a captive service provider engaged in the business of providing software research and development services to its AE could not be compared to:

- E-Infochips Ltd as it earned revenue from software development, hardware maintenance, information technology and consultancy services and no segmental data was available.
- Acropetal Technologies Ltd as it failed the 75% Revenue filter applied by TPO as the income from software development services [Rs. 81.40 cr out of rs. 141.65 cr] was only 57.46% of the total revenue.

Microsoft Research Lab India Pvt. Ltd vs. ACIT-TS-701-ITAT-2017(Bang)-TP-IT(TP)A no. 115/bang/2016 dated 16.08.2017

196. The Tribunal held that the assessee engaged in the business of providing ITeS services could not be compared to:

- Accentia Technologies Ltd as it was operating under Software as a service model (SAAS) model and had developed its own software product for BPO services and therefore was functionally dissimilar to the assessee.
- Datamatics Financial as the export sale of 58.90% and failed the 75% export filter applied by TPO.
- ICRA online Ltd as it was engaged in KPO services and therefore was functionally dissimilar to the assessee.
- Infosys BPO Ltd as it was a giant company with the benefit of brand value and market leadership.
- E-clerx Services Limited as it was engaged in providing data analysis, operating management, audits, reconciliation, metrics management and operating services and therefore was functionally dissimilar to the assessee.

Further, it remitted the comparability of Jeevan Scientific Technology Limited to verify the segmental details submitted by the assessee as the annual report of the company showed that its revenue/income comprised of various operations and activities which included BPO, ERP project implementation, corporate and student training and income from study centre and the assessee had contended that segmental details were available which were not accepted by TPO.

ITO vs Arctern Consulting (P) Ltd-TS-717-ITAT-2017(bang)-TP-I.T. (T.P) A. No.195/Bang/2015 dated 11.08.2017

197. The Tribunal held that the assessee engaged in providing software development services could not be compared to Persistent Systems Ltd as it was engaged in providing software development services as well as manufacture and sale of software products and therefore was functionally dissimilar to the assessee. Further, it included E-Zest Solutions Ltd as it was engaged in providing development and design services, software product testing, maintenance and support and license management and the assessee had not provided any document to show that the comparable owned any intangible assets or had any inventory. It remitted the comparability of E-

Infochips Bangalore Ltd and Mindtree Limited to the file of AO to verify the functional comparability vis a vis the assessee and existence of peculiar circumstances respectively.

Conexant Systems Private Limited vs DCIT-TS-681-ITAT-2017(HYD)-TP-ITA No.264/Hyd/2015 dated 23.08.2017

198. The Tribunal held that the assessee engaged in the business of sale of user license of enterprise application to external parties, software development, software related services and back office services to its AE could not be compared to:

- Accentia Technologies Limited as it was engaged in e-prescription and document management services which were KPO services which was functionally dissimilar to the assessee
- Acropetal Technologies Limited as it was engaged in providing engineering design services and therefore was functionally dissimilar to the assessee.
- eClerx Services Limited as it was engaged in providing KPO services and therefore was functionally dissimilar to the assessee.
- TCS e-serve Limited as it was engaged in providing technical services comprising of software testing, verification and validation of software at the time of implementation and data centre service management activities which was functionally dissimilar to the assessee.
- Infosys BPO Limited as it was a giant company with high risk profile and therefore could not be compared with the assessee having low risk profile.

Further, it included E4e Healthcare Business Services Private Limited to the final list of comparables as the assessee had no objection to the inclusion of this company provided the correct margin was taken and accordingly directed the AO to include this company the correct margin.

DCIT vs Infor (India) Private Limited-TS-682-ITAT-2017(Hyd)-TP-ITA.No.113/Hyd/2016 dated 07.07.2017

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

- Celestial Biolabs Ltd as it was engaged in providing clinical research and manufacture of bio products and other products rendering it functionally dissimilar to the assessee.
- Avani Cimcon Technologies Ltd as it was earning revenue from software products as well as services and its segmental details were unavailable.

ITO vs. Radisys India P Ltd-TS-747-ITAT-2017(bang)-TP-I.T(TP).A No.615/Bang/2013 dated 24.09.2017

200. The Tribunal held that assessee engaged in the business of providing IT related services could not be compared to:

- Celestial Labs as it was engaged in providing pure software development services and R&D and therefore was functionally dissimilar to the assessee.
- Avani Cimcon Technologies as it was earning revenue from software products along with IT services and its segmental details were unavailable.

Further, it remitted the comparability of Flextronics Ltd, iGate Global Solutions Ltd, Infosys Technologies Ltd, Mindtree Ltd, Persistent Systems Ltd, Sasken Communication Technologies Ltd, Tata Elxsi Ltd, Wipro Ltd to the file of AO/TPO to verify whether the turnover or size of the said comparables affected their price/margins. It also remitted the comparability of KALS Information Ltd to the file of AO/TPO for computation of margin and to examine whether it was engaged in product development and earned income from training/brand name.

Radisys India P Ltd [TS-662-ITAT-2017(Bang)-TP-I.T(TP).A No.615/Bang/2013 Dated 24.08.2017

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

- E-Infocips Limited as it earned revenue from software development, hardware maintenance, information technology, consultancy without adequate segmental data rendering it functionally dissimilar to the assessee.

- Sasken Communication Technologies Ltd as the company was engaged in providing software services and software products and segmental details were unavailable.
- E-Zest Solution Ltd as it was engaged in providing KPO services which was not functionally comparable to the assessee.
- Acropetal Technologies Ltd as its income from ITES was less than 75% of its total income failing the filter applied by TPO.
- L&T Infotech Limited as it had an RPT of 18.66% and failed the 15% RPT filter applied by TPO.
- Persistent System Solution Ltd as it was engaged in providing licensing of products and earned income from maintenance contract and therefore was functionally dissimilar to the assessee.
- Tata Elxsi Limited as its export revenue to total revenue was 73.30% which failed the 75% filter applied by TPO.
- ICRA technology Analytics Limited as it was engaged in providing KPO services rendering it functionally dissimilar to the assessee.
- Infosys Technologies Limited as it had huge brand value, intangibles and huge turnover and therefore could not be compared to the assessee.

Electronic Imaging India Pvt Ltd vs DCIT-TS-659-ITAT-2017(Bang)-TP-ITA No. 1506 / bang / 2015 dated 14.07.2017

202. The Tribunal held that the assessee a captive software development services provider could not be compared to:

- ICRA Techno Analytics Ltd as it had an RPT of 20.94% and failed the 15% RPT filter applied by TPO.
- Infosys Ltd as it had huge brand value, substantial intangible asset and bargaining power and there could not be compared to a captive service provider.
- KALS Information Systems Ltd as it was engaged in the business of software products and had huge inventory rendering it functionally dissimilar to the assessee.
- Persistent Systems Ltd as it was engaged in diversified activities and earned revenue from licensing of products, royalty on sale of products as well as income from maintenance contract.
- Sasken Communication Technologies Ltd as it had 3 revenue segments viz., software services, software products and other services without adequate segmental details.
- Tata Elxsi Ltd as it was engaged in providing diversified services like product design, innovation design services, visual computing labs rendering it incomparable to the assessee.

Further, in respect of sales and marketing segment, it held that the assessee could not be compared to:

- HCCA Business Services Pvt. Ltd as it was engaged in providing payroll process services which was functionally dissimilar.
- Killick Agencies & Marketing Ltd as it was acting as an agent for various foreign principals for sale of dredgers, dredging equipment, steerable rudder propulsions and other equipment and machineries rendering it functionally dissimilar to the assessee.

AMD India Pvt Ltd vs DCIT-TS-702-ITAT-2017(Bang)-TP-IT(TP)A No.242 & 204 / B / 15 dated 24.08.2017

203. The Tribunal held that assessee engaged in providing software development services to its AEs could not be compared to:

- KALS Information Systems Limited as it was engaged in development of software products and services and therefore could not be compared to a pure software development service provider.
- Bodhtree Consulting Limited as it was engaged in business of software products and providing open and end to end web solutions software consultancy and design and development of software rendering it functionally dissimilar to the assessee.
- Tata Elxsi Limited as it was engaged in software development services comprising of embedded product design services, industrial design and engineering services and visual computing labs and system integration services and segmental details were unavailable.

- Persistent Systems Limited as it was engaged in product designing and software product development. Further it had a research centre for development informatics, specially life time product, life cycle services, medical research, chemistry and computer science rendering it functionally dissimilar to the assessee.
- Infosys Limited as it owned significant intangibles, brand influence and had huge revenue from software products.

Kodiak Networks India Pvt Ltd vs DCIT-TS-753-ITAT-2017(Bang)-TP-IT(TP)A No. 296 / bang / 2014 dated 08.09.2017

204. The Tribunal had excluded i) Infosys Technologies as it was a giant risk taking company with significant intangibles and assets, ii) KALS Information Systems as it derived income from software products and was also engaged in executing end to end project in the software development cycle in the Software development segment and iii) Vishal Information technology as it outsourced most of its work to vendors/service providers. The Court held that since the Tribunal had assigned clear reasons for exclusion and no substantial question of law arose. Accordingly, it dismissed the Revenue's appeal.

CIT (International Taxation) vs Ut Starcom Inc (India Branch)-TS-758-HC-2017(DEL)-TP-ITA 767/2017 dated 25.09.2017

205. The Tribunal held that the assessee engaged in providing designing and development softwares to its AE could not be compared to:

- KALS Information Systems Ltd as it was engaged in product development and segmental details were unavailable.
- Helios & Matheson Information Technology Ltd as it was engaged in rendering ITES including BPO services, offshore delivery, project management services and therefore was functionally dissimilar to the assessee.
- FCS Software Solution Ltd as it was engaged in providing software development services and application support services and infrastructure management services and segmental details were unavailable.
- Further, in respect of ITES services segment, it held that the assessee could not be compared to:
- Accentia Technologies Ltd as it had an extraordinary event of merger/acquisition which had an impact on the financial results of the company.
- Coral Hubs Ltd as it was engaged in providing diversified activities like custom application development services and ITES without adequate segmental data rendering it incomparable to the assessee.

PTC Software (India) Private Limited vs Dar ACIT-TS-746-ITAT-2017(PUN)-TP-ITA no. 2546/PUN/2012 dated 11.09.2017

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

- E-Clerx services Ltd as it was engaged in providing KPO services and therefore was functionally dissimilar to the assessee.
- Moldteck Technologies Ltd as it was engaged in providing highly technical and specialized engineering services which was in the category of KPO and accordingly functionally dissimilar to the assessee.
- Vishal Information Technologies Ltd as it outsourced the work to third party vendors and therefore functionally dissimilar to the assessee.
- Infosys BPO Ltd and Wipro Ltd as they were giant companies, owning intangibles, brand value and therefore functionally dissimilar to the assessee.

Hinduja Ventures Limited (Formerly known as HTMT Ltd.) vs DCIT & others-TS-685-ITAT-2017(Mum)-TP-ITA 4503/Mum/2012 dated 14.07.2017

207. The Tribunal held that the assessee, engaged in providing software development services to its US based AE could not be compared to Kals Information Systems Ltd as the said company was

engaged in development of software development products. It held that it was a well settled principle that software development companies could not be compared with companies engaged in development of software products.

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

208. The Tribunal in the second round of litigation held that the assessee, engaged in the business of software development and provision of software services to its AEs could not be compared to Aftak Infosys Ltd as it had a different business model as compared to the assessee considering that the said company had Intellectual Property Rights whereas the assessee did not have any IPRs in its fixed assets.

Further, it held that where the DRP, in its directions had excluded 3 companies viz. Mphasis BFL Ltd, Visual Soft Technologies Ltd and Blue Star Infotech Ltd, originally selected by the TPO, the AO was incorrect in considering the said 3 companies as comparable while giving effect to the DRP directions as it was not open for him to do so. Accordingly, it directed for the exclusion of these companies.

Philips India Ltd v DCIT – TS-67-ITAT-2017 (Kol) – TP - I.T.A No. 1068/Kol/2015 dated 8.02.2017

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

- Infosys Technologies Ltd as it was a market leader in software development activities, had huge brand value, dealt in both software and software products owned substantial intangibles and incurred huge R&D expenses
- Kals Information System Ltd & Persistent Systems Ltd as they were engaged in the development of software products
- SaskenComm Technologies as it was engaged in both software development services and development of software products without segmental results.

It also accepted ICRA techno Analytics Ltd (seg), Larsen & Toubro Infotech Ltd, Mindtree Ltd (seg) and Thinksoft Global Services Ltd as comparable.

IDS Software Solutions India Pvt Ltd v ITO – TS-1072-ITAT-2016 (Bang) – TP IT(TP)A No.1541Bang/2015 dated 28.11.2016

210. The Tribunal held that the assessee, engaged in providing contract software development services to its AE could not be compared CelestialBiolabs as the said company was engaged in the development of products in the field of bio technology and pharma and thus functionally dissimilar to the assessee.

DCIT v IDS Software Solutions India Pvt Ltd – TS-1085-ITAT-2016 - IT(TP)A No.214 IBang/20 14 IT(TP)A 179/Bang/2014 dated 16.12.2016

211. The Tribunal held that the assessee engaged in the business of providing ITES and Support Services could not be compared to Infosys BPO Ltd due to its high turnover, high brand value and presence of intangibles.

Further it rejected the assessee's contentions and held that the following companies were to be included as comparable:

- Aditya Birla Minacs Worldwide Ltd as the said company was functionally comparable and satisfied all filters chosen by the TPO
- Accentia Technologies Ltd as the company, as contended by the assessee, was not engaged in software development and in fact was into ITES.
- Cosmic Global Ltd as the company, as contended by the assessee, did not outsource majority of its services considering that the salaries and wages account for 21.31% of its expenses and no expenditure was shown towards outsourcing of work

It remanded the comparability of Eclerx Services as there was no finding on record enabling the Tribunal to determine whether the company was a KPO or ITES company. It held that if it was found to be a KPO company it ought to be excluded.

Control Component India Pvt Ltd v DCIT – TS-1043-ITAT-2016 (Bang)- TP - IT(P)A No.4/Bang/2014 dated 09.11.2016

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

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

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

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

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

- TCS e-Serve Ltd as it was involved in transaction processing and technology services and owned huge intangibles

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

215. The Tribunal held that the assessee, a captive service provider engaged in the business of rendering software development services to its AEs could not be compared to:

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

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

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

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

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

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

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

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

- Accentia Technologies as it had undertaken extra-ordinary events (merger and demerger) during the year which impacted its financial results and also since there was a wide gap between employee costs of the company vis-à-vis the assessee
- Bodthree Consulting Ltd as it was engaged in the business of software products and software services and did not have a segmental break-up
- Eclerx Services Ltd as the company was engaged in KPO and high end services involving specialized knowledge and domain expertise in the field of retail, manufacturing and financial services
- HCL Comnet Systems & Services Ltd as its RPT (18.72%) exceeded the 15 percent RPT filter applied by the assessee
- Informed Technologies Ltd as its employee cost / sales ratio (21.77%) was less than the filter of 25 percent applied

- Infosys BPO Ltd as it owned substantial intangible assets, undertook research development and carried on diverse business activities
- Vishal Information Technologies Ltd as it was a KPO engaged in high end services requiring employees with advanced levels of skills and knowledge.
- Wipro LTd as it was a giant entity with difference as regards risk profile, nature of services, ownership of IP rights etc.

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

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

- Bodhtree Consulting Ltd as it was functionally dissimilar to the assessee being engaged in the business of software product and provided open and end to end web solutions, offshore data management, software consultancy and design services
- Infosys Technologies Ltd as it owned intangibles and derived income from both software services and products without any segmental reporting
- Persistent Systems Ltd as it was engaged in software development services and products and also engaged in R&D activities and owned intangible assets
- Larsen & Turbo Infotech LTd as it carried out various activities including both software development services as well as products, had a huge turnover in excess of 10 times that of the assessee and it also owned intangible assets

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

219. The Tribunal excluded the following companies from the list of comparables while benchmarking the international transactions of the assessee, engaged in providing software development services to its AEs:

- Kals Information System Ltd as it was engaged in development and sale of software products
- Thirdware Solutions Ltd as it was engaged in software development, trading of software licenses and training implementation activities and it earned supernormal profits.

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

220. The Tribunal remitted the issue of comparability of the following companies vis-à-vis the assessee, engaged in the business of development of software and indenting sale of industrial software

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

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

221. The Tribunal held that the international transactions of the assessee viz. provision of software research, development and support services could not be compared to

- Infosys Ltd and FCS Software Ltd as the companies were product companies.
- Kals Information Systems Ltd as the company was engaged in development and sale of software products
- Thirdware Solutions Ltd as the company was engaged in software development, trading of software licenses and training implementation activities
- Acropetal Technologies LTd as the company was engaged in design engineering activities

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

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

222. The Tribunal in the second round of litigation held that the assessee engaged in providing software development services could not be compared to:

- Kals Info Systems Ltd as it was engaged in development of software products and training
- AccelTransmatics as it was functionally different

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

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

223. The Tribunal excluded the following companies from the list of comparables while benchmarking the ITES and software development services rendered by the assessee:

- Accentia Technologies Ltd as it acquired a new business during the year which impacted its financial results
- Acropetal Technologies Ltd as it was functionally different and did not have adequate segmental results
- Cosmis Global Ltd as the company earned only Rs.27.76 lakhs in the BPO segment and also incurred huge costs by way of translation charges which had an inbuilt margin included in the cost
- Eclerx Services Ltd since the company was involved in a diverse nature of services without segmental data and more so since it was engaged in KPO services
- Genesys International Corporation Ltd as it was functionally different.

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

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

- E Infochips Bangalore Ltd as it was engaged in both software development as well as ITES and no segmental information was available
- Persistent Systems Ltd as it had a high turnover of Rs.509 crore as against Rs.29.53 crore of the assessee and also since it was engaged in sale of software products

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

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

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

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

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

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

227. The Tribunal held that the assessee, a software development service provider, could not be compared to:
- Infosys Technologies Ltd on account of the huge difference in turnover
 - Kals Information Systems Ltd as it was engaged in both software development service as well as products
 - Sasken Communication Technologies as it was engaged in both software development services as well as in products
 - Tata Elxsi Ltd as its software service segment contained income from product design, innovation design and engineering design
 - Persistent Systems Ltd as it was engaged in diversified activities including licensing of products, providing maintenance services and earning income by way of royalty on sale of products.

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

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

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

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

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

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

230. The Tribunal held that the assessee engaged in providing software development services to its AE could not be compared to:
- Sankhya Infotech Ltd as it was engaged in the development of software products and services and providing training for the transport and aviation industry
 - Visual Soft Technologies Ltd as it was engaged in substantial R & D activities, which entitled it to command premium return
 - Exensys Software Solutions Ltd as it was engaged in diversified operations visa-vis assessee

- Thirdware Solutions Ltd as it was engaged in diversified activities such as sale and purchase of licenses, ERP, purchase of AMCs etc
- Tata Elxsi Ltd as the company was engaged in development of niche product and development services
- Flextronics Software Systems Ltd since it was engaged in development of software products and incurred R&D expenditure for development of such products
- Satyam Computer Services Ltd since its data and information was unreliable owing to the financial scam
- Infosys Technologies Ltd as it was engaged in diversified activities owned intangibles, had high turnover and brand value

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

231. The Tribunal held that the assessee, engaged in providing IT enabled BPO services and receivable management services to its AEs could not be compared to:

- Accentia Technologies Ltd as it had undertaken an extra-ordinary event during the year (merger) which impacted its profitability
- Cosmic Global Ltd as it outsourced a substantial portion of its work and therefore had a different business model
- Infosys BPO Ltd as it was engaged in providing high end integrated services, had a significantly large scale of operations and high brand value
- R Systems International Ltd as it had a different financial year ending i.e. 31/12/2009 whereas assessee's financial year ended on 31/3/2010

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

232. The Tribunal held that the assessee operating as an offshore processing centre could not be compared to:

- Accentia Technologies Ltd as it was engaged in healthcare management, it owned IPRs which facilitated premium pricing and it had undertaken an extra-ordinary event during the year (acquisition and amalgamation) which impacted its profitability
- Fortune Infotech Ltd as it was engaged in product development, owned IPRs and did not satisfy the RPT filter of 25 percent
- ICRA Online Ltd as it was providing KPO Services including financial research and analysis.

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

233. The Tribunal rejected the claim of the assessee for exclusion of Persistent Systems & Solutions on the ground of turnover and held that where the assessee had not applied a turnover filter itself it would not be justified in excluding one comparable based on turnover without applying the filter to all the comparable companies. However, considering that the said company was not only rendering software development services, but was also in sale of products and carried out R&D in life sciences, products lifecycle services, medical research, chemistry, bio-informatics, it held that the company was not functionally comparable to the assessee and therefore excluded it. Further it held that the assessee, providing software development services and global call centre services to its AE could not be compared to:

- Sonata Software Ltd as it had related party transaction (RPTs) of more than 25% of its total revenue which did not satisfy the filter applied by the TPO himself
- Igate Global Solutions Ltd as it operated in one single segment with respect to both product and services and was engaged in ITE Services
- Bodhtree Consulting Ltd as it earned abnormally high margins which did not reflect a normal business condition.
- Genesys International Corporation Ltd as it was a geospatial service and content provider, specializing in land based technologies
- FCS Software Solutions Ltd as the company operated in diverse segments, including Infrastructure Management outsourcing centre for hardware requirements of its

customers, imparting internet based E-learning and IT consulting services, and its segmental reporting was based on geographies and not as per different activities undertaken by it. Further, it held that CG Vak Software and Exports Ltd was to be included as a comparable relying on the decision in Yodlee Infotech Pvt. Ltd wherein it was held that this company was a good comparable to benchmark software development services for same AY 2009-10.

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

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

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

235. The Tribunal, pursuant to a miscellaneous petition filed by the assessee, adjudicated on the assessee's ground relating to selection of comparables and held that:

- AvaniTransmatic Ltd, Celestial Labs Ltd, Infosys Technologies Ltd, Kals Information Systems Ltd, Lucid Software Ltd, Tata ElxsiLtd, Flextronics Software Systems Ltd and Wipro Ltd were to be excluded as comparable as they were not functionally comparable with the assessee in light of the decision of the Co-ordinate bench in NXP Semiconductors India Pvt Ltd.
- Geometric Ltd and Ishir Infotech be rejected as their RPT was in excess of 15 percent.

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

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

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

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

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

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

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

As regards the BPO services provided by the assessee, it held that the following companies could not be considered as comparable:

- Accentia Technologies Ltd as it operated in KPO segment

- Acropetal Technologies Ltd as it was engaged in providing design engineering activities which was more akin to KPO
ITO vs. Systime Global Solutions Ltd - TS-54-ITAT-2017(PUN)-TP ITA No.336/PUN/2015 dated 31.01.2017
238. The Tribunal held that the assessee, engaged in providing IT enabled & marketing support services could not be compared to:
- Genesys International Corporation Ltd as it was functionally different and had abnormally high profits
 - Accentia Technologies Limited as it had undertaken an extra ordinary event during the year viz. acquisition of IQ group of companies
 - Eclerx Services Ltd as the company had been excluded as comparable in the assessee's own case for AY 2009-10 on account of functional difference.
Cummins Turbo Technologies Limited vs DCIT - TS-1094-ITAT-2016(PUN)-TP ITA No. 593/PUN/2015 dated 28.12.2016
239. The Tribunal held that Infosys, having a huge turnover as compared to the assessee could not be compared to the assessee, a limited risk software development service provider. Accordingly, it directed for the exclusion of the said comparable.
ACIT v Amberpoint Technology India Pvt Ltd – TS-124-ITAT-2017 (Pun) – TP ITA No.266/PUN/2012 ITA No.1862/PUN/2012 dated 15.02.2017
240. The Tribunal held that the following companies could not be included in the list of comparable companies while benchmarking the international transactions carried out by the assessee viz. provision of software development services to its AEs:
- AvaniCincom Technologies, Celestial Biolabs Ltd, e-Zest Solutions Ltd, Infosys Ltd, Kals Information Systems Ltd, Persistent Systems Ltd, Tata Elxsi Ltd and Wirpo Ltd as they were functionally dissimilar as held in the decision of the Tribunal in Infineon Technologies India Pvt. Ltd. [TS-549-ITAT-2015(Bang)-TP]
 - Flextronics Software Systems Ltd, iGate Global Solutions Ltd, Sasken Communication Technologies Ltd as their turnover exceeded 10 times the turnover of the assessee.
- Further, it held that Softsol India Ltd was incorrectly rejected as comparable by the CIT(A) on the ground that it did not satisfy the 15 percent RPT Filter as the RPT filter was not a water tight compartment and the RPT percentage of 15 to 20% had been accepted in many cases. Considering the fact that the RPT of the said company was 18.3% (within the range of 15-20%), it held that the said company was to be considered as a comparable.
ITO vs. Ketera Software India Pvt. Ltd TS-139-ITAT-2017(Bang)-TP IT(TP)A No.460/Bang/2013 dated 22.02.2017
241. The Tribunal held that the assessee, providing software development services to its AE could not be compared to:
- Infosys Technologies Limited as it incurred substantial R&D expenses, owned intangibles, had a higher risk profile, provided diversified services, owned proprietary products, earned more than half of its income from outsourcing activities, had huge brand value and had a large number of employees
 - Tata Consultancy Services Ltd as it was engaged in IT infrastructure services, engineering and industrial services, earned huge profits, sold equipment and software license, incurred substantial R&D expenses
 - Tata Elxsi limited as its software development services segment also included design and development of hardware
 - Thirdwave Solutions Lt as it earned revenue from various business segments such as sale of license, software services and subscription and lacked segmental details
St-Ericsson India Private Limited vs Addl CIT - TS-119-ITAT-2017(DEL)-TP ITA No.1672/Del./2014 dated 22.02.2017

242. The Tribunal held that the assessee, providing IT enabled Services to its AEs could not be compared to the following companies:

- Cosmic Global as it outsourced a substantial portion of its activities as a result of which its employee cost was only 25 percent of its total cost.
- Infosys BPO Ltd as it had a huge turnover of Rs. 850 crores which exceeded the turnover of the assessee by more than 10 times.

Observing that the assessee had itself selected Cosmic Global Ltd in its TP study, relying on the decision of the Special Bench in Quark Systems [TS-23-ITAT-2009(CHANDI)-TP] (which was upheld by P&H HC [TS-448-HC-2011(P & H)-TP]), the Tribunal held that the assessee could not be estopped from seeking exclusion of a comparable which was on its own list.

Visual Graphics Computing Services India Private Limited Vs ACIT - TS-129-ITAT-2017(CHNY)-TP /I.T.A. No.2340/Mds/2012 dated 10-02-2017

243. The Tribunal held that the assessee, engaged in the business of rendering I.T. enabled services to its AEs could not be compared to the following companies:

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

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

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

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

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

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

With regard to benchmarking the international transactions of the assessee it held that:

- R-Systems International Ltd, which had been rejected as a comparable on the ground that it had a different year ending (Calendar year as opposed to the financial year adopted by the assessee), was to be included as a comparable as it was possible to reasonably determine

the financial results of the company for the relevant period with the information available in the public domain

- Mircoland Ltd was incorrectly rejected as comparable by the TPO who contended that the assessee was precluded from considering a comparable at a later stage when the same was not considered earlier in its TP Study. It held that once the TPO has rejected most of the comparables and asked the assessee to furnish fresh comparables, then TPO is bound to consider the comparables as submitted by the assessee. It also rejected the contention of the Revenue that the company ought to have been excluded since it had incurred a loss during the year and held that loss incurred was in the normal course of business unless certain peculiar factors were pointed out, which was not done so by the Revenue.
- Omega Healthcare Management Services Pvt Ltd as the financials of the company were now available in the public domain

Further, it held that Acropetal Technologies Ltd could not be considered as comparable to the assessee as it was engaged in providing a broad spectrum of services in the nature of software development under its 'Engineering Design Services' segment and also since it had undergone an extra-ordinary event (acquisition) which impacted its PLI.

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

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

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

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

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

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

247. The Tribunal held that the assessee, engaged providing software development and technical support services to its AE could not be compared to:

- Acropetal Technologies Ltd as it was engaged in development of computer software
- E-Zest Solutions Limited as it was engaged in product engineering services in the nature of High end knowledge process outsourcing and having expertise in emerging technologies cloud Saas, business Intelligence and mobility
- Persistent Systems as it was engaged in software product development and product design services, it earned income from product licensing and did not have any segmental details

- Sasken Communications Limited as it was engaged in multimedia products.
Symantec Software and Services India Private Limited vs. DCIT - TS-96-ITAT-2017(CHNY)-TP - I.T.A. No. 614/Mds/2016 dated 20.01.2017

248. The Tribunal dismissed the contention of the Revenue viz. that the assessee was a high end software development service provider and upheld the TPO's characterization of the assessee as a captive service provider, who only worked based on the specifications provided by its AEs. It held that the contention of the Revenue had not been taken before lower authorities and therefore it could not be considered at this stage i.e. before the Tribunal. With regard to the benchmarking of international transactions of the assessee, it excluded the following companies as comparable:

- Infosys Technologies Ltd it had substantial R&D, significant intangibles, high risk profile, owned proprietary products, providing onsite services, had a huge brand value and had a high number of employees vis-à-vis the employees of the assessee
- Tata Consultancy Services as it was engaged in IT infrastructure services, ITES, engineering and BPO services, it sold equipment and software licenses and had a high risk profile
- Tata Elxsi Ltd as it was functionally dissimilar as its software development services segment also included design and development of hardware
- Thirdware Solutions Ltd as it earned revenue from various business segments such as sale of license, software services and subscription and did not have segmental data

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

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

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

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

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

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

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

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

- Avani Cimcon Technologies Ltd as it earned revenue from software product sales apart from rendering of software services and no segmental data was available and also since it earned abnormally high profits during the relevant year which represented abnormal circumstances
- Celestial Labs Ltd as it was mainly into clinical research and manufacture of bio- products and other pharma related activities and it also owned Intellectual property
- E-Zest Solutions Ltd as it rendered product development consulting and other high-end IT enabled services normally categorised as KPO-type services
- Helios & Matheson Information Technology Ltd as it was functionally dis-similar
- Infosys Technologies Ltd as it was functionally dis-similar, it owned significant intangibles, had huge revenue from software products, incurred substantial R&D and segmental details for its software services and software products were not available
- Ishir Infotech Ltd as it out-sourced its work and therefore did not satisfy the 25% employee cost filter
- Lucid Software Ltd as it was engaged in development of software in addition to software services as opposed to assessee who was only into software development services
- KALS Information Systems Ltd as it was functionally dis-similar as it was engaged in developing software products as well as services
- Persistent Systems Ltd as it engaged in product development and software designing and segmental details were not available.
- Thirdware Solutions Ltd as it was engaged in product development, it earned revenue from sale of licenses and subscriptions in addition to software development services and segmental details for software development services and product development were not available
- Wipro Ltd as it owned substantial IP and intangibles, was engaged in both software development and product development services and its segmental details were not available
- R-Systems International as it followed a different financial year
- Flexotronics Software Systems as its financial data was only for 9 month period and segment data reconciliation was not available.

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

252. The Tribunal held that the assessee engaged in providing software development services and market support services to its AEs could not be compared to:

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

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

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

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

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

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

255. The Tribunal held that the software development services provided by the assessee to its AEs could not be benchmarked with the following comparables:

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

Further, it held that insignificant 'other income' (interest, foreign exchange gain) could not affect the operating margins and therefore the comparability of an other-wise comparable company and thereby included F C S Software Solutions Ltd & Thinksoft Global Services Ltd as comparable.

Huawei Technologies India P. Ltd. Vs. ITO - TS-157-ITAT-2017(Bang)-TP – IT(TP) A No 265 / Bang / 2014 dated 17.02.2017

256. The Tribunal accepted assessee's application of turnover filter at 10 times the assessee's turnover noting that it was a relevant factor in the selection of comparables and accordingly excluded the following companies on the basis that their turnover was either more than Rs. 560 crores or less than Rs. 5.6 crores considering that assessee's turnover was Rs. 56 crores.

(i) KALS Information System Ltd. (ii) Zylog System Ltd. (iii) Mindtree Limited (Seg.) (iv) L& T Infotech Ltd & (v) Infosys Limited.

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

- Bodhtree Consulting Ltd as it was Software product company and not a software development services company

- Tata Elxsi Ltd as it was engaged in different activities including embedded product design, industrial design, engineering services and visual computing laboratory and segmental details in respect of software services activity was not available.
- Persistent Systems Ltd as it was engaged in product designing services and software product development

Evry India Pvt. Ltd vs DCIT - TS-76-ITAT-2017(Bang)-TP - LT. (T.P)A. No.109/Bang/2014 dated 25.01.2017

257. The Tribunal held that the assessee, engaged in providing software development and consultancy services could not be compared to:

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

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

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

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

Further, it excluded Indium Software (India) Ltd as comparable as its export turnover was less than the 75 percent filter applied and S I P Technologies and Exports Ltd as the company had shown a loss of -33.20 percent.

Applying the turnover filter Rs. 1-200 crore, it directed the exclusion of Helios and Matheson Information Technology Ltd with a turnover of Rs. 213.39 crores on the ground of failing Rs.200cr turnover filter.

Further, rejecting the contention of the assessee that E-Infochips Ltd was to be excluded as it was engaged in the sale of software products, the Tribunal noting that the turnover from software products was merely 4 percent of total turnover, directed for the inclusion of the said company.

MSC Software Corporation India Pvt. Ltd vs. ACIT - TS-226-ITAT-2017(PUN)-TP - ITA No.46/PUN/2013 dated 22.03.2017

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

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

As regards the IT enabled services provided by the assessee, it held that it could not be compared to:

- Vishal Information as it had a low employee cost of 1.25% of operating revenue as against IT/ITes industry average of 46.1%, it was engaged in call centre services and its operating margin at 50.68% could not be considered to be normal
- Nucleus Netsoft& GIS Ltd as it had outsourced a considerable portion of its business, **Google India Pvt. Ltd. Vs. DCIT - TS-154-ITAT-2017(Bang)-TP - IT(TP)A No.1298/Bang/2013 dated 03.03.2017**

260. The Tribunal held that Compucom Software and Sterling International Enterprise Ltd could not be compared to the assessee engaged in the business of software development as they failed to satisfy the RPT filter of 25 percent and had a different financial year ending, respectively.

Tieto Software Technologies LTD. vs. DCIT - TS-155-ITAT-2017(PUN)-TP - ITA No.986/PUN/2013 dated 03.03.2017

261. The Tribunal held that for the purpose of benchmarking the international transactions of the assessee, the following companies could not be considered as comparable:

- KALS Information Systems Ltd. as it was in the field of consultancy, information provider and general insurance sector
- Bodhtree Consulting Ltd as it was engaged in providing open and end to end web solutions software consultancy and design and development of software using latest technology
- Tata Elxsi Ltd. (seg) as the company's software development and services segment constituted three sub-segments i) product design services; ii) engineering design services and iii) visual computing labs and system integration services segment.
- Persistent System Ltd as the company was engaged in product designing services
- Infosys Technologies Ltd as the company was a giant company in the area of software and it assumed all risks leading to higher profits.
- Sasken Communication Tech Ltd being functionally dis-similar as it owned IPR and had branded products, and also since it had undergone significant restructuring during the year **Sandisk India Device Design Centre Pvt. Ltd. Vs. DCIT- TS-183-ITAT-2017(Bang)-TP - IT(TP)A No. 126/Bang/20 14 dated 15.02.2017**

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

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

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

- Infosys Tech. Ltd as it was a giant company in the area of development of software and it assumed higher risks leading to higher profits
- Persistent Systems Ltd as it was engaged in product designing and software product development
- Tata Elxsi Ltd as it was engaged in provision of product design, engineering design and visual computing labs
- Kals Information Systems Ltd. as it operated in the field of consultancy, information provider and general insurance sector
- Bodhtree Consulting Ltd as it was engaged in the business of software product and end-to-end web solutions software consultancy

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

With regard to the assessee's plea for inclusion of certain comparable companies it remitted the issue to the file of the AO / TPO to determine:

- Whether Azlecsoft Ltd & Quintegra Solutions Ltd satisfied the 75 percent export earning filter
- Whether CG-VAK Software and Exports Ltd was functionally comparable and if it would satisfy the 25 percent employee cost filter on inclusion of contribution to PF, gratuity etc were also included in cost
- Whether Goldstone Technologies Ltd was functionally comparable to the assessee

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

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

- Bodhtree Consulting Ltd as the company was engaged in providing open and end to end web solutions software consultancy and design and development of software using latest technology.
- Tata Elxsi Ltd. (Seg) as its software development and services segment constituted three sub-segments i) product design services; ii) engineering design services and iii) visual computing labs and system integration services segment
- Persistent Systems Ltd as it was engaged in product designing services
- Sasken Communications Technology Ltd as this company owned IPR, had branded products, and had undergone significant restructuring during the year.

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

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

265. The Tribunal dismissed the appeal of the Revenue and held that the following companies could not be included in the list of comparables for benchmarking the assessee's software service transactions with its AE:

- Bodhtree Consulting Ltd as it was engaged in ITeS and software development while its segmental details were absent
- Celestial Biolabs as the company was functionally different from that of software development company as it was engaged in clinical research and manufacture of other bio products (Reliance was placed on the decision of 3DPLM Software Solutions Ltd [TS-359-ITAT-2013(Bang)-TP]).
- Lucid Software Ltd as the company was engaged in product development rather than services (Reliance was placed on the decision of 3DPLM Software Solutions Ltd [TS-359-ITAT-2013(Bang)-TP])

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

266. The Tribunal held that the following companies could not be compared to the assessee:

- ICRA Techno Analytics Ltd and Larsen & Toubro Infotech Ltd as their RPT transactions exceeded the 15 percent filter applied
- Acropetal Technologies Ltd. (Seg) as it failed the filter of 75% IT revenue applied by the TPO itself

- e – Zest Solutions Ltd as it was engaged in KPO Services
 - Infosys Ltd as it had high brand value, intangibles and huge turnover
 - Persistent Systems & Solutions Ltd, Persistent Systems Ltd & Sasken Communication Technologies Ltd as it was functionally dissimilar
 - Tata Elxsi Ltd as it failed the export revenue filter of 75%
 - E – Infochips Ltd as it had revenue from software products and segmental details unavailable
- Commscope Networks (India) Private Ltd. (Earlier known as Airvana Networks (India) Private Ltd.) Vs ITO - TS-161-ITAT-2017(Bang)-TP - IT (TP) A No.166 (Bang) 2016 dated 22.02.2017**

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

- Kals Information Systems Ltd as it was engaged in the development of software and sale of software products
- ICRA Techno Analytics Ltd (seg) as its service segment comprises of various services such as software development, software consultancy, engineering services, web development, web hosting, etc and no further segmental results were available
- Persistent Systems & Solutions Ltd as no segmental results were available

Further, rejecting the RPT filter of 0 percent adopted by the DRP and applying the filter of 15 percent, the Tribunal held that RS Software (India) Ltd and Thinksoft Global Services Ltd were now to be considered as comparable as they had RPT of 0.96 and 11.09 percent, respectively. Further, following the decision of the co-ordinate bench in Obopay Mobile Technology India P Ltd [TS-20-ITAT-2016(Bang)-TP], excluded 6 comparables Infosys Ltd (Rs. 21,140 crore), Larsen & Turbo Infotech Ltd (Rs. 1,777 crore), Mindtree Ltd (seg) (Rs. 698 crore), Persistent Systems Ltd (Rs. 504 crore), Sasken Communication Technologies (Rs. 402 crore) and Tata Elxsi Ltd (seg) (Rs. 376.37 crore) on the ground of turnover and size of the said comparables (as compared to the assessee's turnover of Rs. 13.23 crores)

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

268. The Tribunal held that the assessee engaged in the business of providing software development services and support services to its AEs could not be compared to:

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

Further, it rejected the plea of the assessee for exclusion of comparables having Related Party transactions more than 15 percent (as against the 25 percent filter adopted by the TPO) as it noted that the assessee had not contested application of RPT filter of 25% by the TPO. Further, it observed that Tribunals had been consistently upholding TPO's decision to apply RPT filter in the range of 15% to 25%.

Citrix R&D India Pvt. Ltd vs. ITO - TS-242-ITAT-2017(Bang)-TP - IT(TP)A No.1373/Bang/2010 dated 24/03/2017

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

- Celestial Labs Ltd as the company was engaged in clinical research and manufacture of bio products
- E-Zest Solutions Ltd as it rendered product development services and high end technical services under KPO category
- Infosys Technologies Ltd as it owned significant intangible and had huge revenues from software products without any break-up of revenue from software services and software products is not available
- Kals Information Systems Ltd (seg) as it was engaged in providing software development services and development of software products.
- Lucid Software Ltd as the company is also involved in the development of software as compared to the assessee, which is only into software services
- Wipro Ltd (seg) as this company was engaged both in software development and product development services and it owned intellectual property in the form of registered patents and several pending applications for grant of patents
- Accel Transmatic Ltd (seg) as it was engaged in the services in the form of ACCEL IT and ACCEL animation services for 2D and 3D animation
- Avani Cimcon Technologies Ltd as the company was also into development of software product.
- Flextronics Software Systems Ltd (seg) as there was a clear contradiction between contents of annual report and information obtained u/s 133(6)
- Helios & Matheson Information Technology Ltd as the application software segment of the said concern is not comparable to the assessee's segment of IT services
- Ishir Infotech Ltd it was out-sourcing its work and, therefore, had not satisfied the 25% employee cost filter and thus had to be excluded from the list of comparables.
- Persistent Systems Ltd as this company was engaged in product development and product design services while the assessee was a software development services provider
- Sasken Communication Technologies Ltd as the company owned IPR, had branded products and it had undergone significant restructuring during the year
- Tata Elxsi Ltd (seg) as the company was predominantly engaged in product designing services and not purely software development services.
- Thirdware Solutions Ltd as the company was engaged in product development and earned revenue from sale of licenses and subscription, without segmental results
- Quintegra Solutions Ltd as it was engaged in in product engineering services, was developing proprietary software products and owned intangibles.

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

270. The Tribunal held that assessee engaged in the business of providing digital imaging services falling within the category of IT enabled Services (ITeS) to its AEs could not be compared to:

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

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

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

271. The Tribunal held that the assessee engaged in providing ITES to its AEs could not be compared to:

- Bodhtree Consultancy Ltd as the company had only one segment viz. software development which cannot be compared to ITES segment.
- e-clerx Services Ltd as the company was engaged in providing data analysis and process solutions and recognized as expert in market financial services, retail and manufacturing.
- Infosys Ltd as the company was deriving revenue from the software products, had huge intangible assets apart from the brand value and being a leader in the market
- Mold-tek Technology Ltd. (Seg.) as the company was providing highly technical and specialized engineering services and was also is engaged in producing design, drawing and structural engineering drawings of 2D and 3D software and hence, could not be compared with the assessee.
- Vishal Information Technology Ltd as the company outsourced a considerable portion of its business and thus fails employee cost filter
- Wipro Limited as the company was functionally dissimilar because of brand value, significant investment in acquiring new business, innovation activities of various fields including technology innovation and also it as it was engaged in R&D activities
- Apollo Health Street Ltd, Asit C Mehta Financial Services Ltd, HCL Comnet Systems & Services Ltd and Informed Technologies India Ltd as its RPT transactions exceeded the 15 percent filter applied by the TPO.

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

272. The Tribunal held that the assessee engaged in providing software development services to its Associated Enterprises (AE) could not be compared to:

- Bodhtree Consulting Ltd as it was engaged in providing open and end to end web solutions software consultancy and design and development of software using latest technology whereas the assessee was engaged in rendering only software development services
- Tata Elxsi Ltd as this company's software development and services segment constituted three sub-segments i) product design services; ii) engineering design services and iii) visual computing labs and system integration services segment and therefore functionally dissimilar
- Persistent Systems Ltd as the company was engaged in product designing services
- Infosys Technologies Ltd as the company was a giant company in the area of software and it assumed all risks leading to higher profits, whereas assessee company was a captive unit of the parent company and assumed only a limited risk.

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

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

- Infosys Ltd as the functional profile of the company was highly diversified and that it was full-fledged risk bearing entrepreneur having a turnover of above Rs. 21,000 crore and significant R&D, advertising expenses. Further, it held that the brand equity and intangibles of the company were more than Rs.1,00,000 crores which proved that the company derived substantial portion of its profits from its brand value and hence such a giant company could

not be compared with the assessee which did not have any significant intangibles and is a risk mitigated entity.

- Wipro Technology Services Ltd, noting that the said company was part of the Citi Group, rendering services to various entities of the Citi Group worldwide and was acquired on January 20, 2009 by 'Wipro Ltd' and that there was pre-arrangement between Citi group and Wipro Ltd. for providing business of at least \$500 million over a period of 6 years after acquisition as a result of which, all the revenue received by the company from Citi Group on account of such prior agreement or pre- arrangement amounted to a deemed international transaction and therefore the company did not satisfy the RPT filter of 25 percent adopted by the TPO as all its revenue was from the Citi Group.
- Persistent Systems Ltd as it was a leader in the world of outsource software product development and the break-up of income as to revenue from software services and products, both from exports and domestic was not available
- Thirdware Solutions Ltd as it was engaged in various activities like sale of licenses, software services and revenues from subscription and there was no segmental data to work out the separate margin from software services.

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

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

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

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

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

275. The Tribunal held that the assessee engaged in providing core software service activities for its AE and independent customers, could not be compared to:

- Celestial Biolabs since it was functionally dissimilar
- Infosys Technologies Ltd since it was functionally dissimilar and owned significant intangibles and earned huge revenues from software products and no segmental information was available,
- Kals information Systems Ltd(Seg) since it was engaged in developing software development products and was not purely a software development service provider
- Tata Elxsi ltd(Seg) since it was engaged in product designing services and was not purely a software development services provider
- Wipro Ltd (Seg) since it had revenue from both software and product development services and no segmental bifurcation was available and it owned intellectual property
- E-Zest Solution ltd since it was engaged in rendering product developmental services and high end technical services which come under the category of KPO services

- Persistent Systems Ltd since it was engaged in product development and product design services and segmental information was not available
- Quintegra Solution Ltd since it was engaged in product engineering services and not purely providing software development services, it owned intangibles, had done substantial R&D activity and there was extraordinary event of acquisition
- Thirdware Solution Ltd since it was engaged in product development and had earned revenue from sale of licences and subscription which is different from software developmental services and no segmental information was available
- Lucid Software Ltd since it was engaged in development of software product
- Bodhtree Consulting Ltd as the company was not engaged in software development services and no segmental information was available.

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

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

276. The Tribunal, relying on the decisions in the case of Pentair Water India Pvt Ltd [TS-566-HC-2015(BOM)-TP] and Agilent Technologies (International) Pvt. Ltd. [TS-593-HC-2015(P & H)-TP], applied the turnover filter of 10 to 1/10 times the assessee's turnover (Rs. 71.37 crore) and excluded Universal Print Systems Limited, Informed Technologies India Limited, Infosys BPO Limited, Microgenetic Systems, TCS-E Serve Ltd and BNR Udyog Limited as comparables while benchmarking the IT enabled back office services viz. contract administration, claim administration and technical reinsurance accounting provided by the assessee to its AE.

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

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

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

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

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

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

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

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

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

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

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

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

281. The Tribunal held that the assessee rendering software development services and Marketing support services for AY 2011-12 could not be compared to

- Acropetal Technologies Ltd as it was functionally different since it was engaged in both software services and product and segmental information between software services and software products was unavailable and also since it failed the employee cost filter of 9.8% of sale
- E-Zest Solutions Ltd as it was engaged in KPO activity.
- E-Inforchips Ltd as the company earned revenue from software products and segmental details were not available.
- ICRA Techno Analytics Ltd as it was functionally dissimilar since it was engaged into software development, engineering services, web development & hosting, business analytics & BPO and had substantial RPT i.e. 22.37% of sales.
- Infosys Technologies as it had huge brand value, intangibles and huge turnover.
- Larsen & Toubro Infotech Ltd as the RPT exceeded 15% and it was engaged in sale of software products.
- Tata Elxsi (Seg) as it was functionally dissimilar since its software development and services consisted of embedded product design, industrial design and visual computing labs and it failed the 75% export earning filter as it had an export revenue of 73.30%.
- Persistent Systems & Solutions Ltd and Persistent Systems Ltd on the ground that they were functionally dissimilar as there were engaged in diversified activities and earned revenue from various activities.
- Sasken Communication Technologies as it was not functionally comparable due to lack of segmental data

Further, the Tribunal accepted inclusion of 3 companies on the following grounds

- Evoke Technologies, Mindtree Ltd and RS Software (India) Ltd as the assessee did not specifically reject these comparables.

AMD India P Ltd vs ACIT [TS-362-ITAT-2017(Bang)-TP I.T (TP).A No.1487/Bang/2015 dated 06.04.2017

282. The Tribunal held that the following companies could not be considered as comparable while benchmarking the International transaction of the development and design services:

- Accel Transmatic Ltd as the business activities were functionally different from that of the assessee it was engaged in design, development and manufacture of multi function kiosks queue management system, ticket vending system and services for 2D/3D animation.
- Avani Cimcon technologies ltd as it was engaged in the business of software products as well as software services and segmental details were unavailable.
- Celestial Labs Ltd as it was mainly engaged in clinical research and manufacture of software products.
- KALS Information Systems Ltd as it was engaged in the business of development of software products as well as providing training, and thus functionally not comparable.
- E-Zest Solutions as it was engaged in product development and high end technical services under the category of KPO services.
- Helios & Matheson Information Technology Limited relying on coordinate bench ruling in the case of NXP Semiconductors India Pvt Ltd [TS-427-ITAT-2014(Bang)-TP] wherein it was held that it was functionally incomparable.
- Ishir Infotech Limited as it outsourced its work and did not satisfy the 25% employee-cost filter.
- Lucid Software Limited as it was engaged in the business of development of software products and was thus functionally incomparable.
- Tata Elxsi Ltd as the company had significant R&D activity, brand value etc.
- Thirdware Solutions Ltd as it was engaged in product development and earned revenue from selling licenses subscription and no segmental details were available.
- Wipro Limited as it owned a large amount of intellectual property.
- Infosys Technologies Ltd as it owned significant intangibles and had earned huge revenues from software products with no segmental breakup available.
- Persistent Systems Ltd as it was engaged in product development and segmental details were unavailable.

FCG Software Services (India) Pvt Ltd [TS-409-ITAT-2017(Bang)-TP IT(TP)A No. 994 /bang/2011 dated 21.04.2017

283. The Tribunal allowed assessee's plea for exclusion of 4 comparables while benchmarking the provision of software R&D services to AEs during AY 2012-13 and held that the assessee could not be compared to the following companies:

- Infosys Limited, Larsen and Toubro Infotech Limited and Persistent Systems Limited on account of turnover filter. It held that the 3 companies failed the turnover filter of 1/10th and 10 times of assessee's turnover i.e 18.45 crores as they had very high turnover i.e.31253 cr, 2960 cr and 810 cr respectively.
- Genesys International Corporation Limited on the ground of functional dissimilarity as the company was engaged in development of cutting edge applications by developing state of the art GIS technologies and allied spatial data acquisition, processing and integration techniques to meet the demand of the consumers.

UEI Electronics Pvt. Ltd Vs DCIT [TS-274-ITAT-2017(Bang)-TP -IT(TP)A No.2005 (Bang)/2016 dated 10.03.2017

284. The Tribunal allowed assessee's plea for exclusion of 3 comparables while benchmarking the provision of software development services to its AE for AY 2010-11 and held that the assessee could not be compared to the following companies:

- E Infochips Bangalore Ltd as it was engaged in software development ITES and also derived income from consultancy charges and the segmental information was not available.
- Sasken Communication Technologies Ltd as it was functionally dissimilar as it was also engaged in sale of products and no segmental details were available.
- Infosys Technologies Ltd as it was functionally dissimilar as it was a giant company in the area of development of software and it assumed all risks leading to higher profits.

Broadcom Communications Technologies Pvt Ltd vs DCIT- TS-254-ITAT-2017(Bang)-TP - I.T.(TP) A. No. 145/bang/2014 dated 17.03.2017

285. The Tribunal held that the assessee engaged in the business of software development services and marketing support services could not be compared to
- Foursoft Ltd as it was engaged in the sale of products and had substantial selling and marketing expenses and related party transactions greater than 0%
 - Geometric Software Solutions Co Ltd as it rendered services in the nature of design and engineering services, the related party transactions were greater than 0% and it owned intellectual property.
 - Sankya Infotech as it was engaged in the sale of products and had substantial selling and marketing expenses, extreme high profit company and owned intellectual property.
 - Sasken Network System on the ground that it had substantial selling and marketing expenses.
 - Sasken Communication Technologies Ltd as it was engaged in the sale of products and had substantial marketing and selling expenses.
 - Tata Elxsi Ltd as it rendered services in the nature of product and engineering and design services.
 - Flextronics Software Services Pvt Ltd as its profitability was extremely high and the related party transactions were greater than 0%.
 - Exclusion of Exensys Software Solutions Limited, Thirdware Solutions Limited and Bodhtree Consulting Limited was admitted by the Tribunal as additional ground by relying on the decision of Quark Systems India P Ltd [TS-448-HC-2011 (P&H)-TP and remitted the matter to the AO/TPO to decide on comparability.

Infineon Technologies India Pvt Ltd vs ACIT [TS-340-ITAT-2017(Bang)-TP - IT(TP)A No.657/Bang/20 11 dated 06.01.2017

286. The Tribunal held that the assessee, a captive service provider of ITES could not be compared to:
- Accentia Technologies as an extraordinary event took place during the year under consideration
 - eClerx Services as it was a KPO mainly engaged in providing high-end KPO services

Goldman Sachs Service Pvt Ltd [TS-430-ITAT-2017(Bang)-TP] IT(TP)A No. 661Bang/2014

287. The Tribunal relying on the co-ordinate bench ruling in the case of Trilogy E-Business Software India Pvt Ltd [TS-410-ITAT-2016(Bang)-TP] held that for AY 2008-09 the assessee engaged in providing software development to AE for AY 2008-09 could not be compared to
- Avani Cincom Technologies Ltd as it was functionally dissimilar to software development service provider and segmental details were unavailable.
 - Bodhtree Consulting Ltd due to fluctuating margin and different functional profile.
 - Celestial Biolabs Ltd as it was engaged in product development in the field of biotech and pharmaceuticals which was functionally dissimilar to assessee.
 - KALS Information Systems Ltd as it was engaged in development of software products as well as provision of training services.
 - Infosys Technologies Limited as it owned significant intangibles and segmental breakup was unavailable.
 - Wipro Limited as it owned IPR and intangibles and engaged in both software development and sale of product without segmental bifurcation.
 - Tata Elxsi Ltd as it was engaged in product designing services.
 - E-Zest Solutions Ltd as it was engaged in rendering product development services and KPO services which is functionally dissimilar.
 - Third ware Solutions Ltd as it derived revenue from sale of software product licenses.
 - Lucid Software Ltd as it was engaged in development of software products.
 - Persistent Systems Ltd as it was engaged in product development and product design services and segmental data was not available.
 - Quintegra Solutions Limited as it was engaged in product engineering services.
 - Softsol India Ltd as its Related party transactions were greater than 15% limit applied

Verifone India Technology Private Limited vs DCIT TS-345-ITAT-2017(Bang)-TP-IT(TP)A No.1 Bang/2014 dated 24.03.2017

288. The Tribunal held that the assessee engaged in providing software development services to its AE for AY 2011-12 could not be compared to

- E-Zest Solutions Ltd as it was engaged in the activity of KPO
- Persistent Systems Ltd as it was engaged in diversified activities and earned revenue from various activities including licensing of products, royalty on sale of products as well as income from maintenance contract etc.
- Sasken Communication Technologies Ltd as the company had a turnover of Rs 394cr and failed the turnover tolerance range of 10 times of assessee's turnover.
- Akshay Software Technology Ltd as it was engaged in both software services and products and lacked adequate segmental results.
- Acropetal Technologies Ltd on the ground that it did not satisfy the filter of 75% of income from information technology, revenue applied by the TPO itself.
- ICRA Techno Analytic Ltd relying on the decision in the case of Electronics for Imaging wherein it was held that this company was functionally incomparable with pure software development service provider as its service segment comprised of software development, software consultancy, engineering services, web development, web hosting for which segmental details were unavailable. Also, it had RPT greater than 15%.
- Infosys Technologies Ltd as it failed the turnover tolerance range of 10 times of assessee's turnover
- L&T Infotech Ltd failed the turnover tolerance range of 10 times of assessee's turnover. Further, it had RPT greater than 15%
- Tata Elxsi Ltd on the ground that the export revenue of the company was less than 75% applied by the TPO
- E-Infochips Limited due to absence of segmental data.
- Mindtree Ltd as it failed the turnover tolerance range of 10 times of assessee's turnover.
- R S Software as it failed the turnover tolerance range of 10 times of assessee's turnover.

Further, LGS Global Ltd was remitted to the file of the AO to verify relevant facts to ascertain the employee cost and then decide the functional comparability.

GT Nexus Software Pvt Ltd vs Dy.CIT -TS-335-ITAT-2017(BANG)-TP- I.T.A No.409/Bang/2016 dated 18.04.2017

289. The Tribunal relying on the decision of Cisco Systems India excluded 2 companies viz. Kals Information Systems Ltd and Bodhtree Consulting Ltd from the list of comparables while benchmarking the international transactions i.e. provision of software development services to its AEs on the ground of functional dissimilarity noting that both Kals Information Systems Ltd and Bodhtree Consulting Ltd were involved in software products.

Sonim Technologies (India) Pvt Ltd vs Dy CIT - TS-341-ITAT-2017(Bang)-TP- IT (TP) A No.2S2 (Bang) 2014 dated 24.03.2017

290. The Tribunal remitted TP-adjustment made in respect of tele-calling BPO services rendered by the assessee to AE for AY 2007-08 & 2008-09 on the ground that the TPO had committed certain factual errors in calculating operating costs by considering cost of whole business instead of cost relevant for international transactions and that he had selected filters/comparables irrelevant to the assessee. Further, ITAT excluded 6 comparables in respect of ITES rendered by the assessee to AE on the following grounds:

- Infosys BPO Ltd as it was a giant company had a huge brand influence.
- Genesys International Ltd as it was engaged in software development as well as geospatial services which involved the services relating to the relative position of things on the earth's surface. These basically include 3D mapping, Navigation maps, Image processing, Cadastral mapping, etc.
- Exlerx Services Limited as it was engaged in high end KPO services and segmental data was unavailable.
- Cosmic Global Ltd as the revenue from BPO services was negligible i.e Rs 27.76 lakhs.
- Acropetal Technologies Ltd as it was engaged in provision of high end engineering design services and sophisticated delivery system

- Accentia Tech as acquisition of various companies, being an extraordinary event which had an impact on the profit.

Monster.com India Pvt Ltd vs DCIT [TS-247-ITAT-2017(HYD)-TP-1762/H/11,1697/H/11,49/H/13, 69/H/13, 1333/H/14, 872/H/14, dated 15.05.2017

291. The Tribunal relying on the decision of the coordinate bench in the case of Thomson Reuters India Services Pvt. Ltd. [TS-1084-ITAT-2016(Bang)-TP] held that Vishal Information technology ltd was functionally dissimilar as it provided agency services by way of outsourcing to third party vendors and acted as an intermediary between final customer and vendor and directed the AO/TPO to re-adjudicate the issue relating to comparability of Vishal Information Technology Ltd. in respect of assessee's IT enabled back office services for AY 2005-06. Further, it also upheld Revenue's adoption of RPT filter of 15% rejecting CIT(A)'s 0% RPT filter noting that the Tribunal had, in a series of decisions, held that the tolerance range of RPT in normal circumstances was 15% and in extreme cases it could be extended upto 25%. Also, relying on the decision in the case of Wipro BPO Solution Ltd., directed TPO to apply turnover filter of 10 times of assessee's turnover on both sides since it was a consistent view that the if turnover was within range of 1/10th of the turnover or upto 10 times, then the comparable was considered to be a good comparable. Accordingly, it remitted the issue to the file of the AO/TPO to carry out the search afresh pursuant to its directions.

Sykes Enterprises (India) Pvt Ltd [TS-410-ITAT-2017(Bang)-TP] - IT(TP)A No.1034//Bang/2011 dated 28.04.2017

292. The Tribunal excluded Alphageo (India) Ltd engaged in seismic data analysis and Celestial Lab engaged in development of tailor made software packages as comparable on the ground of functional dissimilarity.

Sabic Research and Technology Pvt Ltd TS-327-ITAT-2017(Ahd)-TP ITA No.1065 dated 01.05.2017

293. The Court, dismissed Revenue's appeal challenging Tribunal's exclusion of TCS E-Serve Limited from the list of comparables for benchmarking the provision of ITES by the assessee to its AE on the ground that the Tribunal relying on the decision in the case of Ameriprise India Pvt. Ltd [ITA No. 7014/del/2014] had excluded TCS E-Serve Limited as it was engaged in both transaction processing and technical services. It held that considering the profile of the assessee, (engaged only in BPO services) the size and scale of TCS's operations made it an inapposite comparable vis-à-vis the assessee.

Pr. CIT vs Actis Global Service Pvt Ltd [TS-417-HC-2017(DEL)-TP- ITA No.94 of 2017 dated 15.05.2017

294. The Tribunal following the ruling in McAfee India excluded 3 companies viz. L&T Infotech Ltd (turnover of 2959.55 cr). Persistent Systems Ltd (turnover of 810.36 cr.) and Mindtree Ltd (Turnover of 1255.80cr) from the list of comparables while benchmarking the international transaction of the assessee engaged in the business of software development services as the said companies failed to satisfy the turnover filter of 10 times the assessee's turnover i.e 38.07 cr.

Aptean Software India Pvt Ltd vs DCIT [TS-332-ITAT-2017(Bang)-TP- I.T(TP).A No.1826/Bang/2016 dated 15.05.2017

295. The Tribunal held that it excluded 5 comparables for ITes on the following grounds:

- Accentia Technologies Ltd as it involved an extraordinary event of merger/demerger.
- Coral Hub Ltd as it was engaged in e-publishing business and segmental details were not available.
- Eclerx Services Ltd as it was engaged in providing KPO services.
- Mold-Tek Solutions Ltd as it was engaged in providing engineering services and was classified as a KPO service provider.
- Genesys International Corporation Limited as it was engaged in providing geographical information services and also carried out R&D services.

BA Continuum India Private Limited vs Addl CIT [TS-396-ITAT-2017(HYD)-TP-ITA-1144/HYD/2014 dated 28.04.2017

296. With regard to the assessee engaged in providing data processing services to its AE, the Tribunal:

- remitted back to the TPO/DRP to evaluate the profile of the comparable i.e. Accentia Technologies Ltd vis-à-vis the assessee by relying on the ruling in the case of Swiss Re Shared Services India Pvt Ltd [TS-598-ITAT-2016(BANG)-TP] wherein it was held that in the absence of any document showing the kind of service being rendered by the comparable company, it was difficult to compare the functions/profile.
- Remanded to TPO to verify assessee's claim that RPT of ICRA Online Ltd was 22.77% (i.e. >15%) and directed it to exclude it if it failed 15% threshold.
- Rejected Jeevan Scientific Technology Ltd, Mindtree Ltd and iGate Solutions Ltd as comparable as they failed the 10 times turnover following the ruling in case of Mcfee Software India Pvt. Ltd [TS-136-ITAT-2016(BANG)-TP].
- included two companies on the following grounds-Acropetal Technologies as the assessee itself had selected these companies and had neither challenged it. Infosys BPO as the assessee itself had selected these companies and had neither challenged it before DRP nor Tribunal.

Zyme Solutions Pvt Ltd TS-353-ITAT-2017(Bang)-TP - IT(TP)A No.85/Bang/2016 dated 28.04.2017

297. The Tribunal ruled on selection of companies for assessee engaged in design and development of software used in rendering the services to the shipping industry and rejected its appeal for exclusion of the following companies on the following grounds:

- Mindtree (IT Services segment), L&T Infotech Ltd. And Persistent Systems Ltd. on the ground that even though the turnover of these 3 companies was more than Rs 800 cr compared to assessee's turnover of Rs 22 cr, Rule 10B provided that, turnover and brand-value were not a criteria for selection of comparable. Further, it rejected assessee's reliance on High Court decision in the case of Pentair Water India Pvt. Ltd [TS-566-HC-2015(BOM)-TP] since Pentair was engaged in manufacturing industry and volumes/turnover were relevant factors to meet huge capital investment and service charges, whereas assessee was engaged in service sector where cost of service was proportionate to services rendered.
- Spry Resources Pvt. Ltd as the assessee failed to provide any functional dissimilarity, assets deployed and impact on margins and held that the company could not be excluded merely because it was engaged in Government projects.

Further, it held that the assessee could not be compared to:

- Acropetal Technologies Ltd as it was engaged primarily in Engineering design services.
- Kals Information Systems as it was functionally dissimilar and segmental data with regard to software products, training income, translation fee.
- Goldstone Technologies Ltd. as it was functionally dissimilar and engaged only in IT segment and not in software development. As the assessee failed to rebut the DRP findings, Tribunal upheld exclusion of this company.
- CG-VAK Software Systems Ltd as it was a persistent loss making company and accordingly could not be compared to the assessee. Reliance was placed on the decision in the case of Tibco Software India Pvt. Ltd.
- Sankhya Infotech Ltd on the ground of functional dissimilarity, ownership of intangibles and lack of complete segmental data

Shipnet Software Solutions India Pvt Ltd vs DCIT-TS-427-ITAT-2017(CHNY)-TP-ITA No.3404/Mds/2016 dated 28.04.2017

298. The Tribunal ruled on selection of comparables for assessee providing ITES to AEs in the field of insurance on the following grounds

- Tricom India Private Ltd was rejected as it had developed unique in-house software for providing specialized services.
- Wipro BPO Solutions Ltd was rejected as it had the influence of 'WIPRO' brand and intangibles.
- Fortune Infotech Ltd was rejected as it was functionally dissimilar as it used unique technology/technical knowhow and had developed its own software.
- Vishal Information Technology Ltd as it had outsourced its work.
- Ultramarine & Pigments Ltd was rejected as it had abnormal trading results and was a super profit company.
- Air Line Financial Support Services India Ltd was remitted back to TPO for reexamination and re-adjudication as the company was essentially a captive service provider.
- Nucleus Netsoft & Gis India Ltd- remitted to the AO/TPO for re-examination and re-computation of the margin.

Swiss Re Shared Services (India) P Ltd vs DCIT-TS-352-ITAT-2017(Bang)-TP I.T(TP).A.No.1139/bang/2011 dated 03.05.2017

299. The Revenue filed an appeal challenging the order of the Tribunal on two grounds i.e. i) Whether Vishal Information Technology was rightly excluded on the ground of difference in business model and ii) whether the Tribunal was justified in holding that KPOs could not be compared to the BPO assessee. The Court, relying on the decision of the High Court in Rampgreen, dismissed the appeal of the Revenue stating that no substantial question of law arose therein and held that the Tribunal's order did not suffer from any infirmity.

EXL Services.com India Pvt. Ltd TS-411-HC-2017(DEL)-TP- ITA 329/2017 dated 15.05.2017

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

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

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

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

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

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

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

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

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

303. The Tribunal held that the assessee engaged in the business of providing software development and application engineering services to its AE could not be compared to:-
- I Power Solutions Ltd. as it was dissimilar to the assessee on account of difference in revenue recognition policy as it was based on completed contract method while the assessee followed proportionate completion method. Further there was also difference in terms of salary cost, foreign exchange earnings and comparability in term of size and operation
 - VMF Soft-tech Ltd having turnover of Rs. 2 cr. as it failed the turnover filter of 1/10th of the assessee's turnover i.e. 135 Cr.
 - Xcel Vision Technologies Ltd. having turnover of Rs. 90 lakhs as it failed the turnover filter of 1/10th of assessee's software segment turnover of Rs. 135cr.

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

304. The Tribunal upheld DRP's exclusion of 6 companies having turnover more than Rs.200 crores while benchmarking software development services rendered by the assessee whose turnover was Rs 17.10 crores. It held that though Rs.200 crores turnover filter adopted by the DRP was not appropriate, even if the filter of 10 times of assessee's turnover was applied, the companies which had more than Rs.171 crores of turnover would be excluded i.e 10 times the assessee's of 17.10 cr. Vis-à-vis the assessee's claim for risk adjustment, relying on the decision in the case of Zyme Solutions Pvt. Ltd [IT(TP)A No. 465/bang/2015] it held that where the assessee had not provided any computation for risk adjustment, the claim of the assessee was purely hypothetical in nature and accordingly set aside DRP directions allowing 1% risk adjustment.

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

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

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

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

306. The Tribunal relying on the decision in the case of Symphony Marketing [TS-915-ITAT-2016(Bang)-TP] held that the assessee engaged in the business of providing software development services could not be compared to:-
- Infosys BPO as it was engaged in the business of providing BPO services and had huge brand value having significant influence on the pricing policy.
 - Wipro Limited (BPO division) as it owned substantial intellectual property on software products.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- Virinchi Technologies Limited since as per the annual report, the company was engaged in R&D in software engineering technology and products. Further, the segmental data was unavailable.
- Thirdware Solutions Limited since the company was engaged in diversified activities such as software design and consultancy, trading and development of software, subscription contracts, sale of user license for which no segmental details were available.
- Gebbs Infotech Limited since the company provided software development services as well as BPO services and segmental operating margins were not available
- WTI Advanced Technology since the company reported income from technical services rendered, CAD (computer aided design) convergent drawings and software services and segmental details were not available.
- Transworld Infotech Limited as the company was engaged in software solutions and products as well as consultancy services and segmental details were unavailable.

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

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

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

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

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

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

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

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

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

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

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

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

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

- E-clerx Services Ltd as it was providing high end services involving specialized knowledge and domain expertise.

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

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

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

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

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

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

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

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

- KALS Information Systems Ltd as it was engaged in developing software products and not purely engaged in software development service provider.
- Bodhtree Consulting Ltd as it was engaged in sale of software products and therefore could not be compared to the assessee.
- Tata Elxsi Limited as it was engaged in software development services which comprised of embedded product design services, industrial design and engineering services and visual computing labs and system integration services segment and no segmental breakup was available.
- Infosys Technologies Limited as it was engaged in development as well as sale of software products and therefore functionally dissimilar to the assessee.
- Persistent Systems Ltd as it was engaged in software product development and product design services and therefore functionally dissimilar to the assessee.
- Infosys BPO Ltd as it was a giant company with huge turnover and brand value.

TE Connectivity Global Shared Services India Pvt. Ltd vs. ITO-TS-1049-ITAT-2017(Bang)-TP I.T.(T.P) A. No.1280/Bang/2014 dated 13.12.2017

319. The Tribunal held that the assessee engaged in the business of providing ITES services to its AE could not be compared to:

- Accentia Technologies Ltd as it was engaged in providing a gamut of services, had significant intangibles. Further, segmental details were unavailable.

- Cosmic Global Limited as it had outsourced its main activity and the employee cost was less than 21.30%.
- Fortune Infotech Limited as it was engaged in providing web application development including mobile applications, e-Commerce applications and SEO services, developing CMS based website using Drupal, Joomla, WordPress, e-Commerce Magento etc., offering onsite and offsite services to various clients and also into web designing services.
- Igate Global Ltd as it had a turnover of Rs. 932.18 crores as compared to the assessee's turnover i.e Rs. 76.91 crores.
- Infosys BPO Limited as it was engaged in diversifying services like customer service outsourcing, finance and accounting, knowledge services, human resource outsourcing, legal process outsourcing, sales and fulfillment, sourcing and procurement outsourcing, banking and capital outsourcing, media outsourcing, energy outsourcing, retail, etc. Further, it had an exceptional year of operation as it had acquired McCamish Systems LLC to provide end to end services.
- TCS E-serve International Limited as it was engaged in providing transaction processing and technical services which was functionally dissimilar to the assessee.
- Satyam BPO Limited as the financials were not reliable due to fraud.
- Further, It remitted R Systems International Limited to the file of TPO to examine its functional similarity vis-à-vis the assessee.

Vertex Customer Services India Private Limited (now merged with Vertex Customer Management India Private Ltd) vs. DCIT-TS-1052-ITAT-2017(DEL)-TP dated 28.11.2017

320. The Tribunal noting that the services/ products and functions rendered by Cybermate Infotek Ltd (CIL) i.e providing Custom Built Software development, product development and IT services to customers in domestic and overseas locations were broadly similar to the assessee engaged in providing low end software development & localization services to its AE, upheld AO's retention of CIL as a comparable as TNMM required only broad functional and product/services comparability which was satisfied in the present case.

Lionbridge Technologies Pvt. Ltd vs. ACIT-TS-984-ITAT-2017(Mum)-TP ITA No. 1291/MUM/2017 dated 07.11.2017

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

- Tata Consultancy Ltd as it had earned income from information technology and consultancy services but segmental details were not available.
- Wipro Ltd as it was a leading provider of IT service including business process outsourcing (BPO) and had other products such as IT products and customer care and segmental details were unavailable.

Adobe Systems India Pvt Ltd vs. JCIT-TS-1008-ITAT-2017(DEL)-TP ITA No.1163/Del/2014 dated 30.11.2017

322. The Tribunal held that the assessee engaged in online courseware development services to its AE could not be compared to:

- Infosys Technologies Ltd as it was a giant company in terms of risk profile, nature of services, number of employees, ownership of its branded products and brand related profits, having huge turnover of as compared to assessee's turnover (which was 1043 times of the turnover of the assessee). Further, it also noted that this company was also into software product and incurring huge amount of its R&D.
- KALS Information Systems as it was engaged in imparting training on commercial basis of selling its software products and therefore was functionally dissimilar to the assessee.
- Tata Elxsi Ltd as it was engaged in distinct activities like development of hardware and software for embedded products, such as multi-media and some other electronic etc. and it was also engaged into making some programmes developing technology and was having huge intellectual property.
- Wipro Limited as it had significant investment in R&D for development of IP and products to the extent of 11% of the revenue. Further, it had huge turnover (Rs.11,955 crore), substantial

intangible assets in the form of goodwill and there was no availability of standalone data for FY 2007-08.

Element K India Pvt. Ltd vs. ITO-TS-959-ITAT-2017(DEL)-TP ITA No.6277/Del./2012 dated 22.11.2017

323. The Tribunal held that the assessee engaged in the business of provision of finance/IT back office support services could not be compared to:

- E-clerx Service Limited as it outsourced most of its services. Further, it provided services through two business units viz., financial services including consulting business analysis and solution testing and sales and marketing services which also included web content management & merchandising execution, web analytics which were high end KPO services and segmental details for the same were not available.
- TCS E-serve Limited as it was a subsidiary of Tata Consultancy services limited having an inherent element of very high brand value associated with it. Further, it was engaged in rendering services broadly comprising of transaction processing and technical services including software testing, verification and validation for which no segmental bifurcation was available.
- ICRA Technology Analytics Ltd as it was engaged in the business of software development and consultancy, engineering services, web development and providing business analytic and business process outsourcing and thus functionally dissimilar to the assessee.
- Accentia Technologies Private Limited as it had acquired a software development company during the year due to which its revenue had significantly increased affecting the pricing and comparability of the company vis-à-vis the assessee.

BC Management Services Pvt Ltd vs DCIT-TS-438-ITAT-2017(DEL)-TP-ITA No.6134/del/2015, 5839/del/2015 and 6572/del/2016 dated 25.05.2017

324. The Tribunal held that the assessee engaged in the business of providing back office processing services to AE could not be compared to:

- Tricon India Limited as it had developed a unique software to provide BPO services to customers and thus was functionally dissimilar to the assessee.
- Fortune Infotech Limited as it had developed unique software from which it would derive substantial benefits/advantages and therefore could not be compared to the assessee which was providing pure call centre services.
- Wipro BPO Solution Ltd as it had unique intangibles considering the influence of the wipro brand.

Further, it remitted the comparability of Ultramarine & Pigments Ltd, Spanco Telesystems & Solutions Ltd, Allsec Technologies Ltd to the file of AO/TPO as they were functionally dissimilar to the assessee and this issue had not been examined by the AO/TPO.

Siemens BPO Services Pvt. Ltd vs DCIT-TS-530-ITAT-2017(BANG)-TP

325. The Tribunal held that the assessee engaged in providing back office service in the ITeS sector could not be compared to:-

- Infosys BPO Ltd as it had an extraordinary event of amalgamation during the year. Further, it earned revenue from providing business process management services to other organizations engaged in outsourcing business services.
- Accentia technologies ltd as it was engaged in diversified activity of medical activity of medical transcription, medical coding, billing, receivable management which were functionally different from the service of contract center service provided by assessee.
- Cosmic Global ltd as it was engaged in providing service of medical transcription and consultancy services, translation services and accounts of BPO and therefore functionally dissimilar to the assessee.

Business Process Outsourcing (India) Pvt Ltd vs DCIT-TS-577-ITAT-2017(Bang)-TP dated 09.06.2017

326. The Tribunal held that the assessee engaged in the business of providing shared services (ITeS) to its AE could not be compared to:
- Accentia Technologies Ltd as there was an extraordinary event of merger and amalgamation during the year and thus could not be compared to the assessee.
 - Infosys BPO Ltd as it was engaged in the business of providing software products apart from software services and therefore functionally dissimilar to the assessee. Further, it owned intangible assets and had a brand value commanding premium pricing.
- Flextronics Technologies India Pvt Ltd vs DCIT-TS-588-ITAT-2017(BANG)-TP-ITA No. 649/bang/2015 and Cr. objn IT(TP)A No. 208/bang/2015 dated 21.06.2017***
327. The Apex Court admitted Revenue's SLP challenging Delhi HC ruling in the case of Actis Global Services Pvt. Ltd. The High Court had declined to interfere with the Tribunal ruling on comparability analysis and held that Infosys BPO and Eclerx services ltd were incomparable to assessee engaged in providing KPO services.
- Pr.CIT vs Actis Global Services Pvt Ltd-TS-619-SC-2017-TP-6657/2017-ITA No. 2280/mum/2017 dated 04.08.2017***
328. The Tribunal held that the assessee, engaged in providing software development could not be compared to:
- Vishalsoft Technologies Ltd as 56% of its expenses had been incurred in respect of onsite software development as against assessee who is a captive service provider and it also incurred R&D expenses to the extent of 4.96 percent of its sales and therefore operated a different business model
 - Infosys Technologies Ltd & Satyam Computer Services Ltd as they were functionally not comparable to the assessee a captive service provider.
 - L&T Infotech Ltd as the TPO/AO had accepted the exclusion of this company in remand report dt.8.1.2010 for the case of Vishal Web Solution Ltd and therefore could not take a different stand in this appeal
 - Geometric Software Solution Co. Ltd as its Related Party transactions (16.40 percent) exceeded the 15 percent filter applied.
- DCIT vs. Novell Software Development (India) Pvt. Ltd - TS-190-ITAT-2017(Bang)-TP - I.T. {T.P} A. No.1313 / Bang / 2012 dated 10.02.2017.***
329. The Tribunal held that the assessee engaged in in provision of software development and marketing support services to its AEs could not be compared to:
- Exensys Software Solutions as it was a product development company and a BPO and had also earned abnormal profits due to amalgamation (extra-ordinary event)
 - Satyam Computers Ltd as the financial results of the company were unreliable
 - Thirdware Solutions as it was engaged in the business of information services, consulting and outsourcing company and also derived income from sale of licenses.
 - Infosys Technology Ltd on account of its high brand value
 - Flextronics Software Systems Ltd as it incurred substantial R&D expenses
 - Tata Elxsi as it was engaged in diverse activities which were dissimilar to those rendered by the assessee
 - Bodhtree Consulting as it was engaged in provision of niche IT services and it had fluctuating margins year-on-year since it followed different revenue recognition policies
- Further, it held that L&T Infotech Ltd & iGate Global Solutions Ltd, which were excluded as comparable by the CIT(A) on the ground that their turnover exceeded Rs.200 crore, were to be considered as comparable as turnover was not a relevant criterion for the purpose of deciding the comparability as Rule 10B(2) does not specify turnover as one of the factors for deciding comparability.
- Electronics for Imaging India Pvt. Ltd vs. DCIT - TS-169-ITAT-2017(Bang)-TP - IT(TP)A No.462/Bang/2013 dated 10.03.2017***
330. The Tribunal held that assessee, engaged in rendering ITES to its group companies could not be compared to the following companies viz. a). Accentia Technologies as it was engaged in high on-site operations in different geographical zones and it had undertaken extra-ordinary events

(merger) during the year which resulted in higher profits b). Asit C Mehta as it had abnormally low employee cost c). Bodhtree Consulting Ltd as it was engaged in software development therefore functionally different, d). Eclerx Services Ltd as it was a KPO service provider and it reported extraordinary high profits e). Mold Tek Technologies Ltd as it was engaged in providing structural engineering consulting services under the KPO division f). Vishal Information Technologies since it outsourced a large portion of its work to third party vendors and g). HCL Comnet Systems and Services Ltd, Infosys BPO Ltd, Wipro Ltd on account of functional difference, high brand value and premium pricing.

TNS India Pvt Ltd v ACIT – TS-45-ITAT-2017 (Hyd) - TP

331. The Tribunal held that the assessee, engaged in the business of providing software development, quality assurance and support services to its AEs could not be compared with:

- E Infochips Bangalore Ltd as it was engaged in the business of software and ITES without adequate segmental data
- Kals Info Systems Ltd as it was engaged in the development of software products
- Tata Elxsi as it had high turnover, was engaged in complex activities and did not have segmental data.

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

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

AY 2008-09

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

AY 2009-10

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

AY 2010-11

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

AY 2011-12

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

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

Investment Advisory Services

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

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

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

It also included the following companies that were excluded by the TPO:

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

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

335. Where the assessee was engaged in providing non-binding investment advisory services to its AE, the Tribunal allowing assessee's appeal held that Asian Business Exhibition and Conference limited could not be compared to the assessee as it was engaged in the business of organizing exhibitions.

Intellectual Venture India Consulting Pvt. Ltd-TS-884-ITAT-2017(Bang)-TP dated 20.10.2017

336. The Tribunal held that the assessee engaged in the business of providing investment advisory services to its AE could not be compared to Motilal Oswal Investment Advisors Pvt Ltd. as it was engaged in providing merchant banking functions rendering it functionally dissimilar to the assessee. Further, considering the assessee's submission that the AO had erred in considering interest income as operating income, it remitted the comparable Integrated Capital Services Ltd to the file of AO to verify the same and pass a consequential order.

WL Ross India Pvt. Ltd vs DCIT-TS-954-ITAT-2017(mum)-TP-ITA No. 977 / mum / 2015 dated 03.11.2017

337. The Tribunal held that the assessee engaged in providing investment advisory services to its AEs could not be compared to:
- Brescon Advisors & Holdings Ltd as it was carrying on merchant banking and investment activities along with providing project advisory services. Further, it had two streams of income namely fee based financial services and other income.
 - Keynote Corporate Services limited as it was engaged in merchant banking and therefore was functionally dissimilar to the assessee.

DE Shaw India Advisory Services Pvt. Ltd vs. DCIT-TS-817-ITAT-2017(DEL)-TP ITA No. 1681/Del/2015 dated 24.07.2017

338. The Tribunal held that the assessee engaged in providing investment advisory services to its AEs could not be compared to:
- Brescon Corporate Advisors as it was engaged in merchant banking and its main source of income was from recapitalization advisory and debt syndication.
 - Keynote Corporate Services Ltd as it had launched an ESOP division which focused on designing and implementing stock option schemes for corporate

ChrysCapital Investment Advisors (India) Private Limited vs Addl.CIT-TS-772-ITAT-2017(DEL)-TP ITA No.4294/Del./2014 dated 19.09.2017

ChrysCapital Investment Advisors (India) Private Limited vs Addl.CIT-TS-754-ITAT-2017(DEL)-TP dated 19.09.2017

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

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

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

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

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

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

340. The Tribunal held that the assessee, engaged in providing non-binding investment advisory services' to its AE could not be compared to:

- Centrum Capital Limited as it was engaged in 'merchant banking' activities having its main income from syndication fees, brokerage and commission and trading in bonds
- Keynote Corporate Services Limited as it was engaged in providing merchant banking activities involving lead managing IPOs, right offer, buyback of shares and takeover, corporate finance and M & A advisory
- SREI Capital Markets Limited as it carries out full scale investment banking, corporate advisory and project management consulting firm, and primary income is from merchant banking activities and it operated under a single segment, i.e., Project consultancy, merchant banking and underwriter services
- Sumedha Fiscal Services Limited as it was engaged in providing merchant banking activities involving loan syndication and project consultancy services

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

341. The Tribunal held that the assessee, engaged in providing non-binding investment advisory services could not be compared to Motilal Oswal Investment Advisers Pvt. Ltd as it was a merchant banker and therefore not functionally comparable. Further, it held that ICRA Management Consulting Services Ltd & IDC India Ltd were to be accepted as comparables as they had been accepted as comparables by the Tribunal in the assessee's own case for prior assessment years.

Warburg Pincus India Pvt. Ltd. vs DCIT - TS-238-ITAT-2017(Mum)-TP- I.T.A.No.1612/Mum/2015 dated 29.03.2017

342. The Tribunal held that the assessee engaged in the business of providing non-binding investment advisory services could not be compared to :-

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

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

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

343. Where the Tribunal had excluded 3 comparables on the ground that they were engaged in debt syndication, debt financing, IPO advisory etc, the Court set aside Tribunal's order on comparable selection for benchmarking the international transactions of the assessee providing non-binding investment advisory services. It noted that the Tribunal had gone by usage of terms such as debt syndication, debt financing, IPO advisory etc appearing in annual reports of the 3 contested comparables (merchant bankers) to be functionally dissimilar. Observing that the services of the assessee could not be termed as that of merchant banking though there may be some overlap in the advisory segment of the services provided by merchant bankers, it restored the comparability of 3 companies back to CIT(A).

Avenue Asia Advisors Pvt. Limited vs. DCIT-TS-737-HC-2017(DEL)-TP ITA No. 350 / 2016 dated 18.09.2017

344. The Tribunal held that the assessee engaged in the business of providing non-binding investment advisory services to its AE could not be compared to:

- Eclerx Services Limited as it was engaged in providing data analytics and risk management services rendering it functionally dissimilar to the assessee.
- Mold-Tek Technologies limited as it was engaged in providing engineering design services and therefore was functionally incomparable to the assessee.

- Acropetal Technologies as it was engaged in providing engineering design services and information technologies services without adequate segmental data rendering it functionally dissimilar to the assessee.
- Crossdomain Solutions Limited as it was engaged in providing data processing services and insurance claim processing and therefore was functionally not comparable to the assessee.

Apax Partners India Advisors Private Limited vs DCIT-TS-743-ITAT-2017(MUM)-TP-ITA No.628/Mum/2013 dated 12.09.2017

345. In case of the assessee providing investment advisory and support services to its AE, the Tribunal had disagreed with assessee's contention that it was merely a non-binding investment advisory service provider and affirmed characterization of the assessee by the TPO as a merchant banker / fee based investment and financial advisory service provider. Further, as regards AE receivables the Tribunal had restored the computation of the notional interest on outstanding receivables to the TPO with directions to compute interest for receivables on day to day basis and apply the LIBOR rate of interest as against PLR used by the TPO. The Court admitted assessee's appeal challenging Tribunal's order and framed 3 questions for determination viz.(i) characterization of assessee's function as a merchant banker (ii) inclusion of certain comparables selected by the TPO considering assessee's business profile (iii) whether the Tribunal erred in upholding addition of notional interest on outstanding receivables from AE.
- Avenue Asia Advisors Pvt. Ltd vs DCIT-TS-415-HC-2017(DEL)-TP-ITA 350/2016 dated 26.04.2017***

Manufacturing

346. The Tribunal held that the assessee engaged in the business of manufacture and/or assembly of components of cable glands, hydraulic motors and pumps and its parts could not be compared to:
- Amtek Auto Ltd as it was engaged in automotive components and therefore could not be compared to the assessee.
- In respect of the Hydraulics Division i.e Sale of motor & pumps, noting that the assessee had sought exclusion of Dynamatic Technologies Ltd and Denison Hydraulics India Ltd on the ground of their related party transaction (RPT) was more than 15% of the revenue and the TPO had not applied RPT filter, the Tribunal remitted the matter back to the file of TPO/AO to exclude the same if the RPT was more than 15%.
- British Engines (India) Pvt. Ltd. vs. DCIT-TS-890-ITAT-2017(bang)-TP IT(TP)A No.1454/Bang/2010 dated 06.11.2017***
347. The Tribunal held that Astra Microwave Component Ltd (AMCL) could not be considered as comparable to the assessee, engaged in the manufacturing and export of microwave components as the assessee was a captive unit as against AMCL, a full-fledged manufacturing and marketing company. Further, it also held that the assessee was not a complete manufacturer of the final product, but was only making value addition on behalf of the AE and therefore, it excluded the same company.
- Akon Electronics India Pvt. Ltd vs. DCIT – TS-105-ITAT-2017 (Del) – TP ITA No.4804/Del/2009 ITA No.4837/Del/2009 dated 15.02.2017***
348. The Tribunal held that the assessee engaged in the business of manufacture and sale of train components could not be compared to:
- Shanthi Gears Ltd as it was engaged in the manufacturing of gears and geared boxes used in textile machinery, power sector etc whereas assessee operated in the automotive sector
 - International Combustion (India) Ltd as it was engaged in the manufacture and sale of premium quality equipments, it has three business divisions i.e. heavy engineering, polymer and bauer and catered to a different industry.
- Spicer India Limited Vs ACIT - TS-99-ITAT-2017(PUN)-TP - ITA No.251/PUN/2014 dated 10 . 02.2017***

349. The Tribunal remitted the issue in the case of assessee's contract manufacturing & software services segments to the file of AO/TPO in respect of the following comparables:
- Aztech Software Ltd, Accel Transmatics Limited, Megasoft Limited where the assessee contended that the companies failed the RPT filter of 15% as it had an RPT of 17.35%, 30.76% and 52.74% respectively. The Tribunal questioned assessee about the correctness of RPT% submitted vis-à-vis TPO's order and accordingly remitted the matter to the AO/TPO for fresh decision.
 - Infosys Technologies Limited, KALS Information Systems Ltd and Tata Elxsi Ltd as the assessee contended that these companies should be excluded on grounds of functional dissimilarity. Accordingly, Tribunal remitted the matter back to the AO/TPO for fresh consideration.
- GE Medicals Systems India Pvt Ltd vs DCIT-TS-587-ITAT-2017(BANG)-TP-ITA no. 1414(bang)2010 dated 23.06.2017***
350. The Court dismissed Revenue's appeal seeking exclusion of HMT Limited as a comparable for assessee engaged in manufacture and export of tractors. Noting that both assessee and HMT Limited were in the segment of manufacture of tractors and power tillers and performed the same functions, the Court upheld Tribunal's view that that exclusion of a company only on the ground of high turnover was not justified. Further, it rejected Revenue contention that HMT should be excluded as it was a government company and held that no provision of law which makes any distinction between a government owned company and a company under private management for the purpose of transfer pricing audit and/or fixation of ALP and accordingly dismissed the appeal.
- CIT vs. Same Deutz – Fahr India Private Limited-TS-973-ITAT-2017(MAD)-TP dated 05.12.2017***
351. The Tribunal held that Shroff Engineering Limited engaged in in the manufacturing of premium "PLUGA" brand Submersible Pumpsets, Openwell Submersible Pumpsets, Drainage Pumps and Mini Monoblock Pumps was comparable to the assessee engaged in the business of manufacturing and sale of pumps to AEs and non-AEs and accordingly disregarded DRP's rejection of this company merely on the ground that TPO had no occasion to consider this company in the TP proceedings.
- Weir Minerals (India) Private Ltd. vs DCIT-TS-975-ITAT-2017(DEL)-TP ITA No.-2021/Del/2015dated 23.11.2017***
352. The Tribunal held that the assessee engaged in manufacturing of woodworking machinery and spare parts could not be compared to:
- Lakshmi Precision Tools Ltd as it had RPT of 74.41% which failed the RPT filter of 15% applied by TPO.
 - Guindy Machine Tools Ltd, Lykot Hitech Toolrooms Ltd, Kiran Machine Tools Ltd and Kulkarni Power tools Ltd as they were engaged in the business of software services and thus functionally dissimilar to the assessee engaged in the business of manufacturing machinery.
- Biesse Manufacturing Company Private Limited vs DCIT-TS-601-ITAT-2017(BANG)-TP-IT(TP)A No. 755/bang/2017 dated 07.07.2017***
353. The Tribunal held that the assessee engaged in manufacture and sale of luggage and travel accessories to its AEs could not be compared to:
- Gammco Limited as it was engaged in sales and marketing, services and assembling of DG sets as dealer and manufacture of DG sets and segmental details were unavailable.
 - TIL Limited as it was engaged in manufacturing and marketing of a comprehensive range of material handling, lifting port and road construction solutions with integrated customer support and after Sales Service and its products and services were termed as Materials Handling Solutions (MHS) rendering it functionally dissimilar to the assessee.

Samsonite South Asia Pvt Ltd vs. DCIT-TS-809-ITAT-2017(Mum)-TP ITA No.1934/Mum/2017 dated 01.09.2017

354. Where the assessee was engaged in the manufacture and export of tractors and the TPO rejected HMT Ltd as comparable on the ground that its turnover was Rs.248 crore as against the assessee's turnover of Rs.120 crore, the Tribunal observing that HMT Ltd. was engaged in the manufacturing of tractors and power tillers and was functionally similar to the assessee and held that the turnover of the company was only 2 times that of the assessee, included this company as a comparable.

SAME Deutz-Fahr India Pvt. Ltd. [TS-316-ITAT-2017(CHNY)-TP] - /ITA No.2666/Mds/2016 dated 22.02.2017

Research and Development Services

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

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

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

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

356. The Tribunal held that the assessee, engaged in contract research and development services could not be compared to:

- Celestial Biolabs Ltd as it was engaged in providing host of IT Services and some trading activity and also owned IPRs
- IDC India Ltd as it was engaged in providing market research and survey services
- Oil Field Instrumentations Ltd as the nature of assets employed and the activities performed indicate that the company was functionally different

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

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

357. The Tribunal held that the assessee engaged in providing R&D services to its AE could not be compared to:-

- Alphageo India Limited as it had not undertaken any R&D activities during the year and therefore was not comparable to the assessee.
- Vimta Labs as it was engaged in wide spectrum of services (focusing on food, water, drugs, clinical diagnostics and environment) which was functionally dissimilar to the assessee.
- Geologging Industries Limited as it was engaged in mudlogging services, drilling data monitoring services and wireline services and thus functionally dissimilar to the assessee.

FMC India Private Limited vs DCIT-TS-573-ITAT-2017(Bang)-TP-dated 23.06.2017

358. The Court noting that the Tribunal had excluded Celestial Labs as a comparable in respect of assessee providing contract research and testing services to AE on grounds on functional dissimilarity as the said company was engaged in providing diversified services such as rendering IT services encompassing application development and maintenance, production

support, EERP, data warehousing, SAP implementation and was also engaged into manufacturing and trading of products such as ERP package for manufacturing and had a product 'Sarijivani' which is a portal for live ayurvedic consultation, held that no substantial question of law arose and accordingly dismissed Revenue's appeal

Pr.CIT vs Tevapharm India Pvt Ltd-TS-730-HC-2017(DEL)-TP-ITA No 816 / 2017 dated 19.09.2017

Sales / Trading

359. The Court dismissed Revenue's appeal against Tribunal's exclusion of comparables in the absence of substantial question of law as the Tribunal had assigned clear reasons for exclusion of comparables. The TPO had rejected the comparables adopted by assessee and adopted new set of comparables. The Tribunal held that the following companies could not be considered as a comparable to the assessee engaged in the business of distribution and sale of digital switching equipment, cellular exchange equipment and other telecommunication equipment provided contract software development (CSD) services.

- E-Infochips Ltd. on the ground that it had income from software products and services and there was no segmental data available.
- Larsen & Toubro Ltd. on the ground that it had income from software development services and earned revenue from licensing of products
- Persistent Systems Ltd. on the ground that it was engaged in diversified services such as software consultancy, software product development and system integration services.
- Infosys Ltd. on the ground that it was engaged in providing software consulting and products.
- Zylog Ltd. on the ground that this company derived revenue from consultancy services, project and e Governance projects.

Alcatel Lucent India Ltd-TS-585-HC-2017(DEL)-TP-ITA No.515/2017 dated 18.07.2017

360. The Tribunal, ruling on selection of comparables in respect of assessee engaged in the business of trading of roller, chemical and blanket testing equipments, remitted the comparability of the Tirupati Incs Ltd and ITD imagnetic ltd to the file of AO/TPO directing it to verify whether the said companies were engaged in the business of trading and exclude it if it was confirmed that it was engaged in manufacturing operations.

Boettcher India Pvt. Ltd vs ACIT-TS-760-ITAT-2017(DEL)-TP-ITA No. 6610/Del/2016 dated 29.09.2017

361. The Tribunal held that the assessee engaged in trading of refractory materials and providing marketing support services to its AE could not be compared to:

- Basiz Fund Services Private limited as it was engaged in providing funds accounting services to fund administrators, insurance companies, prime brokers, private equity funds in selected geographies, managed accounts / portfolio accounts, family offices and internal fund accounting for hedge funds.
- ICRA Management Consultancy Services Limited as it was persistent loss making company.

DCIT vs. RHI India Private Limited-TS-818-ITAT-2017(MUM)-TP ITA No.244/Mum/2014 dated 07.08.2017

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

Sojitz India Private Limited [TS-177-HC-2017(Del)-TP] [ITA 28/2017]

Support Services

363. The Tribunal held that the assessee engaged in the business of providing business support services to its AE could not be compared to:

- Aptico Limited as it was engaged in providing services in the nature of Entrepreneurship development & Training, Asset Reconstruction & Management Services, Micro Enterprises Development rendering it functionally dissimilar to the assessee.
- TSR Darashaw Limited and Cameo Corporate Services Limited as they were engaged in performing share registry services which were different from the services performed by the assessee.
- Further, it included EDCIL (India) Ltd on the ground that financial information was available on the MCA website which was in public domain and it was providing similar services as the assessee i.e. technical support services, procurement services, training and management services etc. Further, it also included Sporting & Outdoor Ad-Agency Pvt. Ltd as there was a minor difference in revenue (1 lakh rupees) for the current year as compared to the previous year which could not be regarded as diminishing revenue.

Vestergaard Asia Pvt. Ltd vs. DCIT-TS-1020-ITAT-2017(DEL)-TP ITA No. 6670/Del./2015 dated 30.11.2017

364. The Tribunal held that the assessee engaged in the business of technical support services to its AE could not be compared to:

- Wapcos Limited as it was engaged in rendering consultancy services in Water Resources, Power and Infrastructure which included preliminary investigations and feasibility studies field studies, engineering design, drawings and tendering process, project management operations and maintenance and institutional/human resource development and was also a government company.
- Mahindra Consulting Engineers Limited as it was engaged in the provision of technical consultancy in Multi-Disciplinary Projects which included designing, engineering, procurement, construction, monitoring and supervision, infrastructure consulting services and integrated project management services.
- Further, it included Kirloskar Consultants Limited having an RPT of 11.79% as it satisfied the RPT filter of 25%.

Alcatel-Lucent India Ltd. vs. DCIT-TS-1027-ITAT-2017(DEL)-TP I.T.A .No. 6856/DEL/2015 dated 06.11.2017

365. The Tribunal directed the exclusion of Media Research Users Council as a comparable as it was a not for profit organization and as its major source of revenue was the income from its members in the form of membership fee and subscription fee for Indian Readership Survey (IRS) and Indian Outdoor Survey (IOS) reports and therefore could not be compared to the assessee engaged in the business of marketing support services.

Belkin India Private Limited vs. ACIT-TS-1031-ITAT-2017(DEL)-TP dated 12.12.2017

Autoliv India Pvt. Ltd. vs. DCIT-TS-1033-ITAT-2017(Bang)-TP dated 28.11.2017

366. The Tribunal held that the assessee engaged in providing marketing support services to its AEs could not be compared to:

- Asian Business Exhibition and Conferences Ltd as it earned revenues from organizing exhibitions and events, sponsorship, delegate fees and entry charge whereas the assessee only participated in such events.
- Killick Agencies & Marketing Ltd as it was engaged in varied activities such as exports of micro switches, engineering items and acoustics and head sets, indicating earning of revenue from sale of products and from activity as agent for various foreign principals for sale of dredgers, dredging equipment rendering it functionally dissimilar to the assessee.
- PAE limited as it was engaged in sale of automotive parts of various vehicles all over India and in providing warranty services to its customers in this regard and therefore was functionally dissimilar to the assessee.

- Salora International Ltd as it was engaged in the sale of mobiles, computers and computer peripherals and other telecom products of various companies all over India and also provided after sales services.

NI Systems (India) Pvt. Ltd vs. DCIT-TS-815-ITAT-2017(Bang)-TP IT(TP)A No. 10491Bang/2016 dated 13.09.2017

367. The Court dismissed Revenue's appeal against Tribunal order upholding exclusion of Mold-tek technologies ltd from the list of comparables for benchmarking back-office research services rendered by assessee to its AEs. Noting that the Tribunal had excluded Mold-Tek Technologies holding it was functionally dissimilar as it was dealing in engineering design and detailing services, website design services etc and on account of exceptional financial results due to mergers/demergers, the Court held that being a pure question of fact, the findings of the Tribunal, in the opinion of this Court, **could not** be looked into or faulted under Section 260A of the Income Tax Act.

Pr.CIT vs EVALUESERVE.COM Pvt Ltd-TS-859-HC-2017(DEL)-TP dated 31.10.2017

368. The Tribunal held that the assessee engaged in providing marketing support services to its AE could not be compared to:

- HCCA Business Services Pvt Ltd as it was engaged in providing payroll processing services and therefore was functionally dissimilar to the assessee.
- Killick Agencies and Marketing Limited as it was acting as agent for various foreign principals for sale of dredgers, dredging equipment, steerable rudder propulsions and other equipment and machineries rendering it functionally incomparable to the assessee.
- Asian Business Exhibition & Conferences Ltd as it was mainly engaged in the organization of exhibitions and events as well as conducting conferences on behalf of the various clients for their various products and businesses and therefore was functionally dissimilar to the assessee.

ITO vs. Alcon Laboratories Pvt. Ltd.-TS-942-ITAT-2017(Bang)-TP IT(TP)A No. 391/Bang/2015 dated 21.11.2017

369. The Tribunal held that the assessee engaged in providing marketing support services to its AE could not be compared to:

- ICRA Online Ltd as it had also derived revenue from software products and therefore was functionally dissimilar to the assessee.
- Agrima Consultants International Ltd as it was engaged in providing consultancy services to financial institutions rendering it functionally dissimilar to the assessee.

Further, it included Empire Industries Limited in the final set of comparables rejecting the TPO's contention that it should be excluded from the list as it had segregated trading/distribution activities from the marketing support segment.

Haworth (India) private Limited vs DCIT-TS-940-ITAT-2017(PUN)-TP ITA No. 281/PUN/2014, A.Y. 2009-10 dated 30.10.2017

370. The Tribunal held that the assessee engaged in providing customer support services to its AE could not be compared to:

- Accentia Technologies Ltd as it was engaged in onsite development and therefore was functionally dissimilar to the assessee.
- Coral Hubs Ltd as it was engaged in KPO services and had outsourced majority of its work.
- Cross Domain Solutions Ltd as it was engaged in providing KPO services rendering it functionally dissimilar to the assessee.

Eaton Industries Pvt. Ltd. vs. ACIT-TS-897-ITAT-2017(PUN)-TP ITA No.2544/PUN/2012 dated 30.10.2017

371. The Tribunal held that the assessee engaged in providing back office support services to its AE could not be compared to:

- Airline Financial services, Fortune Infotech Ltd, Datamatics Technologies Ltd. and Tricom Ltd as they had an RPT of 35.54%, 98.32%,52.54% and 58.03% and accordingly failed the 25% RPT filter adopted by TPO.

- National Securities Depository Ltd. as the revenue derived from the ITES sector was only 1.15%, further, it was also catering to government work and therefore was functionally dissimilar to the assessee.
- Shreejal Info Hubs Ltd. as it was a consistently loss making company and therefore could not be compared to the assessee.
- TSR Darashaw as the assessee had not provided copy of the annual report of this company and only a print of its web home page has been enclosed and it only means that the Annual Report or the Management discussion and analysis of this company is not available in the public domain and accordingly the company cannot be taken as comparable for want of sufficient information I data

DCIT vs Exxon Mobile Company India Pvt. Ltd.- TS-903-ITAT-2017(Mum)-TP- ITA No.8798/Mum/2011 dated 27.10.2017

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

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

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

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

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

374. The Tribunal held that the manufacturing segment of the assessee engaged in the business of handling sales, services and technical functions could not be compared to:-

- Rollatainers Limited as it had a different financial year and negative net worth for three consecutive assessment years.
- Stovec Industries Limited as it had a different financial year compared to the assessee and as per Rule 10B(4), data used for comparability had to be of the same financial year in which international transactions were entered into by the tested party.

Bobst India Private Limited vs DCIT-TS-510-ITAT-2017(PUN)-TP-ITA No 2231/PUN/2013 dated 24.05.2017

375. The Court, noting Tribunal's finding that Cosmic Global Ltd's nature of business was distinct from the one carried out by assessee engaged in the business of providing VISA processing services to its AE dismissed Revenue's appeal in the absence of substantial question of law. The Tribunal had remanded the matter back to the AO/TPO for determining the functional comparability of Cosmic Global vis-à-vis the assessee. The Revenue had contended before the Court that since the company was selected by the assessee as a comparable, it was not open for the assessee to deviate from the same.

VFS Global Services Pvt Ltd-TS-595-HC-2017(BOM)-TP-ITA No 336 of 2015 dated 19.07.2017

376. The Tribunal held that the assessee engaged in providing back office services to AE for AY 2010-11 could not be compared to:-

- Accentia Technologies Ltd as it was engaged in the business of medical transcription (which required employment of medical professionals and medical coding) as it was functionally dissimilar to the assessee.
- EClernx Services Ltd as it was a KPO company providing data analytics and data process solutions to global clients and it also provided end to end support through trade life cycle including trade confirmations and settlements and therefore functionally dissimilar to the assessee.
- ICRA Techno Analytics Ltd as it was engaged in business intelligence and analytics space and thus functionally dissimilar to assessee's back office services.
- Infosys BPO Ltd-relying on the decision in the case of Actis Global Service Pvt Ltd[TS-417-HC-2017(Del)-TP], it held that the size of the company was 20 times the assessee's size and therefore not comparable.
- TCS eServe International Ltd as it was engaged in the business of software testing, verification and validation of software and thus functionally dissimilar to the assessee.

Further, it remitted the comparability of R Systems Pvt Ltd and Omega Helthcare Ltd to the file of AO/TPO on the ground that R systems pvt ltd followed a different financial year than the assessee and Omega Healthcare Ltd's annual report which was not available in the public domain earlier was now available.

Further, it included e4e Healthcare Ltd as comparable **as it** was selected by assessee itself and it did not provide any reasons for withdrawing of the comparable at this stage.

Evalueserve SEZ (Gurgaon) Private Ltd vs ACIT-TS-564-ITAT-2017(DEL)-TP-ITA No. 1467 (Delhi) of 2017 dated 30.06.2017

377. Where the assessee was engaged in providing management of day-to day accounting functions, the Tribunal referring to the definition of ITeS under Safe Harbour Rules held that support services were primarily within the ambit of ITeS and if the core function was only to provide support services merely because high skilled personnel were involved, it could not be classified as high-end services. Accordingly, the Tribunal held that assessee's operational outsourcing services to AE was low-end ITeS for AY 2012-13. Based on the above ruling the Tribunal held that the assessee could not be compared to:

- Eclernx Services Ltd as it was engaged in providing KPO services which could not be compared to low end services rendered by assessee.
- Infosys BPO ltd as it had acquired company engaged in providing high end services. Further, it had incurred high AMP expenditure and had brand leverage and presence of intangibles.
- BNR Udyog ltd having RPT of 28.08% I.E >25% filter applied by TPO.
- TCS E-serve Limited as it was engaged in software testing and validation activity which was functionally dissimilar to the assessee.

Further, it remitted the comparability of R systems International ltd and Caliber Point Business Solutions ltd to verify if the quarterly audited statements were available.

IHG IT Services (India) Pvt. Ltd vs. DCIT-TS-638-ITAT-2017(DEL)-TP-ITA no. 397/del/2017 dated 30.06.2017

378. The Tribunal remitted the TP-issues in respect of marketing support services provided by assessee to AE. Noting that the comparables selected by TPO were well established and the assessee was in the initial stage of operation, the Tribunal directed the TPO to make adjustments to the operating expenses in order to give due leverage to the contribution of income to the fixed cost so as to bring it at the level playing field with the comparables. Further, observing that assessee had pointed out specific instances for allowing capacity underutilization adjustment which were not considered by CIT(A) & also furnished certain information on comparables which were not appreciated by CIT(A) in right perspective, it remitted the matter back to the file of AO/TPO for fresh adjudication.

Hitachi High-Technologies (Singapore) Pte Ltd-India BO vs. DDIT-TS-705-ITAT-2017(DEL)-TP-ITA No. 3333/del/2014 dated 28.08.2017

379. The Tribunal held that the assessee engaged in providing of BPO services (online recruitment services) to its AE could not be compared to:

- Accentia Technologies Ltd as it had a different strategy of growth by way of acquisitions and no segmental data was available.
- Eclerx Services Ltd as it was engaged in KPO services and therefore was functionally dissimilar to the assessee.
- Infosys BPO Ltd as it was a giant company and had a huge brand value making it incomparable to the assessee.
- TCS E Serve Ltd as it was engaged in providing technical services involving software testing, verification and validation of software at the time of implementation and data centre management activities and therefore was functionally dissimilar to the assessee.
- Crossdomain Solutions Ltd it was engaged in market research and analysis and IT services which included software development and maintenance and no segmental information was available.

ACIT & others vs. Monster.com-TS-718-ITAT-2017(HYD)-TP- ITA No. 1425 / H / 15 dated 30.08.2017

380. The Tribunal remitted the following comparables to the file of AO in respect of assessee engaged in providing customized and development support services to its AEs:

- Larsen & Toubro Infotech Limited as the functional comparability of this company required adjudication at the DRP level.
- Marveric Systems Limited as the DRP had restored this company holding that it failed the export earning filter of 75%. However, in the final order, AO included this company and granted part relief to the assessee.

Accordingly, it remitted the entire issue to the file of DRP and directed it to give a specific finding on the functional comparability of each company against which the assessee had contested.

Alten Calsoft Labs (India) Pvt Ltd vs DCIT -TS-735-ITAT-2017(Bang)-TP-I.T.,(T'P) A. No.403/Bang/2017 DATED 31.08.2017

381. Where the assessee was engaged in providing business process and back office support services to its AE, the Tribunal directed the TPO to exclude Eclerx Services ltd as a comparable since it was engaged in providing a diverse range of services such as financial services, sales and marketing support services without adequate segmental data.

Fractal Analytics Private Limited vs DCIT-TS-744-ITAT-2017(MUM)-TP-ITA No.1024/Mum/2017 dated 21.09.2017

382. The Tribunal held that the assessee engaged in providing Technical support services to its AE could not be compared to:

- HSCC (India) Ltd as it was a government company and its related party transactions were more than 25%
- Mitcon Consultancy & Engg. Services Ltd and Rites Ltd as both the companies had multi-dimensional functionality and RPT was 100%.

Granite Services International P Ltd vs ACIT-TS-731-ITAT-2017(DEL)-TP- ITA No. 532/Del/2016 dated 12.09.2017

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

Dialogic Networks (India) Pvt Ltd v DCIT – TS-2-ITAT-2017 (Mum) - TP

384. The Tribunal held that the international transaction of the assessee viz Provision of global call centre services could not be benchmarked by considering the following companies as comparable viz. Informed Technologies Ltd as the company was operating as an IT enabled knowledge based Back office processing centre, which was functionally different, Rev IT Systems Ltd as its RPT transactions were in excess of 25 percent of its total revenue. Further, it held that Allsec Technologies Ltd could not be excluded as comparable merely because it incurred losses as it was not a persistently loss making concern.

Dialogic Networks (India) Pvt Ltd v DCIT – TS-2-ITAT-2017 (Mum) – TP

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

Comverse Network Systems India v ACIT – TS-33-ITAT-2017 (Del) – TP

386. The Tribunal noted that the TPO was incorrect in categorizing the services provided by the assessee as technical support services and maintenance services and held that in light of the TP study report, it was clear that the assessee merely acted as an interface between the AEs and customers in India and therefore the services provided by the assessee were mediation services and income therefrom was to be characterized as income from mediation rather than income from technical and maintenance services. It further held that the following companies could not be compared to the assessee:

- Apitco Ltd as the said company was functionally dissimilar and did not have segmental results
- Choksi Lab Ltd as the company was engaged in providing testing services and services in the field of pollution control, not functionally similar to the assessee
- WapcosLtd as the company was engaged in infrastructure development projects

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

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

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

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

388. The Tribunal held that the assessee, engaged in marketing support services to its AEs could not be compared to:

- ICRA Techno Analytics Ltd (seg) as its service segment comprised of various services such as software development, software consultancy, engineering services, web development, web hosting, etc
- Persistent Systems & Solutions Ltd as the segmental details of software services were not available

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

389. The Tribunal held that the assessee, engaged in providing software development services to its AE could not be compared to Infosys Ltd as it owned significant intangibles, had huge revenues from software products and segmental details of software services were not available. Further, it remitted the issue of comparability of LGS Global Limited back to the file of the CIT(A), noting that instead of deciding the issue itself, the CIT(A) had remitted the matter to the file of the TPO, which was not in accordance with the provisions of Section 251 of the Act.

Samsung R&D Institute India Bangalore Pvt. Ltd. Vs. DCIT - TS-156-ITAT-2017(Bang)-TP - IT(TP)A No.55//Bang/2015 dated 03-03-2017

390. The Tribunal held that the assessee, engaged in providing customer support services to its AEs could not be compared to:

- Eclerx Services Ltd as it was involved in diverse services (business consultancy etc) in the nature of KPO services and there was lack of segmental data
- Accentia Technologies Ltd., (Seg.) as it operated a different business strategy i.e acquiring other companies for growth
- Cosmic Global Ltd as it was functionally dissimilar considering the fact that its segment revenue from BPO services was very low
- Informed Technologies Ltd as it had diverse operations, lack of segmental data, was engaged trading of securities
- Infosys BPO Ltd as it was a market leader and a giant company, had significant brand value, incurred large amount of marketing expenses.

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

391. The Tribunal allowed the grounds of the appeal of the Revenue wherein it contended that the CIT(A) was unjustified in 1) reducing lower limit of sales turnover filter from Rs. 1Cr to Rs. 0.50 Cr without assigning any reason 2) rejecting the wage/sales ratio of 25-50 percent where the

assessee's wage/sales ratio was 37% 3) including Astro Bio Systems (Margin: -18.26%) as comparable even when the assessee itself had eliminated comparables having margin less than 0.05%. It noted the submission of the assessee that even if the grounds of the Revenue were accepted, it would be at ALP. Accordingly, it remitted the matter to the file of AO/TPO to examine the veracity of the submissions made by the assessee.

However, it dismissed the Revenue's plea against exclusion of Four Soft, and upheld CIT(A)'s exclusion of the company citing presence of extra ordinary events i.e. merger/amalgamation.

DCIT vs. Aircom International India Pvt. Ltd - TS-162-ITAT-2017(DEL)-TP - ITA No.4836/Del./2009 dated 28.02.2017

392. The Tribunal held that the assessee, engaged in providing representation and logistics/marketing support services and cost reimbursement could not be compared to the following companies:

- IDC India Ltd as it was a KPO and could not be compared with the back office support services carried out by the assessee
- Empire Industries Ltd as it was engaged in the trading and indenting of industrial and medical equipment and machine tools

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

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

393. The Tribunal held that the assessee, engaged in providing business support services and supply based development services and information technologies to its AE could not be compared to the following companies:

- TSR Darashaw Ltd as it was engaged in organizing events with various kinds of sponsors therefore functionally different
- Access India Advisors Ltd as it had deviating margins from year to year.

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

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

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

394. The Tribunal held that the assessee (non-resident company incorporated in Cayman Islands) who had entered into various international transactions with its associated enterprises (AEs) viz. joint acquisition and development of IT infrastructure and software, provision of support services, interest on loan, management services could not be compared to:

- Aptico Limited as it was engaged in skilled allotment, asset reconstruction and management services
- IBI Chemature Limited since the company was engaged in the business of high-end engineering services and had high R&D cost
- TSR Darshwa Limited as it was engaged in the business of providing registrar and share transfer agency services
- Dalkia Energy services Limited and Kirloskar Consultants Limited on the ground of non-availability of financial data in public domain.

It however held that Global Procurement Consultants Ltd could not be excluded merely because it was a Government owned company and held that the fact that the company was a Government company does not have any impact on the business model of the company. It held that Government companies, which are mostly public sector undertakings also operate with similar functions, risks and assets employed, therefore it could not be said that merely because a company is a government company, it should be excluded from comparability analysis.

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

395. The Tribunal ruled on selection of comparables in case of assessee providing customer support services to AE for AY 2007-08. Noting that assessee was providing high end technical services with engineering inputs and architecture applications to its AE with engineering inputs and architecture, it ruled that the assessee could not be compared to
- Mold Tek Technologies Limited, relying on the decision of Tesco Hindustan Service Centre Pvt Ltd [TS-996-ITAT-2016(Bang)-TP] wherein this company was excluded on account of abnormal profits and it failed employee cost filter
 - eClerx Services Limited on the ground of abnormal profits.
 - Vishal Information Technologies Ltd as it was engaged into outsourcing and thus had a different business model than the assessee.
 - Infosys BPO Ltd on account of difference in size of operations.
- G.E India Exports Pvt. Ltd (Formerly GE Power Controls India (P) Ltd) Vs DCIT TS-348-ITAT- 2017(Bang)-TP IT(TP)A No.987/Bang/2011 dated 28.04.2017***

Others

396. The Tribunal held that the assessee engaged in the business of import of assembly of component and re-export of assembled medical disposable balloon catheters could not be compared to:
- Hindustan Syringes and Medical Devices Pvt Ltd as it had technology collaborations with multiple companies and carried out research and development in several areas including quality improvement, capacity optimization, waste reduction etc and therefore was functionally dissimilar to the assessee.
 - Pregna International Ltd as it was a leading contraceptive solutions organization and engaged in sale of components. Further, it also had an inhouse research team.
- Degania Medical Devices Pvt. Ltd. vs. ACIT-TS-946-ITAT-2017(DEL)-TP ITA No. 895/Del/2014 dated 07.11.2017***
397. The Tribunal remitted the issue of comparability of Lotus Labs to the file of the TPO noting that the assessee, a clinical trial coordinator, contended that it was not a good comparable on account of its significant RPT transactions and lack of segmental information in respect of the clinical trial segment of the said company.
- Astra Zeneca Pharma India Ltd v DCIT – TS-1074-ITAT-2016 (Bang) – TP I.T(TP).A NO.107/Bang/2014 dated 27.12.2016***
398. Where the comparable selected for benchmarking the assessee's international transactions in the crop protection segment operated in two segments viz. crop protection segment and pharmaceuticals segment, the Court upheld the order of the Tribunal and held that the relevant segmental results of the comparable were to be considered (segmental results of the crop protection segment) as opposed to the entity level results of the company.
- E.I Dupont India Pvt Ltd vs CIT - TS-179-HC-2017(DEL)-TP - ITA 40/2017, C.M. APPL.2421/2017 dated 01.03.2017***
399. The Tribunal held that the assessee engaged in providing cargo handling and freight forwarding services could not be compared to Gordon Woodfree Logistics Ltd and that the said company was rightly rejected by the TPO as it was a persistent loss making company. It noted that the

company made losses in the prior and relevant year and only earned a small profit in the subsequent year and therefore upheld the TPO's exclusion of the comparable.

As regards the TPO's selection of NR International Ltd and Natura Hue Chem Ltd, the Tribunal noted that though the said companies were engaged in various other businesses, the TPO had only considered the relevant segment viz. cargo handling segment for comparability and therefore upheld their selection.

Further, noting that the TPO had excluded Hindustan Cargo Ltd and Tiger Logistice (India) Ltd on the ground of non-availability of financial data for the relevant year, the Tribunal remitted the issue to the file of the TPO directing the assessee to furnish data for the relevant year for verification of comparability.

Ahlers India Pvt. Ltd. Vs DCIT - TS-150-ITAT-2017(CHNY)-TP - I.T.A.No.1071/Mds./2016 dated 03.03.2017

400. The Tribunal, relied on the decision of the co-ordinate bench in the case of the assessee for the earlier year and held that the assessee engaged in the business of rendering travel and financial services was comparable to Crown Tours Ltd, Tamarind Tours Pvt Ltd, Balmer Lawrie & Co Ltd and Trade Wings Ltd as they were also engaged in the business of Tours and travel.

Thomas Cook (India) Ltd v DCIT – TS-63-ITAT-2017 (Mum) - TP

401. The Tribunal held that the assessee, engaged in providing travel security services to its AEs could not be compared to:

- Apitco Ltd as the company was engaged in providing services in the nature of Project report preparation, Technical and economic studies, Feasibility studies, Micro enterprise development, Skill development, Project management consulting, Industrial cluster development, Environmental management consulting, Energy management consulting, Market and social research and Asset reconstruction management services without any segment-wise profitability data. Relying on the High Court ruling in Rampgreen Sales Pvt. Ltd. vs. CIT [TS-387-HC-2015(DEL)-TP], it dismissed the contention of the Revenue that the activities done by this company were mainly 'Business Services' and that differentiation of functions in the overall 'Business services' umbrella was taken care of under the TNMM.
- TSR Darashaw Limited (TSRDL) as the company was one of India's leading BPO organizations engaged in payroll & employees' Trust Fund administration & management, Record management, providing registry related services, depository related services etc and had striking dissimilarities with the assessee's tourists' safety services.

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

402. The Tribunal held that the assessee engaged in providing application engineering services to its AEs could not be compared to:

- Acropetal Technologies Ltd as an extra-ordinary event had occurred during the year and therefore it could not be considered as a valid comparable.
- Holtech Consulting Private Limited as it was engaged in providing comprehensive services from concept to commissioning for green field, modernization/expansion of cement as well as captive power plant rendering it functionally dissimilar to the assessee..
- Cather Consulting Engineers Pvt as it was involved in providing comprehensive consultancy services in the field of Power, Oil and Gas sectors in India and overseas and during the year it had received orders for project management services for a thermal power plant and therefore could not be compared to the assessee.

Rolls-Royce Marine India Private Limited vs. DCIT [TS-841-ITAT-2017(Mum)-TP] dated 18.10.2017

General

Functionality

403. The Tribunal, rejecting assessee's contention that Tribunal did not consider the functional comparability of Accentia Technologies while including it as a comparable held that the annual report of the company clearly stated that the revenue of the company was derived from medical transmission, billing, income from coding which were in the nature of ITeS and therefore comparable to the assessee. Accordingly, it dismissed assessee's miscellaneous petition.
Control Component India Pvt. Ltd vs DCIT-TS-997-ITAT-2017(Bang)-TP MP Nos.100 & 101/Bang/2017 dated 31.10.2017
404. The Tribunal following the order of the co-ordinate bench in the assessee's own case remitted the issue of exclusion of comparables on the basis of functionality back to the file of the TPO for fresh adjudication. It rejected assessee's reliance on judgments wherein the comparables were excluded and held that since the Tribunal in the assessee's own case had remitted the matter back to the file of the TPO, the facts being the same in the year under consideration, the matter ought to have been remitted to the TPO as well.
Open Silicon Research Pvt. Ltd vs. ITO-TS-1023-ITAT-2017(bang)-TP IT (TP) A No.131 (Bang) 2014 dated 14.02.2017
405. Where the DRP had applied onsite revenue filter to exclude only Thinksoft Global Services Ltd, the Tribunal held that the filter ought to be applied to all comparables and restored the matter to the file of AO/TPO for fresh decision after applying the onsite revenue filter to all comparables. Further, regarding assessee's plea for exclusion of KALS Information Systems, noting that its balance sheet showed inventory as on March 31, 2010 for which no schedule was available, it restored the issue to the AO/TPO directing him to invoke section 133(6) and obtain relevant data of inventory for the purpose of benchmarking.
ITO vs. Galax E Solutions India Pvt. Ltd.-TS-839-ITAT-2017(bang)-T IT (TP) A No. 166/Bang/2015 dated 13.10.2017
406. The Tribunal reversed the order of the CIT(A) order, wherein the CIT(A), relying on the decision of Mentor Graphic Noida, rejected the TPO's application of the employee cost filter ranging from 25% to 65% and held that since employee cost was low or similar throughout India, employee cost would not make a significant difference. Noting that the Tribunal in Mentor Graphics had not rendered any specific finding regarding the acceptability of the employee cost filter, the Tribunal held that since the assessee's employee cost to total cost ratio was 42 percent, companies having employee costs of 10% or 70% would not be comparable. Observing that after application of the 25 to 65% filter, 6 companies remained in the set of comparables, it held that since the number of comparables were sufficient to conduct benchmarking analysis, the application of the said filter by the TPO was justified.
DCIT vs. Unisys India Private Limited-TS-805-ITAT-2017(bang)-TP dated 28.09.2017
407. Where the assessee had obtained factory license, paid excise duty and carried on operations of value addition through plant and machinery, the Tribunal rejected assessee's classification of itself as a 'limited risk distributor and held that the TPO was correct in classifying the assessee's operations of slitting jumbo roll into smaller rolls and repacking it as 'manufacturing activity' for the purpose of benchmarking assessee's import transactions for AY 2012-13. It relied on the decision in the case of Northern Strip Ltd case and Apex Court decision in India Cine Agencies [TS-38-SC-2008], wherein it was held that cutting and slitting of polyester films was a manufacturing activity. Further, it rejected TPO's benchmarking approach whereby he had increased margin of trading comparables selected by assessee by 3%, and held that the presumption drawn by the TPO that the increase of margin by 3% would bring out the result for manufacturing activity also was not correct, since it did not consider the risks attached to manufacturing activity; Accordingly, the Tribunal remitted the selection of comparables to the file of AO directing it to select comparables which were engaged in similar activities of converting jumbo rolls into smaller sized rolls.
UPM-Kymmene India Pvt. Ltd vs. DCIT-TS-765-ITAT-2017(mum)-TP dated 27.09.2017
408. Where the assessee could not put forth any material difference in the FAR between itself and comparable's case, other than that the comparables had a very high profit during the year, the

Tribunal, relying on the decision in the case of Chryscapital Investment Advisors India (P) Ltd [TS-173-HC-2015(DEL)-TP] wherein it was held that mere high profit/loss cannot be basis for comparables exclusion, allowed Revenue's appeal and included Ultramine & Pigments Ltd as comparable for assessee providing ITES to AE.

DCIT vs. Vertex Customer Services India (P) Limited-TS-904-ITAT-2017(DEL)-TP ITA No. 5228/Del/2014 dated 06.11.2017

409. The Tribunal, noting that the DRP had applied onsite revenue filter to only one comparable (RS Software) in assessee's software development segment, accepted Revenue's appeal against the DRP order and held that if a new filter was applied, it had to be applied to all comparables and not to particular comparables on pick and choose basis. Accordingly, it remitted the matter to the file of DRP and directed it examine all comparables under the filter and examine the applicability of other relevant filter as well as functional comparability of those comparables.

ACIT vs Broadcom Communications Technologies Pvt Ltd-TS-932-ITAT-2017(Bang)-TP IT(TP)A No. 347/Bang/2015 dated 17.11.2017

410. Where the assessee was earning 90% of its revenue from onsite services, the Tribunal noting that the comparables selected by the TPO failed the onsite revenue filter, directed the TPO to consider the onsite revenue filter as the relevant factor for the purpose of selecting the comparable and accordingly, remitted the entire TP issue to AO/TPO for AY 2012-13.

Arowana Consulting Ltd vs. ITO-TS-876-ITAT-2017(bang)-TP dated 23.10.2017

411. Where the Tribunal had excluded (a) Ashok Leyland Projects Services Ltd as major part of its revenue was derived from wind energy segment and due to extraordinary event of merger during the year which presented a clear possibility of differential advantage. (b) Kitco Ltd as it was a substantial government undertaking and prominent business was from government entity and (c) Mitcon Consultancy & Engineering Services Ltd as it was engaged in diversified activities like training and engaging in laboratories and research etc. and it derived less than 75% of revenue from consultancy services, the Court held that the issue of inclusion/exclusion of comparables could not be treated as a question of law unless it was demonstrated that the Tribunal/lower authorities took into account irrelevant considerations or excluded relevant factors which impacted the ALP determination significantly. Accordingly, it dismissed Revenue's appeal.

Pr. CIT vs. WSP Consultants India Pvt. Ltd-TS-861-HC-2017(DEL)-TP ITA 935/2017 dated 03.11.2017

412. The Court dismissing Revenue's appeal, confirmed Tribunal's order of exclusion of comparables in case of assessee rendering software development services (IT), IT Enabled Services (ITeS) for AY 2008-09. on the ground that having carefully examined the order of the Tribunal in light of Rule 10B(4) of Income Tax Rules, 1962, the Court was unable to be persuaded that the exclusion of comparables for reasons set out in the order of the Tribunal gave rise to any substantial question of law. The Tribunal had excluded comparables on grounds of functional dissimilarity on account of revenue from software products/KPO services, ownership of branded/proprietary products, RPT filter > 15% and absence of separate segmental reporting.

.Pr. CIT vs Avaya India Pvt Ltd – TS-452-HC-2017(DEL)-TP-ITA No.838/2016 dated 16.05.2017

413. Where the assessee, engaged in the manufacture and sale of internal combustion (IC) engines for power generation and industrial applications in the domestic market as well as for export outside India entered into various international transactions relating to export of IC engines, payment of royalty and technical know-how fees to associate enterprises ('AEs'), rendering of procurement support services and receipt of commission from AEs as well as transactions relating to interest on extended credit period allowed to AEs and other transactions and, benchmarked the same under TNMM by aggregating the said transactions, which was rejected by the TPO who proceeded to benchmark the transactions on a stand-alone basis and made an

upward addition of Rs.40.64 crore, the Tribunal relying on Rule 10A(d) and 10B of the Rules as well as OECD Guidelines, held that, in appropriate circumstances, where there was existence of closely linked transactions, the same could be grouped and constituted as one composite transaction for the purpose of determining ALP. With regard to the facts of the case, it noted that, where the assessee's primary activity was to manufacture and sell IC engines and components, then the activities of importing engine parts and components, payment of royalty against receipt of know-how, provision of procurement support services to the AEs to help the sourcing of components, receipt of IT support services, design services and payment of technical knowhow fees, etc. were closely linked to the export of manufactured IC engines. Accordingly, it directed TPO to aggregate the various activities undertaken by assessee under the head of 'manufacturing activities' for the purpose of benchmarking.

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

414. The Tribunal remitted the TP issue relating to selection of comparables for benchmarking software development services rendered by the assessee to its AE noting that the both the assessee and the Revenue made various contradictory submissions regarding the inclusion / exclusion of comparables. Accordingly, it directed the TPO to re-work the ALP adjustment after conducting a fresh search of comparables by applying requisite filters and provided the assessee liberty to submit a fresh list of comparables.

eGain Communications Pvt Ltd v ITO - TS-51-ITAT-2017 (Pun) - TP - ITA No.1579/PUN/2013 dated 31.01.2017.

415. The Tribunal dismissed the assessee's appeal ex-parte since none appeared on behalf of assessee despite notice of hearing being served and acknowledgement available on record. It rejected the assessee claim for multiple year data and also rejected the assessee's ground against TPO's 'arbitrary' comparability analysis stating that it was general as assessee had not mentioned any specific comparable to be included / excluded on the basis of functionality. Further, it upheld the TPO/DRP's restriction of working capital adjustment to 1.63% for the reason that assessee had not quantified its claim before the lower authorities.

Salesforce.com India Pvt Ltd vs. DCIT - TS-255-ITAT-2017(Bang)-TP - IT (TP) A No.697 (Bang) 2016 dated 10-03-2017

416. The Court dismissed the Revenue's appeal against Tribunal order upholding TPO's inclusion of S.H. Kelkar and Company Limited as comparable for assessee engaged in the business of manufacturing industrial fragrance, flavours and chemical specialities. The Revenue contended that the Tribunal had not considered other instances where the said company was not held to be comparable. Expressing surprise that Revenue had filed an appeal against Tribunal order which was in its favour, the Court held that when the Tribunal held that the Transfer Pricing Officer was right in considering this company as comparable whereas some other instances wherein the said company was held to be not comparable were left out from consideration by the Tribunal, then, such findings and conclusion essentially on facts did not raise any substantial question of law.

CIT vs. Firmenich Aromatics India Pvt. Ltd - TS-286-HC-2017(BOM)-TP - INCOME TAX APPEAL NO. 2483 OF 2013 dated 22.02.2017

417. The Tribunal noting that for trading segment ALP determination, TPO had considered gross profit margin of a comparable- Advanced Micronic Devices Ltd at entity level, set aside CIT(A) order deleting TP-adjustment on international transaction in trading segment and held that if the comparable had more than one segment, then only the trading segment of the said company had to be compared with the assessee. Further, it held that the CIT(A) had violated the principles of natural justice by carrying out ALP determination exercise on its own without calling for remand report from AO/TPO and directed AO/TPO to consider the matter afresh in light of above observations.

DCIT vs Wipro GE Medical Systems Pvt Ltd-TS-429-ITAT-2017(BANG)-TP-IT(TP)A.No.40/bang/2011/ & 1647/bang/2013 dated 21.04.2017

418. The Court dismissed Revenue's appeal against Tribunal's decision wherein it included comparables having negative net-worth and held that when the FAR was comparable, it could not be said that the company was non-comparable unless it was shown how the negative net-worth of the company had impacted the profitability.
Pr. CIT vs Gillette Diversified Operation Pvt Ltd [TS-441-ITAT-2017(DEL)-TP] dated 02.05.2017
419. The Court, set aside Tribunal's order remanding TP-issues in respect of international transactions undertaken in assessee's distribution, agency & marketing segments without giving any conclusive finding on selection of comparables for AY 2008-09. It held that Rule 10B(2) r.w. Rule 10B(3) required that comparables selection to be made with reference to FAR analysis and after considering specific characteristic of the property transferred or services provided in both the controlled and uncontrolled transactions. Accordingly, it remanded the matter to the file of Tribunal for disposal on merits.
Corning SAS-India Branch Office vs DDIT-TS-725-HC-2017(DEL)-TP- ITA 505/2017 dated 18.09.2017
420. Noting that the TPO had conducted the benchmarking analysis of the assessee, a captive service provider, merely on the basis of the TP study, the Tribunal remitted the entire TP issue to the file of the TPO and held that it was incumbent upon the TPO to examine the assessee's agreement with its AE so as to ascertain its exact profile and that he could not merely rely on TP study or profile given in the audited accounts.
GE India Exports Pvt. Ltd vs DCIT-TS-426-ITAT-2017(BANG)-TP- IT(TP)A No.117/Bang/2014 dated 05.05.2017
421. The Tribunal excluded Nitin Fire Protection Industries Ltd from the set of comparables on the ground that its major income was from project related activity.
R Stahl Private Limited [TS-377-ITAT-2017(CHNY)-TP] I.T.A No.2745/Mds/2016 dated 19.04.2017
422. Where the assessee was not engaged in the activity of purchase and sales, the Tribunal held that the TPO had erred in selecting comparables engaged in trading activity while benchmarking the assessee's business support services and accordingly upheld CIT(A)'s order deleting TP-adjustment for AYs 2007-08 and 2008-09 in respect of the aforesaid services provided to its AEs for the purpose of sourcing of goods.
DCIT vs Itochu India (P) Ltd-TS-650-ITAT-2017(DEL)-TP-ITA No. 6287/del/2012 dated 18.08.2017
423. The Court, observing that the order of Tribunal did not give rise to any substantial question of law dismissed Revenue's appeal challenging exclusion of ICC International Agencies Ltd as a comparable for AY 2008-09.
CIT vs Panasonic Industrial Asia Pte Ltd-TS-520-HC-2017(DEL)-TP-ITA No. 244/2017 dated 24.04.2017
424. The Tribunal remitted the comparability of the following companies to the file of the AO/TPO for fresh consideration:
- Infosys Ltd, L&T Infotech Ltd, Midntree Ltd, R S Software Ltd, Tata Elxsi Ltd. Persistent Tech Ltd, Sasken Communications Ltd relying on the decision in the case of Chryscapital Investment Advisors (india) Pvt Ltd [TS-173-HC-2015(DEL)-TP] wherein it was held that before excluding a comparable based on turnover filter, some exercise had to be done by the AO/TPO to find out whether such a high or low turnover had any effect on the price and whether reasonable adjustment could be made for such difference.
 - Acropetal Tech Ltd- the Revenue had sought exclusion of this company on the basis that it did not qualify employee cost filter which was not applied to other companies. Accordingly, the

Tribunal remanded its comparability for fresh consideration and directed the AO/TPO to apply the filter to other comparables as well.

ITO vs Cenduit India Services Pvt. Ltd-TS-576-ITAT-2017(BANG)-TP dated 07.07.2017

425. The Tribunal noting that the TPO had applied filter of commission and related revenue not being less than 75% of the total revenue, excluded Priya International and ICC International Agencies Ltd as comparable for assessee's sales and marketing support services provided during AY 2007-08 on the ground that Priya International Ltd had 23% commission income while ICC International Agencies Ltd had commission income of 59% which did not meet the filter adopted by TPO.

Texas Instruments (India) Private Limited vs ACIT-[TS-544-ITAT-2017(Bang)-TP]- IT(TP)A No. 1032/Bang/2011 dated 16.06.2017

Data for the year

426. The Tribunal, relying on the decision of the Delhi High Court in the case of Mckinsey Knowledge Centre India Pvt. Ltd [TS-672-HC-2015(DEL)-TP (wherein it was held that if from the available data on record, the results for financial year can be reasonably extrapolated then the comparable could not be excluded solely on the ground that it had a different financial year ending) included R Systems International Ltd as a comparable in respect of assessee's ITES segment.

Bain Capability Centre India Pvt Ltd vs DCIT-TS-989-ITAT-2017(DEL)-TP dated 13.11.2017

427. Noting that assessee had not included Microgenetic Systems in final set of comparables due to non-availability of financial data which subsequently became available during assessment proceedings, pursuant to which assessee sought its inclusion, the Tribunal upheld CIT(A)'s direction to include the said company as comparable while benchmarking the assessee's international transaction viz., provision of engineering design services to its AE. Relying on the decision in the case of Vishay Components India Private Ltd [TS-356-ITAT-2016(PUN)] it held that since TPO had the powers to select and include any functionally comparable concern in the final set of comparables, data of which was available during TP proceedings and not TP study report, the same was permissible even in the case of the assessee. Accordingly, it dismissed Revenue's appeal.

Dar Al-Handasah Consultants (Shair and Partners) India Pvt Ltd-TS-741-ITAT-2017(PUN)-TP-ITA No. 1711 / PUN / 2014

428. Noting that engineering segment reported by assessee in its financial statement comprised of a) manufacturing and sale of goods, and b) engineering services and international transaction with AE pertained only to engineering services, however, data considered by TPO comprised of both engineering goods and services, the Tribunal remitted the TP-adjustment in respect of assessee's engineering segment to the file of TPO directing it to take only segmental data for comparability analysis & benchmarking. Observing that assessee had now submitted segmental data of engineering goods and services, the Tribunal accepted assessee's plea that when the segmental data is available, the same should be taken into account. It rejected DRP's observation that assessee had not demonstrated as to how both the divisions are not intertwined and held that by no stretch of imagination, the manufacture and sale of engineering goods on one hand and provision of engineering services on the other can be considered as the same segment unless specific facts to the contrary is put on record. Accordingly, it remitted the matter to the file of TPO for fresh adjudication.

Valmet Automation India Private Limited (Formerly known as Metso Automation India Private Limited) vs. DCIT-TS-812-ITAT-2017

429. The Tribunal remitted the comparability of R Systems International Ltd to the file of TPO as it had a different accounting year (Jan to Dec) directing it to verify the availability of data for FY (April to March). Regarding exclusion of certain companies as comparable, noting **that the TPO**

considered the services **rendered by these companies** as IT enabled services **based on** limited information **it accepted assessee's submission that** it would provide all relevant details if the matter was restored back to the TPO, **and accordingly** remitted the entire matter back to the file of TPO directing him to provide adequate opportunity of being heard to the assessee.

DCIT vs. Continental Automotive Component (I) Pvt Ltd-TS-825-ITAT-2017(Bang)-TP dated 28.09.2017

430. The Tribunal set aside the CIT(A)'s order deleting TP adjustment without giving reasons for taking average of multiple year data for computing PLI of comparables for AY 2005-06. It dismissed assessee's contention that variation in net profit of comparables by itself justified use of multiple year data and held that Rule 10B(4) specifically provides for using the data of the relevant FY and data of the 2 years prior to the relevant FY only if such data reveals facts which could have influence on the determination of the transfer price in relation to the transaction being compared. Noting that assessee had not brought on record any factual information showing the influence of the cyclic nature of the transactions of the comparables or having financial impact of operational activity over the subsequent years, the Tribunal held that CIT-(A) was not justified in deleting the transfer pricing addition without giving reasons for taking average of multiple year data for computing PLI of comparables.

ACIT vs. Va Tech Esher Wyas Flovel Ltd.-TS-902-ITAT-2017(DEL)-TP ITA No. 1675/Del/2010 dated 13.11.2017

431. Where the AO made a TP addition in the hands of the assessee adopting earlier years data for the purpose of benchmarking and the CIT(A) observing that that the AO had neither been able to establish that assessee's pricing pattern was influenced by market conditions/ business cycle etc. of earlier years nor provide fresh working of ALP utilizing current year data which could have been confronted before assessee, the Tribunal upheld the order of the CIT(A) and observed that as per Rule 10B(4) the data for comparability of an uncontrolled transaction with international transactions ought to have been the data of the relevant to the Financial Year in which the international transaction has been entered into, unless there were circumstances justifying the use of previous year data. It held that multiple year data could not be used as a matter of right and accordingly held that the CIT(A) was justified in rejecting the method and basis of making addition by the Assessing Officer.

DCIT vs. Softbrands India Pvt. Ltd (Now Infore Bangalore Pvt Ltd)-TS-934-ITAT-2017(bang)-TP IT(TP)A No. 461/Bang/2013 dated 17.11.2017

432. The Tribunal remitted the comparability of Lucid Software Ltd and Bodhtree Consulting Ltd to the file of TPO for fresh consideration. These comparables were selected by TPO, but the assessee had not objected to their inclusion as the specific details of the financials were not available in the public domain. However, after filing appeal before Tribunal, the assessee noticed that the details were available in the public domain and the Tribunal in various cases had held that since these two companies were engaged in product development, and their financials did not have adequate segmental details, they were functionally dissimilar to the assessee engaged in software development. Accordingly, the Tribunal admitted assessee's additional ground contesting the exclusion of these two companies and held that it would be in the interest of justice to allow the assessee to take these objections.

Moong Controls India P Ltd vs ACIT-TS-483-2017(Bang)-TP-IT(TP)A No. 1519/bang/2012 dated 09.06.2017

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

RBS India Development Centre Pvt Ltd - TS-18-ITAT-2017(Del)-TP

434. The Tribunal, observing that the assessee followed financial year (April to March) for accounting its income, whereas Bosch Chassis and Escorts Ltd followed the calendar year (January to December) and year ending September 2007, respectively, held that since the accounting year adopted by the said comparables were at variance with the financial year adopted by the assessee, the said companies were to be excluded from the final list of comparables, in order to benchmark the international transactions undertaken by the assessee.
Endurance Systems (India) Pvt. Ltd. vs ACIT - TS-114-ITAT-2017(PUN)-TP - TS-114-ITAT-2017(PUN)-TP ITA No.2567/PUN/2012 dated 15.02.2017
435. Where the assessee, in the manufacturing segment, had applied TNMM to benchmark its international transactions and claimed them to be at arm's length price based on certain select comparables but the TPO conducted a fresh search and selected certain other companies also, one of which was Tibrewala Electronics Ltd, which was added in the data base on 25.03.2008 i.e. beyond the due date of compliance, the Tribunal held that the assessee was incorrect in contending that the said company could not be used for benchmarking its international transactions based on the fact that it was selected on a later date. It held that data collected by the TPO could not be called non-contemporaneous, where the comparable companies selected by the TPO were functionally comparable to the assessee, observing that TPO has the power to use data gathered by him so long as (a) it was available in public domain (b) it related to the year under consideration (c) assessee had been given an opportunity to explain before the said data is used against him.
Accordingly, it upheld TPO's action in selecting the said concern and dismissed assessee's grounds.
Vishay Components Pvt Ltd v ACIT – TS-73-ITAT-2017 (Pun) – TP - ITA No.1712/PUN/2011 dated 10.02.2017
436. The Tribunal relying on its decision for the prior year held that for the purpose of benchmarking, the TPO was correct in adopting the single year data as the assessee had failed to demonstrate any peculiarities in the data that would justify invoking proviso to Rule 10B(4) permitting use of multiple year data. In this regard it held that the multiple year data in the case of a comparable could be used only to understand its peculiar circumstances and not to work out PLI of comparable and that the proviso to Rule 10B (4) provides that multiple year data can be invoked only if assessee demonstrates any Qualitative peculiarities in the data which reveal facts that are potent to justify invoking the proviso.
Vishay Components Pvt Ltd v ACIT – TS-73-ITAT-2017 (Pun) – TP - ITA No. 1712/PUN/2011 dated 10.02.2017
437. The Tribunal upheld TPO's rejection of assessee's TP-study due to failure to adopt filters like employee-cost filter and export earnings filter as well as use of 3 years weighted profit margin. Further, it rejected assessee's grounds to include/exclude comparables since no proper application had been made by assessee for admission of additional grounds and the same had not been a subject matter of proceedings before the AO/DRP.
Curam Software International Pvt Ltd vs ITO-TS-540-ITAT-2017(Bang)-TP-IT(TP)A No.192/bang/2017 dated 07.06.2017
438. The Apex Court, admitted Revenue's SLP challenging High Court decision upholding exclusion of comparable following different financial period and rejecting the Revenue's submission that mandate of Rule 10B of the Rules could **not** be ignored **merely because** the difference in the respective financial periods was only of three months.
CIT vs PTC Software (I) Pvt Ltd-TS-598-SC-2017-TP- SLP 16015/2017 dated 04.07.2017
439. The Tribunal, relying on the decision in assessee's own case for AY 2006-07 [TS-672-HC-2015(DEL)-TP] remanded the matter to the file of TPO directing it to verify the quarterly results and include CG-VAK Software & Exports as a comparable for the assessee since it was a listed company and quarterly results of the company were available in the public domain and accordingly there was no need of extrapolating the result.

Mckinsey Knowledge centre India Private Limited vs DDIT-TS-700-ITAT-2017(DEL)-TP-ITA No. 1879/del/2014 dated 30.08.2017

440. Noting that assessee had not included Microgenetic Systems in final set of comparables due to non-availability of financial data which subsequently became available during assessment proceedings, pursuant to which assessee sought its inclusion, the Tribunal upheld CIT(A)'s direction to include the said company as comparable while benchmarking the assessee's international transaction viz., provision of engineering design services to its AE. Relying on the decision in the case of Vishay Components India Private Ltd [TS-356-ITAT-2016(PUN)] held that since TPO had the powers to select and include any functionally comparable concern in the final set of comparables, data of which was available during TP proceedings and not TP study report, the same was permissible even in the case of assessee. Accordingly, it dismissed Revenue's appeal.

Dar Al-Handasah Consultants (Shair and Partners) India Pvt Ltd-TS-741-ITAT-2017(PUN)-TP-ITA No. 1711 / PUN / 2014 dated 30.08.2017

441. The Court dismissed Revenue's appeal against Tribunal's order noting that the Tribunal had excluded Tata Elxsi and E-Infochips as comparables on the ground that separate segmental details in respect of software development services segment was not available, as the order of the Tribunal given on facts, did not give rise any substantial question of law.

Pr.CIT vs. Steria India Ltd-TS-733-HC-2017(DEL)-TP -ITA no. 762 / 2017 dated 19.09.2017

442. The Apex Court, allowed Revenue's request to withdraw SLP against High Court order for AYs 2006-07 & 2007-08 wherein the Court had upheld exclusion of comparables on account of different financial year, rejecting Revenue's contention that a difference of 3 months could be ignored.

CIT vs. PTC Software India Pvt. Ltd-TS-707-SC-2017-I.A no. 84278 of 2017 dated 08.09.2017

Turnover

443. Where the CIT(A) had excluded several comparables applying the high turnover filter, the Tribunal relying on the decision in the case of Chryscapital Investment Advisors India Pvt Ltd [TS-173-HC-2015(DEL)-TP held that it had to be seen whether the size and turnover was materially affecting the price or not and whether the effect of such differences can be eliminated by way of a reasonable adjustment or not. Accordingly, it remitted the matter back to the file of CIT(A) for fresh consideration.

ITO vs. Huawei Technologies India Pvt Ltd-TS-826-ITAT-2017(bang)-TP-ITA No. 598/bang/2013, C.O No.192/bang/2015 dated 22.09.2017

444. The Tribunal, relying on the decision in the case of Chryscapital Investment Advisors held that turnover filters could not be applied unless and until it was established that it affected the profitability of the comparables and accordingly remitted the comparability of iPower Solutions Limited, Infosys Technologies Limited, Satyam Computer Services Limited and Larsen & Toubro Infotech Limited and Xcelvision Limited to the file of CIT(A) for re-examination.

Sharp Software Development India Pvt Ltd vs Dy.CIT-TS-797-ITAT-2017(bang)-TP dated 27.09.2017

445. Noting that Tribunal has **in other cases** been restoring cases back to AO/TPO for fresh consideration where grounds raised relate to application of turnover/ high profit filter in light of Chryscapital HC ruling (wherein it was held that turnover cannot be a criteria for inclusion / exclusion of a comparable, but it is for DRP / TPO to examine whether the turnover has affected the price or margin of the comparable with that of the assessee), the Tribunal remitted the entire TP issue in respect of assessee's provision of software development and marketing support

services for AY 2010-11. Further, in respect of RPT filter, relying on the decision in the case of ACI Worldwide Solutions P Ltd [TS-614-ITAT-2017(bang)-TP], held that **25% RPT filter was to be applied as opposed to 0% proposed by the CIT(A) as it would lead to a larger number of comparables and 25% filter had been consistently applied by the Tribunal.** Accordingly, it restored the entire TP issue to the file of TPO.

Microchip Technology (India) P Ltd vs. ACIT-TS-864-ITAT-2017(bang)-TP-I.T(TP).A No.260/Bang/2015 dated 27.10.2017

446. The Tribunal, relying on the decision in the case of Chryscapital Investment Advisors Limited [TS-173-HC-2015(DEL)-TP (wherein it was held that mere fact that an entity makes high profits/losses or has huge turnover does not ipso facto lead to its exclusion from the list of comparables for the purpose of determination of ALP) , remitted the comparability of Flextronics Software Systems Ltd, Infosys Ltd, Foursoft Ltd, Geometric Software Solutions Company Ltd, Sankhya Infotech Ltd, Satyam Computer Services Ltd, iGate Global Solutions Ltd and L&T Infotech Ltd to the file of AO/TPO for fresh decision. Further, in respect of Exensys Software Solutions Ltd, noting that the Tribunal had not decided all the aspects as they were never argued before the Tribunal (except the issue of extraordinary event), remitted it back to the file of AO/TPO to consider it afresh.

DCIT vs IGEFI Software India Pvt Ltd-TS-923-ITAT-2017(bang)-IT(TP)A No. 461/Bang/2013 dated 17.11.2017

447. The Tribunal held that the assessee engaged in the business of development and delivery of domain specific software for its AE was not comparable to Infosys Ltd, Larsen & Toubro Infotech Ltd, Mindtree Ltd, Persistent Systems Ltd having turnover Rs. 25385 crores, Rs. 2181 crores, Rs. 878 crores and Rs. 610 crores respectively as the said comparables failed the 10 times turnover filter of the assessee having turnover Rs. 41.13 crores.

Obopay Mobile Technology India Private Ltd vs DCIT-TS-493-ITAT-2017(Bang)-TP-IT(TP)A Nos 238 & 553/bang/2016 28.04.2017

448. The Tribunal excluded 10 companies viz. Visual Soft Technologies Ltd, Infosys Technologies Ltd, Satyam Computer Services Ltd, Geometric Software Solutions Co Ltd, Tata Elxsi Ltd, RS Software Ltd, Sasken Communication Technologies Ltd, Flextronics Software Systems Ltd, iGate Global Solutions Ltd & L&T Infotech Ltd by applying the turnover filter of 10 times the turnover of the assessee i.e. Rs.4.95 crores. Accordingly, these companies having turnover ranging between 81.69 crore to Rs.6859.66 crore were excluded.

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

449. The Tribunal applied a turnover filter of 1/10th times to 10 times of the assessee's turnover (Rs. 90 crore) and accordingly held that:

AvaniCimcon Technologies (Rs.2.93 crore), e-zest Solutions Ltd (Rs.7.66 crore), Flextronics (Rs.954.42 crore), Infosys Ltd (Rs.15,672 crore), Kals Information Systems Ltd (Rs.2.05 crore), Lucid Software Ltd (Rs.2.35 crore) could not be considered as comparable to the assessee engaged in providing software development services and that iGate Global Solution Ltd, Mindtree Ltd and Sasken Communication Technologies Ltd which were previously excluded on the turnover filter of Rs.1 – 200 crore were to be included as they satisfied the 1/10th to 10 times filter.

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

450. The Tribunal directed the TPO to consider turnover filter while selecting comparables for the purpose of benchmarking, noting that the turnover of the company was very vital for determining the ALP since it would have a substantial impact on the financial results. It noted the contention of the assessee viz. that TPO erred in selecting comparables with turnover ranging from Rs. 3

crores to Rs. 730 against its turnover of Rs. 148 crores the fact that the issue was not adjudicated by CIT(A) and accordingly remitted the selection of comparables back to the file of TPO for fresh examination on the basis of turnover. However, it directed the assessee to submit specific and necessary information on how the comparables were not comparable instead of giving generalized grounds like huge turnover.

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

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

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

452. The Tribunal set aside TP issues relating to ALP determination in respect of software development services rendered to AE for AY 2008-09. Out of 20 comparables selected by TPO, CIT(A) had rejected 7 comparables by applying Rs 1-200 cr turnover filter, 1 comparable on the ground of high profit margin and 2 on the grounds of functional dissimilarity. Rejecting Rs 1-200 cr turnover filter applied by CIT(A), the Tribunal held that a turnover filter of 1-200 cr was not proper as it gave unacceptable results and a tolerance range of turnover as ten times of turnover of the tested party was an appropriate filter. Regarding the ground of high profit margin, it held that high profit margin or loss could not be a ground or criteria for exclusion or inclusion of comparable, however, abnormal circumstances or extraordinary events could be a reason for exclusion but not high profit margin alone. Further, observing that the CIT(A) had not examined the functional comparability of 8 out of 10 comparables rejected by it, the Tribunal set aside the entire issue of determination of arm's length price and consequential transfer pricing adjustment to the file of CIT(A) for fresh determination of the functional comparability of the companies objected by assessee.

Huawei Technologies India Pvt. Ltd vs ITO-TS-526-ITAT-2017(Bang)-TP-IT(TP)A No.395 and 459/bang/2013 dated 31.05.2017

453. The Tribunal, relying on the decision in the case of Chryscapital Investment Advisors India P Ltd [TS-173-HC-2015(DEL)-TP], restored TP-adjustment for AY 2005-06 and 2008-09 to the file of AO/TPO. It held that huge profits or huge turnover could not ipso facto lead to exclusion of comparable unless such difference could materially affect the price or cost. Further, it held that an attempt had to be made to make a reasonable adjustment to eliminate the material differences between assessee's transaction and comparables. Accordingly, it directed the AO/TPO to consider the issue afresh after giving the assessee an opportunity of being heard.

DCIT v ARM Embedded Technologies P. Ltd-TS-703-ITAT-2017(Bang)-TP-ITA No. 623 & 624(bang) 2013 dated 24.08.2017

454. Where the CIT(A) had excluded companies by applying the Rs. 1-200 crores turnover filter without examining the functional differences of these companies, the Tribunal relying on the decision in the case of Chryscapital Investment advisors (India) (P) ltd and held that mere high profit or loss could not be basis for comparables exclusion and analysis under rule 10B(3) must be done and accordingly remitted the matter to the file of AO/TPO for fresh consideration.

ITO vs iPass India P LTD-TS-584-ITAT-2017(Bang)-TP-IT(TP)A no.597/bang/2013 dated 16.06.2017

455. The Tribunal allowed the appeal of the Revenue and relying on Chryscapital Investment Advisors (India) Pvt Ltd [TS-173-HC-2015(DEL)-TP], held that the CIT(A) erred in excluding certain

comparables on grounds like size, turnover, high profit margin etc.,It held that huge profit or turnover, ipso facto would not lead to the exclusion of a comparable and directed the TPO to verify if such difference materially affected the price or cost and if so make reasonable adjustment to eliminate the effect of such differences. Accordingly, it restored the matter to the file of AO for fresh consideration.

DCIT vs. Synopsys India Pvt. Ltd.-TS-678-ITAT-2017(Bang)-TP-ITA no. 874/B/2013, 1576 & 1622/B/2014 & C.O No. 154(B)-2015 dated 16.06.2017

456. The Tribunal allowed the appeal of the Revenue and relying on Chryscapital Investment Advisors (India) Pvt Ltd [TS-173-HC-2015(DEL)-TP], held that the CIT(A) erred in excluding certain comparables on grounds like size, turnover, high profit margin etc.,It held that huge profit or turnover, ipso facto would not lead to the exclusion of a comparable and directed the TPO to verify if such difference materially affected the price or cost and if so make reasonable adjustment to eliminate the effect of such differences. Accordingly, it restored the matter to the file of AO for fresh consideration.

Tesco Hindustan Service Centre Pvt Ltd vs CIT and others-TS-740-ITAT-2017(Bang)-TP-IT(TP)A No.577/Bang/2012 dated 13.09.2017

Related Party Transactions

457. The Tribunal upheld the order of CIT(A) upholding RPT filter of 25% and held that if lower RPT filter was applied, the number. of remaining comparables would be lesser and as a result, the whole TP exercise would become redundant. Observing that only 3 comparables were left even after applying 25% RPT, the Tribunal refused to interfere with the order of CIT(A).

Siebel Systems Software (India) Pvt. Ltd vs. ACIT-TS-832-ITAT-2017(Bang)-TP-ITA No. 1195/bang/2013 dated 22.09.2017

458. The Tribunal held that a related party filter of 15% was to be adopted as against CIT(A)'s 0% filter and TPO's 25% RPT filter. It held that the 0% related party transaction was an impossible situation and no comparables would be available if the said filter was applied. It explained that 15% RPT filter would be proper in ordinary circumstances when there was no difficulty of selecting comparable companies and only in extreme and exceptional circumstances when the comparable companies were not easily available the tolerance range could be relaxed upto 25%. It held that the Tribunal in a series of decisions had taken the view that a tolerance range of related party transaction could be considered from 5% to 25% depending upon the facts and circumstances of each case particularly the availability of the comparable companies. Further, Since neither the TPO not the assessee had made out a case of exceptional difficulty in searching for comparables, it adopted the 15% RPT filter. Further, relying on the decision in the case of Maersk Global Centres (India) (P.) Ltd [TS-74-ITAT-2014(Mum)-TP] , it held that mere high profit margin or loss could not be considered as a parameter or criteria for selection/exclusion of comparable companies, and accordingly held that the CIT(A) erred in excluding Éxensys Solutions Ltd and Thirdware Solutions Ltd merely on the ground of high profit margin.

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

459. The Tribunal upheld 15% RPT filter as proper in assessee's case on the ground that ideally the RPT should be nil, however in case of non-availability of enough comparables by applying 0% filter, RPT Filter of 15 or 25% may be acceptable on case to case basis.

Novell Software Development (Ind.) Pvt Ltd - TS-1044-ITAT-2016(Bang)-TP

460. The Tribunal held that the CIT(A) was not justified in applying the RPT filter of 0 percent and relying on the decision of ITO v Net Devices India Pvt Ltd (TS-354-ITAT-2016 (Bang) – TP, ordered the adoption of 15 percent as the RPT filter. Accordingly, companies having RPT below 15 percent were considered and included / excluded based on functionality of the companies.

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

461. The Tribunal set aside the DRP's direction adopting 0% RTP filter and directed the TPO to adopt 15% RPT filter and restored the entire TP issue to the files of AO/TPO noting that several comparables rejected due to adoption of 0% RPT filter would have to be considered afresh for comparability. Accordingly, it directed the AO/TPO to decide the matter afresh after allowing adequate opportunity of being heard to the assessee.

***Net Devices India Pvt. Ltd. Vs. ITO - TS-216-ITAT-2017(Bang)-TP - IT(TP)A
No.435/Bang/2012 dated 23/02/2017***

462. The Tribunal held that the CIT(A) was incorrect in applying a 0% RPT filter as it was an impossible situation and held that a reasonable range of RPT to sales had to be considered for selecting uncontrolled comparables. Noting that the Tribunal, in a series of orders, accepted a tolerance range of 5% to 25% of total revenue depending upon availability of comparables, it held that when a good number of comparables were available, the threshold limit of RPT should not be more than 15% of total revenue. Accordingly, it opined that the RPT filter of 15% was proper in assessee's case and directed AO/TPO to apply the same.

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

463. The Tribunal noting that various benches of Tribunal were consistently adopting 15% RPT filter, set aside CIT(A)'s order adopting 0% RPT filter for selection of comparables for assessee engaged in providing software development services and directed the CIT(A) to obtain remand report from the AO/TPO and then examine and decide the entire TP matter including other objections of the assessee in respect of comparables which were excluded applying 0% RPT filter.

***DCIT vs Though Works Technologies (I) Pvt Ltd-TS-542-ITAT-2017(Bang)-TP- IT(TP)A
No.31(B) & CO No.31(B)2012 dated 16.06.2017***

464. The Tribunal admitted assessee's grounds seeking exclusion of 14 comparables viz. [Accel Transmatic Limited, Avani Cincom Technologies Limited, Celestial Labs Limited, E-Zest Solutions Limited, Flextronics Software Systems Limited, Geometric Limited, Ishir Infotech Limited, KALS Information Systems Limited, Lucid Software Limited, Megasoft Limited, Persistent Systems Limited, Tata Elxsi Limited, Thirdware Solutions Limited and Wipro Limited] on grounds of functional dissimilarity and 4 companies viz., [Hello & Matheson Information Technology Limited, Infosys Technologies Limited and Sasken Communication Technology Limited on grounds of RPT filter **and remanded the matter** to the file of AO/TPO with the direction to decide the issue on merits.

***Novellus Systems (India) P Ltd-TS-632-ITAT-2017(Bang)-TP-ITA No. 1087/bang/2011 dated
12.07.2017***

465. The Tribunal rejected Revenue's miscellaneous petition against Tribunal order remitting the comparability of Lotus Labs to examine RPT percentage. Since the assessee had argued that Lotus Labs should be rejected as a comparable as it had significant RPT while Revenue had contended that there were no RPT in the non-AE segment, the Tribunal restored the matter back to the file of AO/TPO to re-examine whether RPT was significant or not.

***DCIT vs AstrsZeneca Pharma India Ltd-TS-708-ITAT-2017(Bang)-TP-[MP No. 1 Q9/B/2017
dated 24.08.2017***

Loss making companies

466. The Court dismissed Revenue's appeal against Tribunal's order directing inclusion of two loss making comparables and considering DEPB (Duty Entitlement Passbook) benefits and depreciation while computing assessee's margin for AY 2008-09 since the Revenue itself accepted the comparables in the earlier AY, and as such there was no dispute regarding their comparability. Further, the parameters set out in Rule 10B(2) or judging comparability with

international transaction are exhaustive and the rule does not require exclusion of a company only because it had suffered a loss in a particular year.

Welspun Zucchi Textiles Ltd -TS-9-HC-2017(BOM)-TP

467. The Tribunal held that where the disputed companies viz. Gujarat Poly Avx Electronics and Keltron Group companies were not simply loss making concerns but persistently loss making concerns, their margins could not be adopted in order to benchmark the international transactions of assessee which was making supplies to AEs and was a market dominant concern.

Accordingly, ITAT directed AO to verify the claim of assessee and exclude the comparables if found to be persistent loss making concerns.

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

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

Erdhardt+Leimer India Private Limited - TS-1059-ITAT-2016(AHD)-TP

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

ASB International Pvt Ltd - TS-6-ITAT-2017(Mum)-TP

Multiple filters

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

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

471. Where the DRP suo-moto invoked 0% RPT filter and applied Rs. 200 cr turnover filter pursuant to which only 2 companies remained in the list of comparables, the Tribunal, relying on the decision in the case of ACI Worldwide Solutions P Ltd. [TS-614-ITAT-2017(Bang)-TP] wherein it was held that RPT filter of 25% was required to be applied if there were less than six comparables and 15% would be applied if they were more than six comparables, remitted the matter to the file of DRP directing it to apply 25% RPT filter. Further, in respect of application of Rs. 200 cr turnover filter, noting that the DRP did not have the benefit of Chryscapital Investment Advisors India P Ltd [TS-173-HC-2015(DEL)-TP] ruling wherein it was held that if the turnover has not affected the margin or price of the comparable and the comparable on the test-stone of FAR, then it cannot be included/excluded merely on the ground of turnover, it remitted the application of turnover filter back to DRP for fresh adjudication.

Broadcom Communications Technologies P Ltd vs ACIT-TS-752-ITAT-2017(Bang)-TP IT(TP)A No.1230/Bang/2011 dated 01.09.2017

472. The Tribunal, relying on the decision in the case of Chryscapital investment advisors (India) pvt ltd-TS-173-HC-2015(DEL)-TP wherein it was held that the huge turnover/abnormal margin etc. ipso facto does not lead to the conclusion that a company which is otherwise comparable on FAR analysis can be excluded, restored the TP issue to the file of CIT(A), directing it to decide comparable issue after examining the aspect of high profit margin/turnover. Further, relying on the decision in the case of ACI Worldwide Solutions P Ltd [TS-614-ITAT-2017(bang)-TP], held that On account of application of 25% RPT filter, several comparables would be available which were earlier deleted on account of 0% RPT filter. Further, the Tribunal has been consistently adopting 25% and 15% filter depending on availability of comparables. Accordingly, it held that this aspect required fresh consideration and remitted the matter to the file of the CIT(A).

Robert Bosch Engineering and Business Solutions Ltd vs DCIT-TS-783-ITAT-2017(BANG)-TP I.T(TP).A No.1519/Bang/2013 dated 13.09.2017

473. The Tribunal held that where a reasonable number of comparable companies were available (29 in this case) the RPT filter could not allowed to be the extreme limit of 25 percent of revenue. Accordingly, it directed the application of 15 percent RPT filter, which led to the exclusion of 3 comparables viz. Aztec Software Ltd, Lanco Global Solutions Ltd and Geometric Software Ltd. As regards the turnover filter applied by the AO/TPO viz. Rs. 1 crore to Rs. 200 Crore, the Tribunal observed that there was an inherent difficulty in applying such a turnover slab as it gave unrealistic results i.e. an entity having Rs. 1 Cr turnover could be compared with a concern having turnover of Rs. 200 Cr, but an entity having Rs. 200 Cr turnover could not be compared with an entity having 201 Cr turnover. Accordingly, it held that such classification of comparables on the basis of companies selected on turnover basis is not appropriate and acceptable and adopted the multiple of 10 times of turnover. Since the assessee's turnover was Rs. 31.33 Cr, it directed the exclusion of companies having turnover less than Rs. 3.1 Cr and more than Rs. 313 Cr. As a result, following 4 comparables were excluded IGate Global Solutions Ltd. (Rs.527.91 Cr), Infosys Ltd. (Rs.9,028 Cr), Mindtree Ltd. (Rs.448.79 Cr) and Flextronic Software System Ltd. (Rs.595.1 Cr)

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

474. Where the TPO had applied the export revenue filter of 75% while benchmarking the software development segment but did not apply the same in ITES Segment, the Tribunal dismissed the appeal of the Revenue against the CIT(A)'s direction to apply the filter in ITES Segment (on the ground that the assessee had not objected on this issue before TPO) and held that since the international transactions either in the software development or in ITES Segment were 100% export sales, it was justified to compare them with the uncontrolled unrelated price of comparable with at least 75% of export sale. Thus, it concurred with CIT(A)'s direction in principle and stated that CIT(A) had co-terminus power of the A.O. and could take up an issue for adjudication even if assessee had not raised any objection earlier.

Further, it held that the employee cost filter was a relevant criteria for selection of comparables as it showed the business model of a particular company and noting that the assessee's employee cost was much more than 25 percent of total revenue, it held that an employee cost filter of 25 percent was not incorrect. Accordingly, the Tribunal set aside the issue to TPO and added that assessee was at liberty to raise the objections of functional comparability if the need arose.

As regards the assessee claim for inclusion of comparables with a different financial year ending, the Tribunal noted that FAR analysis had to be done by considering the contemporaneous financial data of the assessee as well as comparables and held that such companies could not be considered as good comparable for want of necessary data.

The Tribunal also held that the turnover filter of < Rs. 1 crore could not be applied and upheld the 10 times turnover filter as applied by various Tribunals.

Further, noting that the TPO's eliminated Thinksoft Global Services Ltd. and FCS Software Solutions Ltd. on ground that these companies were having borrowed funds and the working capital impact was more than 4% on company profits which would distort the profit margin, the Tribunal opined that the limit of working capital was relevant for adjustment in the price and not for inclusion/exclusion of comparables. Accordingly, the Tribunal directed AO/TPO to include the functionally similar comparables.

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

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

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

476. The Tribunal upheld the application of the turnover filter of 10 and 1/10th times assessee's turnover and also directed the TPO to adopt a 15% related party transaction filter in view of the fact that there were adequate number of comparable companies. It observed that the entire TP-issue required fresh examination and consideration at AO/TPO's level as the comparability of the entire set of comparables had to be decided by applying the appropriate filters. Accordingly, it set aside the transfer pricing issue for AY 2008-09 including the issue of selection of comparables to TPO for fresh consideration after giving opportunity of being heard to assessee.

Microchip Technology (India) Pvt. Ltd v ACIT - TS-384-ITAT-2017(Bang)-TP - I.T.(T.P) A. No.1586/Bang/2012 dated 03.05.2017.

477. The Tribunal relying on the decision in the case of Thyssen Krupp Industries (P) Ltd [TS-46-ITAT-2013(MUM)-TP] (Confirmed by Bombay High Court [TS-134-HC-2016(BOM)-TP] held that the assessee engaged in the business of providing Engineering Consultancy services in the field of chemicals, petrochemicals, fertilizers, cement, pharmaceuticals and allied industries could not be compared to:-

- Engineers India Ltd and Water and Power Consultancy Ltd as they were Government companies and the contracts between Public Sector Undertakings were not driven by profit motive alone by other consideration also, such as discharge of social obligations.

Further, it directed the AO to exclude infrastructure and overhead recoveries in the case of L&T Sargent & Lundy Limited, as they were mere reimbursement of expenses incurred by a group concern on behalf of the assessee and hence should not be considered as a commercial transaction involving profit element while computing the percentage of related party transactions. Relying on the decision in the case of McAfee Software India P Ltd [TS-136-ITAT-2016(Bang)] it held that the co-ordinate bench had consistently accepted the turnover filter at 1/10th to 10 times of turnover and the adoption by TPO of filter of 1/4th to 4 times the assessee's turnover was arbitrary in nature. Accordingly it directed the AO/TPO to adopt a filter of 1/10th to 10 times of the turnover of the assessee. It accepted assessee's argument that Telecommunications Consultants India Ltd was functionally similar to the assessee and held that since it had been accepted as a comparable in the earlier year and subsequent year in the assessee's own case, the TPO was not justified in rejecting the same during the year under consideration and accordingly restored the issue to the file of the AO with the direction to finalize the comparables.

Jacobs Engineering India Private Limited vs DCIT-TS-428-ITAT-2017(MUM)-TP-I.T.A.No.7194/Mum/2012 dated 17.05.2017

478. The Tribunal upheld the exclusion of Mecon Limited from the list of comparables due to (i) unavailability of current year data, (ii) persistent losses, (iii) unavailability of segmental data and (iv) functional dissimilarity as it was a Government owned company.

Sunway Construction India Pvt Ltd-TS-342-ITAT-2017(Bang)-TP-IT(TP)A No.1190(bang) dated 23.05.2017

479. The Tribunal upheld DRP's order and held that,

- Pfizer Ltd was to be excluded from its list of comparables as its related party transactions were about 95% which did not satisfy the RPT Filter applied and the said company had a different accounting year. It relied on the decision in the case of PTC Software (I) Pvt Ltd [TS-788-HC-2016(BOM)-TP] it held that to ensure comparability the accounting period of the comparable and the assessee had to be same.
- Celestial lab limited could not be considered as comparable due to difference in functional profile as it was engaged in software development and services and derived revenue from sale of products and services.

Tevapharm India Pvt Ltd vs DCIT (formerly known as Ratio Pharm India pvt ltd [TS-387-ITAT-2017(Mum)-TP] dated 12.05.2017

480. The Tribunal, noting that wrong filters for related party transactions i.e. 0% and turnover i.e. 1-200 crores were adopted by DRP in respect of assessee engaged in providing software development and related services, held that the Tribunal had consistently adopted 15% RPT filter and 1/10th or 10 times of assessee's turnover as filter and accordingly remitted the TP-issue back to the AO/TPO for fresh consideration after applying proper filters.

L.G Soft India Pvt. Ltd vs. DCIT- [TS-553-ITAT-2017(Bang)-TP]- IT(TP)A Nos.463 & 516(B)/2015 & CO No. 140(B)/2015 dated 09.06.2017

481. Noting that the DRP had excluded Jeevan Scientific Technology by applying employee cost filter on its own account, the Tribunal accepted assessee's & Revenue's submission that employee cost filter should not have been applied to this company alone but to all comparables. Further, by way of additional grounds, assessee requested for rejection of comparable based on 10 times turnover range. Relying on the decision in the case of Chryscapital Investment Advisors (India) Pvt Ltd[TS-173-HC-2015(DEL)-TP] held that huge profit or a huge turnover, ipso facto could not lead to exclusion of comparable and the TPO first had to be satisfied that such differences did not materially affect the price or cost. Accordingly, it remitted the matter back to the AO/TPO for fresh consideration.

Dell International Services India Pvt Ltd vs JCIT-TS-575-ITAT-2017(Bang)-TP-IT (TP) A No.636 (Bang) 2016 dated 28.06.2017

482. Where the DRP had adopted wrong related party transactions (0)% and Turnover (Rs. 1-200 cr) in respect of assessee providing software development and related services, the Tribunal held that the Tribunal had been consistently adopting 15% RPT filter and 1/10th or 10 times of assessee's turnover as turnover filter and accordingly remitted TP-issue back to the file of AO/TPO for fresh adjudication.

L.G Soft India Pvt. Ltd vs. DCIT-TS-553-ITAT-2017(BANG)-TP dated 09.06.2017

483. The Tribunal restored TP-issue for assessee engaged in the manufacture of spark plugs and marketing and distribution of products for AY 2005-06 to the file of AO/TPO for fresh consideration. The TPO while reviewing the valuation done by assessee found that the assessee had earned commission income of Rs. 1.65 crores while none of the comparables had earned commission income. The Ld. TPO also observed that the goods sold to the Associated Enterprise and non-AE were not similar and hence the comparison made by the assessee company was not acceptable. Noting that the TPO had refused to include commission income while working out PLI of assessee on the ground that none of the comparables earned commission income, it held that the TPO's approach of outright rejecting the comparable was not tenable. The assessee had adopted TNMM with operating revenue computed in relation to total cost as a PLI for import of raw material, components and tools, provision of marketing support services and professional services. Noting the assessee's contention that marketing and professional services were intrinsic to assessee's business model and therefore could not be considered as separate business segment, it held that combined transactions approach could be followed under Rule 10A(d) r.w.r. 10B, but the onus to demonstrate with evidence that such an approach was justifiable was on the assessee and it had failed to justify as to why the rendering of marketing services and professional services should be classified as closely linked transactions. The Tribunal questioned TPO's approach of outright rejecting aggregation of transactions without giving any justification and accordingly directed the AO/TPO to re-determine the ALP of each transaction after considering whether such transactions should be combined for the purpose of benchmarking after taking into account the material submitted by assessee..

ITO vs Federal Mogul Automotive Product (India) Pvt Ltd-TS-499-ITAT-2017(DEL)-TP-ITA No. 599/del/2012 dated 12.05.2017

484. The Tribunal, relying on the decision of High Court in the case of Chryscapital Investment Advisors (India) Pvt Ltd [376 ITR 183], held that huge profit / turnover does not ipso facto lead to exclusion of a comparable unless such difference materially affected price/ cost. Further, on the RPT filter, it held that Tribunal had been consistently adopting 25% and accordingly directed the CIT(A) to adopt 25% as the RPT filter as against 0%. Accordingly, it restored the matter to the file of CIT(A), directing it to decide the issue afresh by applying 25% RPT filter and examining the aspect of high profit and turnover.

ITO vs. AT & T Global Business Bangalore Services India (P) Ltd (Formerly known as USI Internet Working Solutions Pvt. Ltd.)-TS-680-ITAT-2017(BANG)-TP-IT(TP)A no. 342/bang/2012 dated 24.08.2017

485. Where the assessee had filed an appeal against various filters applied by TPO viz., 25% RPT filter, Rs. 1-200 cr turnover filter, employee cost filter, functionality etc, the Tribunal noting that the RPT filter of 25% and turnover filter have been universally applied by many coordinate benches, restored the matter to the file of AO/TPO directing it to verify the functional comparability of those companies satisfying the turnover and RPT filter applied by TPO.

Texas Instruments (India) Pvt Ltd vs ACIT-TS-738-ITAT-2017(Bang)-TP-IT(TP)A no. 755 & 756 (bang) 2012 dated 08.09.2017

Argue own comparables

486. Where the assessee engaged in providing ITES filed an additional ground of appeal seeking exclusion of 3 comparables (Maple Esolutions, Datamatics Financial Services and Apex Knowledge Solutions) on different grounds i.e. functional dissimilarity as compared to that pleaded before DRP, the Tribunal admitting the additional ground held that it was not a new plea for seeking exclusion of these companies per se as but only an additional point for exclusion of the companies. Further observing that the DRP rejected assessee's arguments without giving reasons or considering various Tribunal rulings on points raised by assessee, it held that the entire TP issue required to be reconsidered at the level of the TPO and directed the TPO to adjudicate the same by considering the earlier objections as well as other fresh objections raised by the assessee .
Indecomm Global Services (India) Pvt. Ltd vs. ACIT-TS-909-ITAT-2017(Bang)-TP I.T.(T.P)A. No.1484/Bang/2010 dated 27.10.2017
487. The Tribunal held that the assessee engaged in the business of manufacturing and trading of packaging equipment and reconditioning of packaging equipment and machines could not be compared to Rollatainers Ltd as the said company had significant related party transactions (48.57%), it was a sick company and it followed a different financial year ending. It rejected the Revenue's argument that the said company could not be excluded as it was included as comparable in the TP study by the assessee itself and relying on the ruling of Barclays Technology Centre India Pvt Ltd TS-41-ITAT-2015 (Pun) – TP, held that where an assessee subsequently points out that a company is not comparable due to justifiable reasons, the plea of the assessee could not be rejected merely because the said company was initially adopted by it as a comparable in its TP study.
Bobst India Pvt Ltd v ACIT – TS-90-ITAT-2017 (Pun) – TP - ITA No.2090/PUN/2012 dated 03.02.2017
488. The Tribunal relying on the decision of Quark System wherein it was held that merely because the assessee had wrongly added in the list of comparables, it would not bar the assessee to take objection against the functional dissimilarity of a company dismissed petition filed by the assessee seeking rectification of mistake in the order of Tribunal for AY 2010-11 in respect of comparability of ICRA Techno Analysis Ltd on the ground that the company had been selected as a comparable by both the assessee and TPO, and the assessee had not raised any objection before lower authorities.
Aptean Software India Pvt Ltd - TS-1076-ITAT-2016(Bang)-TP
489. The Court upheld the order of the Tribunal and held that an assessee is not barred from withdrawing a comparable originally selected by it in its transfer pricing study where the comparable was included on account of mistake of fact or where on further examination the assessee realised that the said company is not comparable. It held that the Transfer Pricing mechanism requires comparability analysis to be done between companies and the controlled transactions and that the assessee's submission in arriving at ALP is not the final position as the TPO is to examine whether the companies selected by the assessee are in fact comparable.
CIT v Tata Power Solar Systems – published on 09.08.2017

Others

490. The Tribunal partly allowed Revenue's appeal and directed the AO /TPO to retain inclusion of FCS Solutions and Thinksoft Global Services Limited as comparables after making working capital adjustment on actual basis for AY 2009-10. It noted that the AO/TPO had excluded these comparables on the basis that their working capital adjustment required was more than 4% and held that once a working capital adjustment was made, there was no reason to exclude any company for such reasons it is found that the company was comparable on all other grounds.

Since no other reason was given for exclusion of these companies, the Tribunal held that the two companies were wrongly excluded by the AO / TPO.

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

491. The Tribunal held that the margin approved in MAP proceedings for provision of ITES to US AEs could be adopted for benchmarking international transactions with non-US AEs as well. Reliance was placed on the orders of the co-ordinate bench for earlier years where the assessee's claim was accepted on identical facts.

JP Morgan Services India Pvt Ltd – TS-64-ITAT-2017 (Mum) - TP

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

Timex Watches India Pvt Ltd - TS-1064-ITAT-2016(Del)-TP

493. The Tribunal, referring to Rule 10B(1)(e)(ii) noted that net profit margin realized could be benchmarked from one or more comparable uncontrolled transactions and therefore rejected the Revenue's argument that consideration of one comparable company could not be taken for benchmarking ALP of a party. It further explained that although more than one comparable was desirable to get appropriate arm's length results, there was no mandate in the law that one may choose more than one comparable only.

However, it clarified that on consideration of only one comparable, the tolerance range of +/- 5% (or 3%) as envisaged in the second proviso to Sec 92C would not be applicable. Accordingly, considering the Tribunal eliminated 4 out of 5 companies on functionality, it directed the TPO to benchmark assessee's margin with only one comparable.

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

494. Where the TPO neither gave reasons for rejection of 2 comparables nor provided details of search process adopted for selection of 14 new comparables and even the DRP had not fully addressed assessee's contentions in this regard, the Tribunal taking note of sizeable increase in quantum of addition due to margin proposed by TPO (8.53%) being substantial as against assessee's margin (1.47%), it directed the TPO to provide reasons for rejecting existing comparable as well as the search criteria for selection of new comparables and decide the issue afresh after giving assessee an opportunity of being heard.

Woosu Automotive India Private Vs ACIT - TS-74-ITAT-2017(CHNY)-TP - ITA No.870/Mds/2016 dated 13.01.2017

495. Tribunal admitted additional evidence filed by assessee in respect of its international transaction of providing software development services to AE for AY 2006-07. Relying on the decision in the assessee's own case wherein the coordinate bench had restored the matter back to the CIT(A) with directions to consider the additional evidence submitted by the assessee relating to segmental accounts and provide a reasonable opportunity of being heard, it restored the matter back to CIT(A) to adjudicate the issue afresh.

RMSI Pvt Ltd vs ACIT -TS-321-ITAT(DEL)-TP ITA No.3478/del/2012 dated 21.04.2017

496. The Tribunal directed the DRP to consider the correctness of margins of various comparables chosen by the TPO and decide on their inclusion/exclusion. It noted that the TPO in its original order had considered 9 comparables with the average margin of 25.90%. Thereafter, TPO passed a rectification order finalizing a set of 7 comparables with average margin of 24.12%. The Tribunal opined that a change in profit level margins of comparables would have a considerable effect on the TP study since assessee's margin had to be compared with the average PLI of comparables. The Tribunal thus remitted the matter to DRP for fresh consideration.

Extreme Networks India Pvt. Ltd vs DCIT TS-367-ITAT-2017(CHNY)-TP – I.T.A.No.434/mds/2015 and I.T.A.No.449/mds/2015 dated 07.04.2017

497. The Tribunal upheld DRP's inclusion of FCS Software Solutions and Thinksoft Global Services Limited and held that the comparables were wrongly excluded by the TPO merely because their impact on working capital adjustment exceeded 4%. Further, relying on the decision in the case of Mercer Consulting (India) Pvt. Ltd [TS-664-HC-2016(P&H)-TP, it upheld assessee's claim for inclusion of R Systems having different accounting years noting that data for quarter ended 31/3/2008 and 2009 was available in public domain so as to reliably arrive at data for FY ended 31/03/2009.

G.E India Exports Pvt. Ltd vs DCIT-TS-426-ITAT-2017(Bang)-TP- IT(TP)A No.117/Bang/2014 dated 05.05.2017

498. The Tribunal allowed Revenue's appeal and set aside CIT(A)'s order on application of filters for comparables selection for AY 2005-06 stating that the order of the CIT(A) was very cryptic and erroneous as he had adopted 0% RPT filter as opposed to 15% RPT filter adopted by a number of Tribunals. It noted that, once 15% RPT filter had been adopted instead of 0% RPT filter, several comparables which were rejected by the CIT(A) would come back and be required to be re-examined on functional comparability aspect. Thus, it restored the matter to the file of Ld CIT(A) fresh consideration.

Novellus Systems (Ind) Pvt Ltd [TS-391-ITAT-2017(Bang)-TP- In IT(TP)A No.1101(bang)/2011

499. Where the assessee did not have any objection to Revenue's ground for excluding the two comparables viz. Thinksoft Global and FCS Software for benchmarking software development services, the Tribunal allowed the exclusion of the said two comparables for benchmarking software development services provided by the assessee to its AE.

DCIT vs Yodlee Infotech P Ltd-TS-497-ITAT-2017(Bang)-TP-IT(TP)A.83/B/2014 & CO.70/B/2016 dated 05.05.2017

500. Tribunal allowed assessee's appeal and held that the AO/TPO was incorrect in considering the 2 related parties as comparable for determining ALP of its royalty payment at 4% of net sales to AE. It held that for determination of ALP, price to be taken into account was the price charged or paid in the same or similar uncontrolled transaction with or between two non-related parties and therefore held that the comparable adopted by TPO was invalid.

Praxair India Private Limited vs DCIT-TS-388-ITAT-2017(Bang)-TP-IT(TP)A No.315/bang/2014 dated 15.05.2017

501. The Tribunal remanded the benchmarking of assessee's international transactions relating to provision of software development & back office processing (ITeS) services. The TPO had rejected assessee's TP study report including adoption of comparable uncontrolled price (CUP) method as MAM and undertook FAR analysis of comparables in respect of software development services segment but made a TP-adjustment in respect of ITeS segment. Noting that there was no finding of TPO on software segment and no FAR analysis of comparables in ITeS segment, the Tribunal held that the order of the TPO was not sustainable and accordingly remanded the matter back for fresh benchmarking analysis in both the segments after affording an opportunity of being heard to the assessee.

First Advantage Global Operating Center Pvt Ltd (formerly known as First Advantage Offshore Services Pvt Ltd) vs DCIT-TS0548-ITAT-2017(Bang)-TP dated 24.05.2017

502. The Tribunal allowed assessee's appeal against cryptic CIT(A) order on comparables selection in respect of call center services rendered to AE for AY 2005-06. The TPO had finalized a list of 9 comparable enterprises exporting IT Enabled Services. The Tribunal noting that the CIT(A) had not given any reasoning for upholding the inclusion of the comparables, held that the CIT(A) should have examined the FAR of the comparables while examining assessee's objections. Accordingly, it remitted the matter back to the file of CIT(A) for fresh adjudication.
24/7 Customer.com P. Ltd vs. DCIT-TS-627-ITAT-2017(BANG)-TP-IT(TP)A no. 228/bang/2010 dated 12.07.2017
503. Where the assessee was awarded an Engineering, Procurement and Construction contract from its AE containing 4 parts viz. 1.onshore services 2. Onshore supply of equipment / spares 3. Offshore services and 4.offshore supply of equipment, the Tribunal held that the TPO was justified in aggregating all the transactions for the purpose of benchmarking the transaction under TNMM as against the benchmarking approach adopted by the assessee i.e. separate benchmarking of equipment supply and services. Observing that the contract was composite in nature as the assessee was required to deliver the complete facility to its AE and revenue of both supply and services were recognized under the percentage of contract executed method, it held that aggregate benchmarking was justified. However, the Tribunal rejected the TPO's characterization of the assessee as an engineering service provider as more than 60 percent of revenue was from supply of equipment. Accordingly, it remitted the matter to the TPO for fresh adjudication directing him to consider the assessee as an EPC contractor engaged in providing turnkey solutions.
RTA Alesa AG vs DCIT (International Taxation)-TS-675-ITAT-2017(DEL)-TP-ITA No. 1659/del/2017 dated 31.08.2017
504. The Tribunal, relying on the decision in the case of Logica Private Limited [TS-187-ITAT-2017(bang)-TP] wherein it was held that merely because of a working capital impact of 4%, the said companies could not be characterized as being engaged in the provision of financing activities, held that as the TPO himself had included the companies, they passed all necessary filters and directed the inclusion of FCS and Thinksoft Global as comparables in respect of benchmarking assessee's international transaction of ITes services.
Target Corporation India Pvt Ltd-TS-756-ITAT-2017(Bang)-TP-IT(TP)A No.184 (Bang) 2014 dated 31.08.2017
505. The Tribunal deleted the TP adjustment made vis-à-vis the manufacturing and trading segment of the assessee (engaged in manufacturing and distributing electric meters). It upheld the assessee's approach of benchmarking each transaction separately based on separate certified segments viz. domestic manufacturing, export manufacturing and trading as opposed to the TPOs approach of benchmarking the same on an aggregate basis. It held that the bundled / aggregate approach was only permissible when the transactions could not be benchmarked independently and considering the fact that the assessee's international transactions constituted only 5.75 percent of total transactions it held that comparison based on aggregation of both domestic and international transactions would lead to absurdity. Accordingly, it deleted the addition made by the TPO.
DCIT vs Landis + Gyr Ltd-TS-711-ITAT-2017(Kol)-TP dated I.T.A No. 584/Kol/2015 , I.T.A No. 687/Kol/2015 , I.T.A No. 549/Kol/2016 13.09.2017
506. The Tribunal accepted the assessee's approach of benchmarking its international transactions (viz. developing and selling packaging material, importing and reselling straws and manufacturing processing equipment) on an aggregate basis as opposed to the TPO's approach of benchmarking the transactions separately. Observing that the assessee sold straws along with packaging material at a reduced price so to as reduce its total cost of packaging in order to create demand for consumables manufactured by it, relying on the OECD Transfer Pricing guidelines, it held that since the business strategy of the assessee was an accepted manner of conducting business, the same should not be segregated. Accordingly, it dismissed the appeal of the Revenue.

d. Computation / Adjustments

Capacity Utilization Adjustment

507. The Court dismissed the appeal of the assessee against the order of the Tribunal, wherein the Tribunal rejected the assessee's claim for adjustment towards abnormal expenses arising on account of lower capacity utilization since the assessee had not brought any material on record relating to the capacity utilization of the comparable companies. It upheld the finding of the Tribunal that capacity utilization was a relative feature and therefore unless the capacity utilization figures of comparables were known, no adjustment could be granted to the assessee. Further, noting that the assessee was engaged in jewellery manufacturing, it held that it was very difficult to standardize capacity in case of such companies as it involved several items with a wide variation in the consumption of time and labour.

Royal Star Jewellery Pvt Ltd v ACIT – TS-43-HC-2017 (Bom) – TP - INCOME TAX APPEAL NO. 2463 OF 2013 dated 30.01.2017

508. Where the assessee claimed a capacity utilization adjustment on the ground that it went through shutdowns and lockout for a longer period of time which hampered production which was rejected by the DRP on the ground that the labour unrest did not adversely impact assessee's margins and that the assessee had failed to furnish actual details for loss caused by labour problems, the Tribunal after referring to the tabular statement filed by assessee containing details of power and fuel, salary and wages and capacity utilization in last 3 years and present AY, opined that that prima facie, there was under-utilization of installed capacity towards which suitable adjustments were required to be made. Since the assessee had not furnished all details before DRP, the Tribunal directed the DRP to consider under-utilization of installed capacity and grant suitable deduction in TP-adjustment, if any.

Bailey Hydropower (P) Ltd. vs. ACIT - TS-122-ITAT-2017(CHNY)-TP- /I.T.A.No.2605/Mds./2014 dated 17.02.2017

509. Where the TPO determined ALP based on only 1 comparable, after rejecting 3 other comparables selected by assessee on the premise that capacity utilization figures of production as well as of the installed capacity of these comparables were not available in same units, the Tribunal restored the matter to the file of TPO and held that that Rule 10B clearly provided for reasonable accurate adjustment to be made to eliminate material differences between assessee & comparables and the TPO was obligated to work out the capacity utilization and its effect on the profit earned by the comparable as well as by the assessee. Accordingly, it restored the matter to the file of TPO for fresh consideration.

Nissin Brake India Pvt. Ltd vs. DCIT-TS-779-ITAT-2017(DEL)-TP ITA No. 3425/Del/2016 dated 22.09.2017

510. Where the assessee claimed capacity utilization adjustment on the ground that this being its initial year of operation, it was operating only at 28% capacity, thereby incurring substantial amount of idle capacity costs and significant under recovery of cost resulting in lower margins, whereas comparables were in the mature stage of their economic life cycle and were operating at average capacity of 71%, the Tribunal held that idle capacity was one of the factors which could influence margins substantially and observed that the reasons for non-utilization of capacity were required to be verified with respect to resources available and functions performed by comparable companies. Noting that the assessee was engaged in manufacturing and trading while comparables were engaged only in manufacturing activity, it remitted the issue and directed AO to make necessary adjustments for idle capacity after considering all the factors.

Nippon Paint India Pvt Ltd v ACIT– TS-102-ITAT-2017 (Chny) – TP - ITA No.779/Mds/2016 dated 10.02.2017

511. The Tribunal allowed assessee's appeal with regard to the issue of grant of capacity utilization adjustment and working capital adjustment for AY 2005-06, observing that the Tribunal, in the

assessee's own case for succeeding AY 2006-07, had examined the issue in light of the ruling in Claas India (ITA No.1783/Del/2011) and remitted the matter to AO/TPO for granting capacity utilization and working capital adjustment. It held that since the Tribunal had taken a view in assessee's own case in the succeeding year, there was no justification to take contrary view in this appeal and accordingly set aside the CIT(A) order and remitted the matter to AO/TPO to re-adjudicate the issue of lower capacity utilization and working capital adjustment in light of decision in assessee's own case for AY 2006-07.

***Molex India Tooling Pvt Ltd v ACIT – TS-92-ITAT-2017 (Bang) – TP – IT(TP)A
No.770/Bang/2012 dated 25.01.2017***

512. The Tribunal, noting that the assessee was incorporated as a subsidiary of Japanese parent company in March 2007, and that AY 2009-10 was its first year of operation, wherein it had actually utilized only 35.70% of capacity for actual production, remitted the matter to AO/TPO for consideration of capacity utilization issue while selecting comparables.

***Yutaka Auto Parts India Pvt. Ltd. Vs DCIT – TS-1096-ITAT-2016 (Del) – TP – ITA No 1120 /
Del / 2014 dated 09.12.2016***

513. The Tribunal, dismissed the Revenue's appeal and upheld the order of the CIT(A) granting idle capacity adjustment to the assessee engaged in purchase and sale of components of refrigeration, industrial controls, frequency converters, etc. for AY 2004-05. Noting the assessee's contention that its utilized capacity for AY 2004-05 was only 200 units as against installed capacity of 7200 units and that its margin after idle capacity adjustment was 11.77% as against ALP of 7.16% as determined by the TPO, it dismissed the Revenue's contention that the assessee had not demonstrated idle capacity and capacity utilization.

***DCIT Vs Danfoss Industries Pvt. Ltd.- TS-164-ITAT-2017(CHNY)-TP - ITA Nos.1131, 1132 &
1582/Mds/2016 dated 23.02.2017***

514. The Tribunal denied the assessee's claim for idle capacity adjustment dismissing the claim of the assessee that it was in the initial stage of business and incurred huge fixed cost and that it could not achieve the optimum capacity utilization as its utilized capacity was only 34% against the comparable company's capacity utilization of 61.36%. It noted that that assessee was not a new or a startup company, and was existing prior to 2002 when it was manufacturing tractors along with Greaves. Accordingly, it held that since the company was reasonably old from the profile, justifiable reasons had to be explained for non-utilization of the capacity, fixed costs incurred from the year of inception, the installed capacity, utilized capacity and capacity of breakeven point. It further held that the assessee should have submitted detailed reasons with particular reference to the availability of raw materials, man power, machinery, capital resources, which have influenced the utilization of maximum capacity and for non-utilization of the installed capacity. Accordingly, since the aforesaid details had not been submitted, it rejected the assessee's idle capacity adjustment claim.

***SAME Deutz-Fahr India Pvt. Ltd. Vs CIT - TS-316-ITAT-2017(CHNY)-TP - /ITA
No.2666/Mds/2016 dated 22.02.2017***

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

assessee had even been unable to prove that idle capacity in service industry was not an across the industry feature, or the existence nor nonexistence of idle capacity for the various comparables selected by it.

Saipem India Projects Limited Vs DCIT - TS-308-ITAT-2017(CHNY)-TP - ITA Nos.985 & 1400, CO 79/2014 dated 05.04.2017

516. The Tribunal, reversing the order of the TPO and DRP and relying on the decision of Tasty Bite Eatables Ltd. Vs. ACIT (2015) 59 taxmann.com 437 (Pune-Trib.) allowed the assessee capacity under-utilization adjustment in its manufacturing segment noting that subject AY 2009-10 was its first complete year of operations and it was due to under-utilization of capacity and other unabsorbed expenses that the assessee had incurred losses during the year. It rejected the TPO's alternative stand that since assessee had received support payments from AE for low capacity utilization in the succeeding AY, assessee should have received similar payments in subject AY although such arrangement did not exist. Referring to Section 92B, it held that none of the limbs of section 92B of the Act or Explanation defining the expression 'international transaction' spoke of any hypothetical transaction and in the absence of the same, TPO could not pre-suppose an international transaction between the assessee and its AEs and determinate the TP adjustment on account thereof. Further, it held that even if there was a presumption of support payments from the AEs to the assessee, it did not get covered by the definition of international transaction and accordingly was beyond the scope of the TPO.

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

517. The Tribunal remitted adjustment on account of underutilization in respect of extraordinary/non-recurring expenses (like high manufacturing cost, high personnel cost, high import content cost etc.) to operating cost while computing operating margin for assessee. The assessee was engaged in manufacture of programmable logic controllers, automation software and related automation products. The assessee contended that adjustment in respect of extraordinary expenses/of non-recurring expenses should be allowed since they were incurred keeping in view anticipated expenses of operation of the company and directly relatable to manufacturing activity of the company. The Tribunal held that though the law was quite settled that adjustment should be made for unutilized capacity/manpower and that underutilization does impact operating margin, it held that onus was on the assessee to establish that there was underutilization of capacity which was more than the average underutilization in the industry. Stating that the assessee failed to demonstrate capacity underutilization and that its utilization was also not falling below average rate of utilization in the industry, it remitted the issue back to AO/TPO for adjudication. Further, it remanded the matter back to the file of the TPO for fresh adjudication on the assessee's additional grounds in respect of risk, working capital, entity vs. transaction level adjustments, exclusion of inventory write-off from operating cost and use of internal-CUP for benchmarking purchase of raw materials from AE as TPO had no occasion to adjudicate on the matter since the grounds were not raised before him earlier.

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

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

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

519. Where the assessee's total installed capacity took into account anticipated provision of web hosting services which was approved by the AE but during the year under consideration the said web hosting services were not provided to the AE, the Tribunal held that the AO erred in imputing a mark-up on the costs incurred by the assessee with regard to the web hosting services as the assessee had not performed any functions vis-à-vis the services. Accordingly, it held that the assessee was justified in claiming that only the expenses incurred by it with regard to the web hosting services were to be recovered at cost. However, considering that the assessee submitted additional evidence i.e. addendum to the agreement, it restored the issue to the file of the AO for verification of such evidences.

Affinity Global Advertising Pvt. Ltd (Formerly known as Hostway Solutions Pvt. Ltd) vs. ITO-TS-1057-ITAT-2017(Mum)-TP dated 20.12.2017

Depreciation Adjustment

520. The Tribunal, relying on the decision passed by the co-ordinate bench in the assessee's own case for AY 2003-04 [TS-441-ITAT-2014(DEL)-TP] held that depreciation adjustment was to be made to the operating profit margin of comparable companies if there was a difference in the rates of depreciation charged by assessee vi-a-vis comparables.

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

521. Where the assessee depreciated its assets at higher rates than those prescribed by Schedule XIV of the Companies Act, 1956 and most of the comparable companies considered by the TPO followed the rates prescribed under Companies Act, 1956, thereby charging a lower rate of depreciation, the Tribunal accepted the plea of the assessee and relying on the Tribunal judgments in ExlService.com India Private Limited [TS-441-ITAT-2014(DEL)-TP] and Worldwide Solutions Private [TS-176-ITAT-2015(Bang)-TP], wherein depreciation adjustment had been granted, remitted the matter to TPO for re-examination and re-adjudication in accordance with aforesaid Tribunal decisions.

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

522. The Tribunal dismissed Revenue's appeal against granting adjustment for accelerated depreciation and exclusion of VoltAmp Transformers from the comparable list on the ground that with respect to the accelerated depreciation adjustment, the Tribunal had decided the issue in favour of the assessee for AY 2008-09 and in respect of exclusion of VoltAmp Transformers as a comparable it held that the Tribunal had regarded it as not a good comparable for AY 2003-04.

Advance Power Display Systems Limited - TS-14-ITAT-2017(Mum)-TP

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

Tieto Software Technologies LTD. vs. DCIT - TS-155-ITAT-2017(PUN)-TP - ITA No.986/PUN/2013 dated 03.03.2017

524. The Tribunal held that a depreciation adjustment could not be granted in isolation, without taking into consideration the repair and maintenance cost as well as lease rentals for hiring plant and machinery. It observed that depreciation would be higher in a case of newly installed plant and machinery, but corresponding expenditure on maintenance and repairs would be higher in case of old plant and machinery. Noting that the assessee did not produce comparative details of depreciation rates charged by assessee vis-à-vis comparables, it directed the TPO/AO to grant appropriate adjustment if any in respect of difference of depreciation charged by assessee in

comparison to comparable companies after taking into consideration corresponding expenditure on repairs and maintenance as well as lease rentals if any.

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

525. The Tribunal noting that the assessee providing contract research and development services to its AE in the field of petrochemicals and polymers, had adopted SLM for the purpose of computing depreciation as against WDV method adopted by the comparables and noting that the assessee's asset turnover ratio ranged from 17% to 29% for the relevant years AY 2004-05 to 2008-09 while that of the comparables ranged between 71% and 177.8%, directed that depreciation cost be excluded from operating cost for computing PLI. Accordingly held that the issue of allowance of depreciation adjustment claimed by the assessee was academic. Further, relying on Pole to Win India Ruling it held that expenses disallowed as deduction by the assessee in its computation of income could not be included in operating cost for computing operating margin.

Sabic Research and Technology Pvt Ltd TS-327-ITAT-2017(Ahd)-TP ITANo.1065 dated 01.05.2017

Extraordinary expenses

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

KOB Medical Textiles Pvt Ltd. Vs. DCIT- TS-211-ITAT-2017(CHNY)-TP - /I.T.A.No.855/Mds./2015 dated 09.03.2017

527. The Tribunal allowed the assessee's claim towards adjustment of extraordinary expenditure relating to employee cost and consultancy charges incurred for future project requirement while computing operating margin for AY 2012-13. Noting that manpower was one of the main costs for assessee rendering software development services, it considered the assessee's submission that it maintained more than 10% of its manpower requirement in anticipation of new job orders due to difficulty in recruiting trained software personnel. It held that lack of mention of the fact of such extraordinary event having material impact on profitability in its financials, could not be reason for rejection of assessee's claim. It also observed that these expenses did not relate to the project executed and billed in the subject AY and that assessee was only in the 2nd year of operations, and therefore the impugned expenses could not be considered as intangible assets as the assessee had not exercised sufficient control over the expected future benefits arising from a team of skilled staff and from training so as to consider the expenses as intangible assets. Accordingly, it held that business module could not be straightway compared with other comparables, unless the extraordinary item of expenditure were excluded so as to arrive at correct margin of profit and since the assessee's PLI after adjustment was higher than that of comparables, it deleted the TP adjustment of Rs. 2.64 Cr.

Saggezza India P Ltd. Vs. DCIT - TS-240-ITAT-2017(CHNY)-TP - /I.T.A.No.3323/Mds./2016 dated 22 -03-2017

528. Where the assessee claimed adjustment on account of custom duty on imports stating that due to stringent quality norms, imports were necessitated in the initial stages and the non-cenvatable basic custom duty constituted additional cost for the assessee and the TPO disregarded the claim of the assessee stating that no evidence had been provided and that the comparable companies in the industry to which the assessee belonged also incurred import duties for

sourcing material, the Tribunal remitted the matter to the TPO for examination of the assessee's claim and to eliminate the difference, if any.

Doowon Automotive Systems India Pvt Ltd v DCIT – TS-97-ITAT-2017 (Chny) – TP- / I.T.A. No. 692/Mds/2016 dated 25.01.2017

529. The Tribunal accepted assessee's claim for adjustment towards difference in Lube oil price and Zinc tolling fee while benchmarking international transactions of assessee engaged in manufacture and sale of lubricant additives, noting that the comparable company viz. Lubrizol India P Ltd enjoyed better discount from IOCL (one of the JV partner for Lubrizol) in respect of price of Lube Oil and hence, cost of raw material was lower in its case as compared to the assessee and that the cost of zinc for Lubrizol was lower as it had an in-house manufacturing facility as opposed to the assessee, who had entered into sub-contracting arrangement with a third party for manufacture of zinc. Accordingly, it remitted both the issues to TPO for re-consideration with directions to work out the PLI after considering these adjustments. It also stated that the adjustment for difference in cost of zinc could be granted only if Lubrizol's cost details were made available.

Indian Additives Ltd. Vs. DCIT TS-121-ITAT-2017(CHNY)-TP - /I.T.A.No.2579/Mds./2016 dated 17.02.2017

530. The Tribunal allowed the assessee adjustment on account of extraordinary expenditure incurred by assessee relating to ex-gratia paid to the family of employee on his death as it was a non-recurring expense and also towards extraordinary expenses pertaining to merger (i.e. press meet expenses and rent for vacated old premises as they had a direct connection with the process of merger). However, it refused adjustment towards extra salary paid for duplicate post of CEO/CFO and held that such expenses / salary paid to existing staff could not be treated as extraordinary expenditure. Further it rejected the assessee's claim of extra-ordinary cost adjustment towards salary cost of 5,128 man hours due to the merger, which was claimed without establishing how the assessee's business was impacted because of the acquisition.

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

531. During the relevant AY, the assessee suffered an abnormal increase in the price of some of its raw – materials, mainly gold, owing to unexpected increase in price of gold (20 percent increase in price of gold) as a result of which it reduced this cost from the operating cost while arriving at the PLI margin of gross profit to sales, contending that, as the change in gold market did not coincide with the conditions prevailing when the agreement for sale of goods was entered into with the customers, it had not been able to pass on the increased cost to its customers including its AE. The aforesaid reduction in cost was denied by the TPO and on appeal restricted by the CIT(A) to 5 percent as opposed to 20 percent (as claimed by the assessee). The Tribunal, observing that the CIT (A) had not examined the sales price charged to AE in the present and preceding year, remitted the issue to the file of the CIT (A) with directions to examine the details submitted by assessee in this regard.

Molex Mafatlal Micron Pvt Ltd (now merged with Molex India Ltd) vs DCIT - TS-191-ITAT-2017(Bang)-TP – 1170/ Ahd/2010, 1197/Ahd/2010 etc dated 10.01.2017

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

Erhardt + Leimr (India) Pvt Ltd v DCIT – TS-72-ITAT-2017 (Ahd) – TP - ITA No. 352/Ahd/2015 dated 06.02.2017

533. The Tribunal, relying on coordinate bench's decision in assessee's own case for AYs 2006-07 and 2007-08 deleted adjustment **made on alleged** excess payment made by assessee in procuring raw material from AE on the ground that payment of higher price to AE as compared to non-AE was justified considering there were minimum order quantity restrictions on Non-AE purchases. Further, relying on coordinate bench's ruling in assessee's own case it accepted assessee's contention that the commission was paid for the purpose of business wholly and exclusively based on turnover and remitted issue of ALP determination in respect of sales commission paid to AE at 5% of net exports to the file of the Assessing officer to decide the matter afresh on the basis available supporting material and evidence and after providing an opportunity to the assessee to substantiate its claim.

Intimate Fashions India Pvt. Ltd vs DCIT-TS-424-ITAT-2017(CHNY)-TP-I.T.A.No.1163/Mds/2014 dated 10.04.2017

Profit Level Indicator

534. The Tribunal rejected the assessee's contention for exclusion of expenses reimbursement in operating cost / revenue and held that the relevant expenses were incurred by the assessee in connection with providing services to its AE and therefore ought to have been included while computing operating cost / revenue irrespective of the fact that no mark-up had been charged.

AXA Business Services Pvt Ltd – TS-1032-ITAT-2016 (Bang) - TP

535. The Tribunal rejected the contention of the assessee i.e. that Rs. 17.13 lacs incurred on outsourced maintenance services to third party vendors should be excluded from the computation of total costs since no value added functions were provided by the assessee on such costs. It noted that in the instant case the costs were incurred qua third parties and ultimately was incurred towards rendering of services by assessee to its AE which fetched contracted revenue and also that they were not recovered as such from AE. Therefore, it held that pass through costs pre-supposed specific and identifiable recovery as such from its AE without any profit element and if such cost was not separately recoverable from AE and formed part of the overall contracted value, then, it would shed the character of pass through costs.

Fujitsu India Ltd v DCIT – TS-56-ITAT-2017 (Del) – TP - I.T. (T.P) A. No.334/Bang/2013, IT. (T.P) A. No.484/Bang/2013, IT. (T.P) A. No.96S/Bang/2014, I.T. (T.P) A. No.91/Bang/2014 dated 29.11.2016.

536. The Tribunal remitted the issue of whether forex gain/loss was to be treated as a part of operating income while computing operating margin of the tested party and comparable companies to the file of AO directing it to consider forex gain as operating for computing profit percentage for ALP only if it was in respect of turnover of present year.

Akamai Technologies India Private Limited vs. DCIT-TS-757-ITAT-2017(Bang)-TP IT(TP)A No. 1122/Bang/2011 dated 08.09.2017

537. The Tribunal allowed the assessee's appeal and held that the arbitration award payment by the assessee to DRMC on behalf of AE which was subsequently reimbursed to the assessee does not form part of cost base for margin computation as it was a mere cost to cost reimbursement, however more so since the TPO had accepted the assessee's PLI without including the arbitration payment in the subsequent AY 2012-13.

Hyundai Rotem Company vs. ACIT-TS-924-ITAT-2017(DEL)-TP-ITA No. 510/Del./2016 dated 22.11.2017

538. The Court dismissed the appeal on whether repair and maintenance, electricity, insurance and depreciation on assets was to be included in the computation of PLI, noting that the assessee's transaction were at ALP irrespective of inclusion/exclusion.

Pr.CIT vs Swarovski India Pvt. Ltd-TS-874-HC-2017(DEL)-TP ITA No. 419/2017 dated 04.09.2017

539. The Court, noting that Tribunal had discussed in detail the factual position regarding the sharp depreciation of Indian Rupee (INR) against the Euro (EUR) by about 16% in a short span of 6

months, i.e., February to July 2008, held that a forex fluctuation adjustment had to be carried out in accordance with the Transfer Pricing regulations so as to eliminate differences between international transactions involving comparable companies and that entered into by the assessee. Accordingly, it held that the Tribunal was correct in making the said adjustment in assessee's hands.

Pr. CIT vs. Schneider Electric India Pvt. Ltd-TS-696-HC-2017(DEL)-TP-ITA no. 713/2017 Dated 09.07.2017

540. The Court, relying on the decision in the case of Ameriprise India (wherein it was held that forex gains earned in relation to trading items and emanating from international transactions could not be treated as non-operating in nature), held that forex gain/loss was to be treated as operating in nature.

Pr.CIT vs B.C Management Services Pvt Ltd-TS-948-HC-2017(DEL)-TP-ITA no.1064/2017 and CM no. 43177/2017 dated 28.11.2017

541. Where the TPO applied PLI on entire costs which included cost attributable to non-AEs as the well and the assessee had both the AE as well as non-AE transactions, the Tribunal held that the operating profit and operating cost relating to the AE transactions alone ought to be considered for determining the ALP and thereafter the fixed cost attributable to both the transactions ought to be apportioned. Accordingly, it remitted the TP issue for assessee engaged in rendering engineering & consulting services to AEs to the file of AO with the direction to consider only operating profit / operating cost of AE transactions.

Satyam Venture Engg. Services P) Ltd vs Dy.CIT-TS-1072-ITAT-2017(Hyd)-TP ITA No. 1464/Hyd/2014 dated 29.12.2017

542. The Court admitted assessee's appeal on whether Tribunal erred in coming to the conclusion that reimbursement of assessee's expenses by AE could form part of the receipts as well as cost base of the marketing support services segment while determining operating profitability of such segment. The Tribunal had upheld CIT(A)'s inclusion of reimbursements received from AEs as part of cost base / income while determining operating margins and allocation of certain cost items on head count basis.

Pernod Ricard India Pvt. Ltd vs CIT-TS-1082-HC-2017(DEL)-TP ITA 1177/2017 dated 22.12.2017

543. Where the TPO treated the entire write back amount of Rs. 37.84 crores as non-operating income on the basis that it was a mere book entry and not connected with assessee's business operations, the Tribunal, relying on the decision in the case of Sony India (P) Ltd – (315 ITR 50) and Gillete Diversified Operations ITA No.400/DEL/2013 (wherein it was held that if the reversal of provision / write back is on account of revenue in nature, it should be included as part of operating income and if the liabilities originally created were on account of capital items then their write back cannot be considered to be a normal instances of business and hence to be excluded as operating income), accepted assessee's plea for inclusion of Rs. 37.49cr representing write back in connection with revenue items as part of operating profit.

Suessen Asia Private Limited (merged with Rieter India Private Limited) vs. ACIT-TS-1055-ITAT-2017(PUN)-TP ITA No.1629/PUN/2011 dated 20.10.2017

544. The Tribunal dismissed Revenue's appeal against CIT(A)'s acceptance of assessee's operating profit/sales (OP/sales) as PLI while benchmarking imports by assessee under TNMM. Noting that the CIT(A) had rejected OP/TC as PLI as the purchase price in total cost included purchases from AEs, the Tribunal held that there was no infirmity in the order of the CIT(A) and accordingly, dismissed Revenue's appeal.

ACIT vs Dentsply India (P) Ltd-TS-947-ITAT-2017(DEL)-TP ITA No. 1860/Del/2009 dated 06.11.2017

545. The assessee, a wholly owned subsidiary of Mitsubishi Corporation Japan, one of the leading Sogo Shosha establishments in Japan, carried out transaction of provision of services, purchase of goods and various other transactions and used the Berry Ratio to benchmark its transactions. The TPO rejected use of Berry ratio (Gross Profit / Operating Cost)adopted by the assessee contending that the assessee performed all the critical functions, assumed significant risks and used both tangible and unique intangibles developed by it over a period of time and applied the ratio of Operating Profit / Total Cost of comparables (around 2.49%) to the FOB value of goods sourced from India & finally made a TP adjustment. The Court dismissed the appeal of the Revenue and upheld the order of the Tribunal wherein it accepted the assessee's contention that the Berry Ratio was appropriate for benchmarking its transactions (as the assessee neither assumed any major inventory risk nor committed any significant assets for the same and as there was no value addition or involvement of unique intangibles) and remitted the issue of the TPO to benchmark the assessee's transactions accordingly.
Mitsubishi Corporation India P Ltd. [TS-230-HC-2017(DEL)-TP - ITA 159/2017, CM APPL.6427/2017 dated 22.03.2017
546. The Tribunal directed the AO / TPO to exclude the pre-operative expenses incurred by the assessee such as rent, employee cost and administrative expenses from the computation of PLI noting that the assessee had entered into an agreement with its AE for provision of software development services on 1.04.2005 while it was granted STPI registration with effect from 30.06.2005 and therefore expenses incurred prior to the registration were to be considered as expenses for establishment of business and not for rendering services and therefore could not be considered as operating in nature.
ACIT v Amberpoint Technology India Pvt Ltd – TS-124-ITAT-2017 (Pun) – TP - ITA No.266/PUN/2012, ITA No.1862/PUN/2012 dated 15.02.2017
547. The Tribunal rejected assessee's plea to consider operating profit before depreciation, interest and tax (PBDIT) as PLI. It held that in an asset intensive industry where revenues were driven by assets, exclusion of depreciation from profits would distort the comparability analysis. However, it directed the AO/TPO to grant a suitable adjustment in hands of comparables if assessee was able to establish that its depreciation rates were higher than that of its comparables.
Vishay Components Pvt Ltd v ACIT – TS-73-ITAT-2017 (Pun) – TP - ITA No.1712/PUN/2011 dated 10.02.2017
548. The Tribunal, relying on ruling in Welspun Zucchi Textiles Ltd. Vs. ACIT[TS-6-ITAT-2013(Mum)-TP], upheld the claim of assessee and held that export incentives were to be considered as operating income for computation of operating margins of the assessee as well as the comparable.
Carraro India Pvt Ltd v ACIT – TS-26-ITAT-2017 (Pun) – TP - ITA No.1629/PUN/2013, ITA No.1673/PUN/2013 dated 19.01.2017
549. **Since** the DRP's order was cryptic in respect of forex fluctuation and risk adjustment for AY 2011-12, the Tribunal restored the matter back to the file of DRP for fresh consideration directing it to verify whether such fluctuation was in respect of turnover of the present year or of the earlier year and include it only if it was relatable to the turnover of the present year for computation of ALP. Further, in respect of risk adjustment, it directed the assessee to provide working of such claim before DRP's adjudication on the issue.
Marlabs Software Pvt Ltd vs ACIT-TS-1002-ITAT-2017(Bang)-TP- IT(TP)A No. 588/Bang/2016 dated 08.12.2017
550. The Court, relying on the decision in the case of Cash Edge – (351 ITR 8) (wherein the coordinate bench for same AY 2010-11 had considered forex fluctuation as operating item and held that safe harbor rules which came into force after AY 2010-11 were not applicable), upheld the Tribunal's order considering forex gain/losses as operating in nature.
Pr. CIT vs. Rolls Royce India Pvt. Ltd-TS-1066-HC-2017(DEL)-TP ITA 419/2016 & ITA 747/2016 dated 23.10.2017

551. The Tribunal held that the foreign exchange loss on account of borrowing from AE should be considered as operating expenditure for assessee engaged in manufacturing of APIs, other intermediaries and bulk drugs. However, since the assessee had failed to link exchange loss of Rs. 112.40 million with the transaction of borrowing from the assessee's AE, the Tribunal remitted the matter to AO/TPO with the direction that exchange loss pertaining to loan transactions should be treated as non-operating while remaining amount pertaining to trading transactions to be taken as operating expenses for determination of PLI.
Teva API India Pvt Ltd (Formerly known as Teva API India Ltd.) vs. ACIT-TS-952-ITAT-2017(DEL)-TP ITA No.6706/Del/2016 dated 27.10.2017
552. The Tribunal accepted the assessee's contention to consider 'contract termination fee' received from AEs as part of operating revenue for AY 2010-11 and held that the contract termination fee was in effect compensating the assessee for the expenses incurred by it for executing the contract partially and therefore was to be considered as operating revenue. It observed that the assessee, on execution of contract for rendering software development services, would have received full consideration from AE, whereas contract termination fee was paid on similar lines, but proportionately owing to premature contract termination.
Invensys Development Centre India Pvt Ltd v DCIT – TS-125-ITAT-2017 (Hyd) – TP - ITA No.329/Hyd/2015, ITA No.318/Hyd/2015 dated 23.02.2017
553. The Tribunal held that provision for bad and doubtful debts was to be considered as operating expenses and accordingly remitted the issue of the AO to re-compute the margins of the assessee and comparables treating the same as operating expenses.
ITO v Intoto Software (India) Pvt Ltd – TS-42-ITAT-2017 (Hyd) – TP – ITA No 1921/Hyd/14, ITA No 25/Hyd/15 dated 31-01-2017
554. The Tribunal upheld the CIT(A)'s approach of considering cost of raw-material obtained from its AE as pass through cost and directed its exclusion from operating cost as well as operating revenue for computing GP margin under Cost Plus Method (CPM), observing that AE had supplied raw material kits which were to be re-exported to AE after assembling and partial testing and that there was a prior binding obligation on part of the assessee for returning the same raw kits in their finished form to the AEs. Thus, it held that assessee's duty was confined only to rendering services (testing etc.) on the raw kits and that there was no profit element involved. It also took note of method of accounting followed by assessee whereby purchase price of kits received from AE was recorded separately, and though no separate amount was paid to the AE, the same was ultimately adjusted against export price receivable from AE on re-export.
Akon Electronics India Pvt. Ltd vs. DCIT – TS-105-ITAT-2017 (Del) – TP - ITA No.4804/Del/2009, ITA No.4837/Del/2009 dated 15.02.2017
555. The Tribunal dismissed the contention of the Revenue that foreign exchange loss was to be considered as non-operating expense relying on Safe Harbour Rules, wherein foreign exchange loss and income had been excluded from the calculation of operating expense and income respectively and relying on the ruling of Westfalia Separator India (P.) Ltd. vs. ACIT [TS-220-ITAT-2014(DEL)-TP], held that the safe harbor rules were notified on 18.09.2013, and hence were not applicable to the subject AY and accordingly held that foreign exchange loss was required to be treated as operating in nature.
St-Ericsson India Private Limited vs Addl CIT - TS-119-ITAT-2017(DEL)-TP - ITA No.1672/Del./2014 dated 22.02.2017
556. The Tribunal held that the foreign exchange loss arising due to reinstatement of foreign currency in accordance with accounting standards was to be treated as operating in nature. It placed reliance on the ruling of CIT Vs. Pentasoft Technologies Ltd [TS-123-HC-2010(MAD)] wherein it was held that Section 10A benefit would be granted in respect of foreign exchange gain as the gain arose on account of export operations of the assessee, and accordingly held that foreign exchange loss was operating in nature.

Infac India P. Ltd vs DCIT - TS-120-ITAT-2017(CHNY)-TP- I.T.A.No.3182/Mds./2016 dated 17.02.2017

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

Symbol Technologies India Private Limited - TS-19-ITAT-2017(Bang)-TP

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

Synova Innovative Technologies Pvt Ltd - TS-1068-ITAT-2016(Bang)-TP

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

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

560. The Tribunal agreed with the contention of the assessee that foreign exchange losses were to be treated operating expenses and rejected the Revenues contention that as per the Safe Harbour Rules, foreign exchange loss and income was to be excluded from the calculation of operating expense and income respectively. Relying on the decision of Westfalia Separator India (P.) Ltd. vs. ACIT [TS-220-ITAT-2014(DEL)-TP], it held that since the safe harbor rules were notified on 18.09.2013, they were not applicable to the subject AY and accordingly, the foreign exchange loss was required to be treated as operating in nature.

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

561. The Tribunal remitted the issue regarding treatment of abnormal loss on account of cancellation of orders as extraordinary cost under Cost Plus Method (CPM) for AY 2006-07 to the TPO / AO and held that the assessee (an exporter of ready-made garments) had failed to prove actual loss incurred on the basis of concrete evidences. Noting the contention of the assessee that in January 2005, export orders from one of its biggest buyers were cancelled because of the buyer

going bankrupt, which led to loss of Rs. 2.4 Cr on account of revaluation of raw material inventory at present realisable scrap value, it held that extraordinary costs which were beyond assessee's control and unrelated to sale of goods, were to be excluded from direct / indirect cost, however it observed that assessee had neither shown such extraordinary expenditure in its P&L A/c / schedules as specifically required by accounting standard nor had it furnished details regarding cancellation of order, realisable value of materials or how valuation loss of Rs. 2.4 Cr was determined. It also noted that the assessee was also supplying goods not only to that buyer but also to 3 other AEs, whereas it was not proved whether raw material was purchased for supply to that buyer only. Accordingly, it directed the assessee to furnish all this information to justify its claim and also to show the nature and extent of extraordinary loss incurred by the assessee with evidences.

Cornell Overseas P Ltd Vs DCIT - TS-1092-ITAT-2016(DEL)-TP - ITA No.1158/Del/2014 dated 24.10.2016

562. The Tribunal held that foreign exchange fluctuation gain or loss arising from realization of sales made during the year would be considered as operating in nature. Accordingly, it remitted the issue to AO/TPO for verify the source of such gains / losses.

Dhanya Agroindustrial Pvt. Ltd. Vs DCIT - TS-168-ITAT-2017(Bang)-TP- I.T.(T.P) A. No.161/Bang/2016 dated 08.03.2017

563. The Tribunal accepted the contention of the Revenue and held that only foreign exchange fluctuation gains/losses in respect of the sale proceeds of the current year could be considered as operating in nature and not on account of realization of sale of earlier years. Accordingly, it set aside the issue to the record of AO/TPO for re-computing the margins.

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

ACIT v Bateman Engineering Pvt Ltd – TS-192-ITAT-2017 (Bang) – TP - IT (TP) A No.495 (Bang) 2015 dated 17-02-2017

564. The Tribunal held that foreign exchange fluctuation gains arising out of earlier years turnover was to be excluded from the operating profit while computing the PLI as it would be absurd to include the same if the related turnover was not included in the denominator. Accordingly, in the absence of details as to whether the gain arose on account of current year's turnover of earlier year's turnover, it remitted the issue to the file of the AO / TPO for verification.

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

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

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

566. The Tribunal allowed Revenue's appeal w.r.t treatment of forex gain and held that forex gain/loss had to be treated as operating income while computing the margin of the current year if such gain was in respect of the turnover of the current year. It observed that the lower authorities had not given a finding on this aspect and accordingly remitted the matter to the file of the AO/TPO with the direction that assessee should establish that the foreign exchange gain was earned by the assessee in the current year for the purpose of computing operating margin.

DCIT vs ABB Global Services Pvt Ltd-TS-501-ITAT-2017(BANG)-TP- IT(TP)A No.49 and 97/B/2014 dated 05.05.2017

567. The Tribunal rejected Revenue's contention that definition of 'operating cost' & 'operating revenue' under Rule 10TA (Definitions in respect of Safe Harbour Rules for International Transactions) should be adopted for Rule 10B & Sec. 92 and held that such definition under Rule 10TA was for a specific purpose. Accordingly, it held that the forex gain on AE-receivables on account of services rendered by assessee (captive service provider designing transformer components etc. under the projects provided by AE) was to be considered as operating revenue for computing assessee/comparables margin for AY 2009-10.
Virginia Transformer India P. Ltd vs. ITO-TS-651-ITAT-2017(DEL)-TP-ITA No. 1001/del/2014 dated 31.07.2017
568. The Tribunal, following the decision of co-ordinate bench in assessee's own case for AYs 2009-10 and 2010-11 [TS-80-ITAT-2015(Mum)-TP], allowed assessee's appeal and held that loss/gain on account of foreign exchange fluctuation had to be considered as operating in nature
Hapag-Llyod Global Services Private Limited-TS-676-ITAT-2017(Mum)-TP-ITA No. 2190/mum/2017dated 18.08.2017
569. The Tribunal held that for the purpose of computing profit margin under Rule 10B(1)(e) there could be any denominator such as cost incurred or sales effected or assets employed, however the numerator ought to be the net operating profit as against the net profit adopted by the TPO as the net profit would factor in non-operating expenses as well.
ACIT vs. Progressive Tools & Components Pvt. Ltd - TS-200-ITAT-2017(DEL)-TP -
570. The Tribunal, noting that the assessee had debited provision of doubtful debts to the P&L A/c and had also claimed the same in its computation of income on the basis of amount written-off during the year, dismissed the contention of the assessee that the provision for doubtful advances debited to P&L A/c was a non-operating expense which ought to be excluded while computing the operating cost. It held that once the amount was allowed as a written off claim, then it would be part of the operating cost. Noting that the TPO had excluded provision for doubtful debts from the operating margins of comparables, it held that the exclusion of doubtful debts in the case of comparables would also depend on whether the amount was actually written off and claimed as an allowable revenue expenditure u/s 36(1)(vii). Accordingly, it remitted this issue to AO/TPO for verification of relevant facts and directed exclusion of this expenditure from operating cost in the case of both the assessee as well as the comparables only if it was found to be only a provision and not a write-off.
VMware Software India Pvt. Ltd. Vs DCITTS-71-ITAT-2017(Bang)-TP -LT. (T.P)A. No.1311/Bang/2014 dated 6.1.2017
571. The Court, noting that Tribunal had discussed in detail the factual position regarding the sharp depreciation of Indian Rupee (INR) against the Euro (EUR) by about 16% in a short span of 6 months, i.e., February to July 2008, held that a forex fluctuation adjustment had to be carried out in accordance with the Transfer Pricing regulations so as to eliminate differences between international transactions involving comparable companies and that entered into by the assessee. Accordingly, it held that the Tribunal was correct in making the said adjustment.
Pr. CIT vs. Schneider Electric India Pvt. Ltd-TS-696-HC-2017(DEL)-TP-ITA no. 713/2017 Dated 09.07.2017
572. The Tribunal upheld the directions of the DRP excluding assessee's Solar Test (ST) activity costs from operating costs while computing the PLI as they were extra-ordinary in nature. It noted that the assessee had undertaken trial runs for production of solar receiver tubes during AY 2010-11, and subsequently, the economic conditions had turned unviable creating uncertainty in demand, owing to which, assessee had stopped the production of tubes and that the solar test trails, carried out by assessee during the period 09.10.2009 to 23.11.2009, were an exception to its regular business of producing tubes for pharmaceutical packaging. Accordingly,

it held that the costs incurred on the impugned activity could not be treated as operating in nature. Further, it held that the provision of Rs. 13.9 Cr for impairment of assets used in the trial made by the assessee as per AS-28 was also to be considered as an extra-ordinary cost.

ITO vs. Schott Glass India Pvt. Ltd. - TS-166-ITAT-2017(Mum)-TP - I.T.A./1867/Mum/2015 dated 08.03.2017

573. The Apex Court admitted the Revenue's SLP against order of the Delhi High Court wherein the High Court had held that for the purpose of computing PLI of OP/TC, the denominator had to be total costs incurred by assessee and not the FOB value of goods sourced through the assessee as the Act did not authorize broadening of the cost base in such circumstances and dismissed the appeal of the Revenue holding that no question of law arose. Since the same issue had arisen in earlier years as well, the Apex Court directed that this case would be heard along with earlier year appeal and other connected matters.

Pr. CIT vs. Li and Fung (India) Pvt Ltd - TS-223-SC-2017-TP - Petition(s) for Special Leave to Appeal (C).....CC No. 5274/2017 dated 24.03.2017

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

575. The assessee, a wholly owned subsidiary of Mitsui & Company Pvt Ltd., Japan engaged in providing sales support services and liasoning services to its Associated Enterprises ("AEs") with regard to the exports and imports of the commodities from its AE to / from India used TNMM as the MAM for determining ALP of its international transactions and adopted the Berry Ratio i.e. Gross Profit / Operating Cost as PLI but the TPO re-characterized the service and commission activities of the assessee as its trading segment and also rejected the comparables selected by assessee thereby inflating the assessee's total cost by Rs 4,541cr in AY 2009-10 and Rs 5,924cr in AY 2010-11 by including the value of sale / purchases on which it earned commission income, ignoring the fact said value was recorded as sale / purchase by AEs and was never a cost to assessee. The Tribunal, relying on the decision of the co-ordinate bench, in assessee's own case for AY 2007-08 and 2008-09 rejected the TPO's recharacterisation and held that the computation of the operating profit margin by increasing the cost led to an arbitrary adjustment of assessee's income and was contrary to the Rules and the provisions of the Act. The Court upheld the order of the Tribunal. Further, noting that the Tribunal had observed that when the value of the goods on which commission/ service income was earned was not to be added to the cost base, the assessee's international transactions computed by using TNMM as MAM and Berry Ratio (Gross Profit / Operating Cost) as PLI was at arm's length, the Court dismissed the appeal of the Revenue and held that no substantial question of law arose.

Mitsui & India Pvt. Ltd. [TS-174-HC-2017(Del)-TP] [ITA 788 & 789/2016]

576. Where the Tribunal had upheld use of Berry Ratio (i.e. Gross Profit / Operating Cost) under TNMM for benchmarking international transactions of purchase of goods, provisions of services etc. undertaken by 'Soga Shosha' assessee, but remitted matter back to TPO to determine outcome in line with legal principles, the Court dismissed the Revenue's appeal against Tribunal order by relying on the decision of the co-ordinate bench of Court for a different AY, wherein the Court had declined to interfere with remand order in assessee's appeal. Accordingly, it held no substantial question of law arose.

CIT vs. Mitsubishi Corporation India (P) Ltd - TS-230-HC-2017(DEL)-TP - ITA 159/2017, CM APPL.6427/2017

577. The Tribunal, following the decision of Capital One Services India P. Ltd [TS-214-ITAT-2015(Bang)-TP], held that donation was to be treated as a non-operating item as it was not in nature of normal business activity.

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

578. The Tribunal, relying on its decision in the case of Techbooks International Pvt Ltd (TS-317-ITAT-2015 (Del) – TP) dismissed the appeal of the Revenue challenging the order of the CIT(A) wherein the CIT(A) had accepted the assessee's claim of including the foreign exchange gains / loss while computing its PLI as well as while computing the PLI of comparable companies. It noted that the foreign exchange loss and gains were in respect of revenue items.

ITT Corporation India Pvt Ltd – TS-245-ITAT-2017 (Ahd) - TP - IT(TP)A No. 552/Ahd/2016 dated March 28, 2017

579. The assessee had suffered forex loss to the tune of Rs. 2.66 Cr on account of cancellation of forward contracts. The Revenue argued that assessee had entered into forward contracts to cover the loss that could arise, if payments were delayed, and since 88% of assessee's revenue was from AEs, the foreign exchange loss ought to have been considered as operational in nature. The Tribunal followed the decision in Pangea3 & Legal Database Systems Pvt. Ltd. [TS-148-ITAT-2017(Mum)-TP], and held that entering into forward contracts for covering the risks of exchange rate fall was a normal business transaction, and further, extraordinary fluctuations could warrant an adjustment if it could be demonstrated that such a phenomena was absent for comparable cases. Since the assessee had not demonstrated extraordinary forex fluctuations on the basis of comparable cases, the Tribunal accepted the contention of the Revenue and considered the foreign exchange loss/gain as operating in nature.

Saipem India Projects Limited Vs DCIT - TS-308-ITAT-2017(CHNY)-TP - ITA Nos.985 & 1400, CO 79/2014 dated 05.04.2017

580. The Tribunal noted that the TPO included depreciation as part of operating cost while working out PLI for assessee, but excluded the same while working out comparables' margin. Relying on Bombay High Court decision in Welspun Zucchi Textiles Ltd [TS-9-HC-2017(BOM)-TP] it held that depreciation was required to be considered as part of operating cost for computing PLI and therefore directed the AO/TPO to recompute PLI of comparable companies after considering depreciation as part of operating costs.

Further, it noted that the TPO had excluded duty drawback of Rs. 73.17 lakhs and scrap sale of 23.04 lakhs from operating profit of the assessee while computing PLI. Relying on Welspun Zucchi HC (supra), the Tribunal held that duty drawback was to be considered as part of operating profits. Thus, it directed AO/TPO to recompute PLI of assessee as well as comparables by considering duty drawback and sale of scrap as part of operating profit.

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

581. The Court dismissed the Revenue's appeal against the order of the Tribunal treating reimbursement received by assessee towards advertisement, marking and promotion expenses as operating in nature. It noted that the similar issue had arisen in AY 2002-03, wherein its co-ordinate bench had taken the same view and therefore held that no substantial question of law arose warranting any interference.

Pr. CIT vs. Samsung Electronics India Information & Telecommunications Ltd - TS-324-HC-2017(DEL)-TP - ITA 305/2017 dated 18.04.2017

582. The Court upheld the order of the Tribunal directing the AO/TPO to exclude reimbursement of costs (without mark-up) from AE in respect of spare infrastructure capacity while working out assessee's PLI for AY 2011-12. It distinguished the decision of Cushman and Wakefield (India) (P.) Ltd [TS-150-HC-2014(DEL)-TP], which provided that the reimbursement was to be included while computing PLI as the said case pertained to reimbursement by an Indian entity for costs incurred by AE and not vice versa as in assessee's case. It also observed that there was no categorization of the reimbursement costs (with/without markup) in Cushman & Wakefield ruling as in instant case. Noting that the Tribunal had examined agreement with AE to come to a definite factual conclusion as regards reimbursement of the infrastructure costs without any mark up, it rejected the Revenue's general plea that order of the Tribunal was 'perverse and bad in

law' as it had failed to consider reasons provided in TPO/DRP's order. Accordingly, it dismissed the Revenue's appeal absent any substantial question of law.

Pr. CIT vs. CPA Global Services Private Limited - TS-329-HC-2017(DEL)-TP - ITA 266/2017 dated 03.05.2017

583. The Tribunal accepted the plea of the assessee for exclusion of forex gain / loss from operating items, noting that the content of raw material imported was low in case of comparables because of which they were not impacted as much by currency fluctuations, and that in any case the impugned year was an extraordinary year of depreciating rupee.

Relying on the decision of the Tribunal in Motonic India Automotive, it opined that forex fluctuations gains / losses ought to be excluded from the operating incomes / expenses and thus remitted this ground to AO for fresh consideration.

Gates Unitta India company P Ltd. Vs DCIT TS-360-ITAT-2017(CHNY)-TP - /I.T.A.Nos.1041/Mds./2014 dated 26-04-2017

584. The Tribunal directed the consideration of foreign exchange gain arising out of current year's turnover as part of operating revenue for AY 2005-06 and directed the assessee to furnish complete details before CIT(A) regarding sale against which forex gain had been received. Further, the Revenue had argued that CIT(A) had erred in considering assessee's nature of business as construction activity when the assessee was actually providing managerial support services. Referring to the order of CIT(A), the Tribunal observed that the CIT(A) had decided the issue considering the assessee to be engaged in the provision of management and supervisory services and thus the Revenue had filed the appeal in the wrong impression that the CIT(A) had considered the assessee as engaged in construction activity.

Sunway Construction India Pvt Ltd-TS-342-ITAT-2017(Bang)-TP-IT(TP)A No.1190(bang) dated 23.05.2017

585. The Tribunal rejected Revenue's contention that the CIT(A) had erred in holding foreign exchange loss or gain, amortization expenses of pre-operative and preliminary expenses, forex losses, bad debts written off and fixed assets written off etc. as part of operating cost, when TPO had excluded it from the comparables. CIT(A) had held that such expenses were in the natural course of business and therefore their exclusion for the purpose of calculation of operating profits would not be in line with audited accounts. While upholding the order of the CIT(A), the Tribunal remitted the matter to the AO/TPO to reexamine as to whether there was any calculation error adopted by the CIT(A)/TPO in applying the principles and make suitable correction after affording due opportunity to the assessee.

Swiss Re Shared Services (India) P Ltd vs DCIT-TS-352-ITAT-2017(Bang)-TP I.T(TP).A.No.1139/bang/2011 dated 03.05.2017

586. The Tribunal, relying on the decision in the case of Fiserv India Pvt Ltd [TS-437-HC-2016(DEL)-TP], held that the exchange gain/loss arising on account of realizing sales, payment to suppliers was to be treated as part of operating revenue/operating cost. It noted that nothing was brought on record to establish that the foreign exchange loss was on account of revenue items and therefore remanded the matter back to the AO/TPO directing him to examine whether loss was arising on account of revenue items, and if so, directed him to treat it as part of operating cost for the purpose of computing the operating margins of the company.

FCG Software Services (India) Pvt Ltd [TS-409-ITAT-2017(Bang)-TP IT(TP)A No. 994 /bang/2011 dated 21.04.2017

587. The Tribunal directed the AO to exclude recovery of advance written off from operating profit for comparing ALP, relying on the decision in the case of Logica Private Ltd (Bang)-TP- ITA No.1129/bang/2011. Further, it remitted the issue of non-allowance of adjustment in respect of extraordinary forex loss suffered by the assessee as against comparables by relying on the decision in the case of Motonic India Automotive (P.) Ltd and held that exchange rate was subject to fluctuation due to economic conditions and while determining the ALP, such factors

had to be considered. Further, it also excluded Nitin Fire Protection Industries Ltd from the set of comparables on the ground that its major income was from project related activity.

R Stahl Private Limited [TS-377-ITAT-2017(CHNY)-TP] I.T.A No.2745/Mds/2016 dated 19.04.2017

588. The Tribunal, relying on the decision in the case of Motonic India Automotive, allowed custom duty adjustment in principle in respect of assessee's manufacturing segment for AY 2009-10, noting the fact that the raw material import content of the assessee was 99% as against 30% import content for comparable companies. It held that the custom duty was to be eliminated from comparable price also to arrive at the correct PLI in order to arrive at correct PLI in order to bring uniformity and therefore remitted the issue to AO for fresh consideration. Further, it excluded one company from list of comparables noting that it used raw material re-cycled from worn out tyres and tread peelings and thus had an inferior product compared to that of the assessee.

Gates Unitta India Company P Ltd -TS-360-ITAT-2017(CHNY)-TP-.ITA Nos 1041/Mds./2014 dated 11.05.2017

589. The Tribunal held that foreign exchange gain/loss arising during the year on account of fluctuation of foreign exchange rate in respect of export realization would form part of operating revenue or cost as the case may be.

Goldman Sachs Service Pvt Ltd [TS-430-ITAT-2017(Bang)-TP] IT(TP)A No. 66/Bang/2014

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

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

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

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

592. The Tribunal relying on the decision in the case of SAP Labs [TS-61-ITAT-2010(Bang)-TP] held that foreign exchange loss/gain was to be considered as operating in nature and directed the DRP to consider them as part of operating income/expenses only to the extent pertaining to international transactions entered during the year under consideration.

Obopay Mobile Technology India Private Ltd vs DCIT-TS-493-ITAT-2017(Bang)-TP-IT(TP)A Nos. 238 & 553/bang/2016 dated 28.04.2017

593. The Tribunal upheld the DRP's view that forex fluctuation gain/loss is operating in nature and was to be considered for computing assessee and comparables margin while determining ALP. However, relying on the decision in the case of Synova Innovative Technologies Pvt Ltd [TS-1068-ITAT-2016(BANG)-TP], it also clarified that if the fluctuation of foreign exchange, either gain or loss, was on account of the sale proceeds booked in the earlier Financial Year, then the same could not be considered as part of the operating margin of the current assessment year. Accordingly, it held that since in the present case, the turnover of the earlier year had already been taken into consideration for benchmarking the profit margin of the earlier year, the foreign exchange gain resulting from such turnover could not be considered for calculation of operating margin of the current assessment year.

ACIT vs Swiss Re Shared Services (India) Pvt Ltd-TS-504-ITAT-2017(BANG)-TP-IT(TP)A No 630/bang/2016 dated 13.04.2017

594. The Tribunal, relying on the decision in the case of Techbooks International Pvt Ltd [TS-317-ITAT-2015(DEL)-TP] directed the TPO to treat the provision for doubtful debts in case of comparables viz. BVG India Ltd and Cameo Corporate Services Ltd as in operating nature. Noting that Revenue had not disputed that assessee's provision of doubtful debts was excessive and concurring with DRP's direction to have consistent treatment vis-à-vis the assessee and comparables, it held that provision for doubtful debts should be treated as operating. TPO had excluded provision for doubtful debts in case of these 2 comparables treating it as an extraordinary event on the basis that it appeared in their financials for the first time.

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

595. Where the assessee benchmarked its international transactions viz. provision of software development services under TNMM and allocated its indirect costs to the software development segment based on manpower and turnover and the TPO accepting the application of TNMM disputed the allocation of indirect costs as done by the assessee, proceeded to benchmark the transactions based on the gross profit margins of the assessee and the comparables, the Court upheld the order of the Tribunal and CIT(A) accepting the benchmarking conducted by the assessee and dismissed Revenues appeal. It held that the computation of PLI being a factual issue did not constitute a substantial question of law.

Pr.CIT vs Network Programs India Ltd-TS-883-HC-2017(DEL)-TP ITA 883/2017 dated 07.11.2017

Restrict adjustment to AE transactions

596. Where in the second of proceedings the assessee in respect of computation of adjustment of manufacturing activity contended that the TPO/DRP had erroneously benchmarked the transactions with AE at entity level ignoring the fact that the transactions with AEs were required to be benchmarked adopting the basis of proportionality, the Tribunal, relying on the coordinate bench's ruling in assessee's own case for AY 2006-07 to 2008-09 wherein the principle of proportionality against entity level benchmarking was approved. Held that applying the principle of consistency, the ground raised by assessee is allowed.

Demag Cranes & Components (India) Pvt Ltd-TS-892-ITAT-2017(PUN)-TP ITA No.328/PUN/2014 dated 11.11.2017

597. The Tribunal remitted the issue of computation of arm's length cost for onsite services rendered to assessee by its AE to the file of TPO. Noting that the TPO while computing the arm's length cost had first determined the total arm's length cost of the entire revenue of the assessee and then divided in proportion to transactions with the related party and non-related party, it accepted assessee's contention that TPO instead should have calculated ALP of costs of international transactions only and should have taken into account, details furnished by assessee to show that TPO's methodology resulted in excess adjustment of Rs. 60.53 lakhs.

598. The Tribunal, relying on its earlier and subsequent year's orders in the case of the assessee, held that where the assessee had maintained segmental profits that were used for the purpose of claiming deduction under section 10A, the TPO erred in computing TP adjustment on the entire turnover of the assessee which included transactions with non-AEs. Accordingly, it directed the AO / TPO to make adjustments only to the extent of transactions with AE and exclude the adjustment on transactions with non-AEs.
TNS India Pvt Ltd v ACIT – TS-45-ITAT-2017 (Hyd) -TP - I.T.A. No. 1927/HYD/2011 dated 06-01-2017
599. The Tribunal held that the TPO erred in making adjustment under TNMM on the entire turnover of the assessee and that the adjustment should only be made on the international transactions undertaken by the assessee. Further, it held that movement in Work-in-Progress was to be considered for computing the operating margin of the assessee. Accordingly, it directed the AO / TPO to make adjustments only to the extent of transactions with the AE and exclude the adjustment on transactions with Non-AEs and to re-compute the correct margin.
TNS India Pvt Ltd v ACIT – TS-45-ITAT-2017 (Hyd) – TP
600. The Tribunal upheld the CIT(A)s restriction of the TP addition exclusively to AE transactions relating to purchase of raw material and components. However, it observed that while segregating the purchases made from AEs from the entity level transactions, the CIT(A) had also included the value of international transaction relating to purchase of machinery / spares, against which no TP-addition had been made. Accordingly, it suggested two options for segregation – i) apportioning the total operating profit in the ratio of 'utilized raw material purchased from the AEs' and 'utilized raw material purchased from non-AEs' (Opening stock of raw material + Purchases– Closing stock) or ii) Deducing the share of operating profit from the 'utilized raw material purchased from AEs' by dividing the amount of 'utilized raw material purchased from AEs' with overall amount of 'utilized raw material purchased from AEs and non-AEs and remitted the matter to the file of the AO / TPO for re-computation of AE transactions in line with its suggestions.
Hi Lex India Pvt Ltd – TS-152-ITAT-2017 (Del) – TP - ITA No.2036/Del/2014 dated 03.03.2017
601. The Tribunal, relying on the decision of the Bombay High Court in CIT Vs Hindustan Unilever Limited [TS-538-HC-2016(BOM)-TP] held that transfer pricing adjustments ought to be restricted to the international transactions only and it could not be applied to uncontrolled transactions. Accordingly, it directed the AO/TPO to restrict adjustment on account of ALP to the extent of the transactions with AE only.
Cornell Overseas P Ltd Vs DCIT - TS-1092-ITAT-2016(DEL)-TP - ITA No.1158/Del/2014 dated 24.10.2016
602. The Tribunal deleted TP-adjustment made at entity level in respect of international transactions entered into by assessee, engaged in manufacturing and trading of tractors/its parts, holding that the TP adjustments had to be made only with respect to international transactions with AEs and not at entity level. Noting that by working out proportionate adjustment on the basis of AE sales to total sales of tractor division, assessee had claimed that entity level transactions could be segregated into AE and non-AE segments, relying on the decision in the case of Bombay HC in the case of Alstom Projects India [TS-758-HC-2016(BOM)-TP], it held that the absence of segmental accounts did not warrant entity wise adjustment and that the absence of segmental data was not an insurmountable issue and proportionate basis could be adopted.
New Holland Fiat (India) Pvt Ltd vs DCIT- TS-356-ITAT-2017(Mum)-TP – I.T.A No. 7574/Mum/2012 dated 03.05.2017
603. The Tribunal directed the TPO to restrict TP-adjustment only in respect of assessee's international transaction of purchase of components from AE and not assessee's entire turnover for AY 2005-06.. The Tribunal held that the action of the TPO was illegal and arbitrary and the adjustment was to be made only in respect of international transaction of purchase of

components from its AE and not the entire turnover. Further, it remitted the comparability of Remi Process Plant & Machinery Ltd to the file of TPO/AO for fresh consideration. The CIT(A) had excluded the comparable since its selling price was higher than 5% margin adopted by TPO. The assessee submitted that if the extraordinary item of late delivery charges was excluded from sales expenses, Remi Process would be comparable to the assessee. Accordingly, the Tribunal held that contention of the assessee required fresh examination and restored the matter to the file of AO/TPO for fresh adjudication.

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

604. The Tribunal, relying on the decision in the case of Kshema Technologies Ltd [TS-182-ITAT-2016(BANG)], held that the use of entity level margin for the purpose of benchmarking international transactions was not permissible as per the provisions of Transfer pricing under chapter X of the Act. Accordingly, it remitted the TP-issue in respect of assessee (engaged in the development of computer software and providing other related services) to the AO/TPO for fresh consideration by comparing the margins of the international transactions with the uncontrolled comparable price. Observing that the CIT(A) had considered foreign AE as a tested party, it held that only price/PLI of the assessee's international transaction had to be compared with the uncontrolled comparable price.

Mphasis Limited vs ACIT-TS-539-ITAT-2017(Bang)-TP- I.T. (T.P) A. No.1104/Bang/2012 and 1258/bang/2012 dated 07.06.2017

605. The Tribunal dismissed the contention of the assessee that the TP adjustment was to be restricted to the international transactions of the assessee and held that the while determining the ALP, comparison was to be made between the PLI of assessee vis-à-vis arithmetic mean of the PLI of the uncontrollable comparables, and therefore it was to be presumed that every other factor was constant and that the difference had arisen only because of the international transactions. It held that, if this presumption was not made, no adjustment in any case could be made and the assessee could always take an argument that difference in PLI was not due to international transactions and that it was due to non-international transactions.

Caterpillar India Pvt. Ltd vs. ACIT - TS-302-ITAT-2017(CHNY)-TP - ITA 204 & 365/12 dated 05.04.2017

606. The Tribunal relying on the coordinate bench ruling in the case of UCB India [TS-8-ITAT-2009(MUM)-TP] and Tej Diam [TS-54-ITAT-2010(MUM)] and considering transaction level margins over entity level approach, upheld the CIT(A)'s order deleting Rs. 10.83 Cr TP-adjustment made by TPO in respect of sale of silk fabrics by assessee to its US subsidiary during AY 2007-08. It held that as per the statutory provision in Rule 10B(e)(i) to (iii) it was only the international transaction that had to be compared with uncontrolled transaction and not the transactions undertaken by the entity as a whole. Noting that the profit margin earned by the assessee from controlled international transaction i.e. sale of silk fabrics was higher than average net profit margin earned by the comparables selected by assessee as well as by TPO it dismissed Revenue's appeal.

J.J Exporters Ltd [TS-392-ITAT-2017(Kol)-TP – ITA No.201/kol/2012 dated 12.05.2017

Risk Adjustment

607. The Tribunal accepted the assessee's contention for granting market risk adjustment noting that comparable uncontrolled companies assumed significant business risks visa-vis a captive service provider such as the assessee, thus warranting an adjustment to account for differences in comparability.

DCIT v IDS Software Solutions India Pvt Ltd – TS-1085-ITAT-2016- IT(TP)A No.214 IBang/20 14, IT(TP)A 179/Bang/2014 dated 16.12.2016

608. The Tribunal, relying on its earlier year's order held that foreign exchange gain / loss was to be considered as part of operating revenue / operating cost, respectively.
Mercedes Benz Research & Development India Pvt Ltd v DCIT – TS-1075-ITAT-2016 (Bang) – TP - IT (TP) A No.120 (Bang) 2014 dated 11.11.2016
609. The Tribunal accepted the assessee's claim for risk adjustment and held that where the comparables were independent risk bearing entities visa-vis the assessee who, being a captive service provider, was a risk free entity, compensated on a Cost plus basis regardless of the result of its operations, the assessee was entitled to a risk adjustment to account for the differences in risk (and consequent margins) between the assessee and the comparable company.
IDS Software Solutions India Pvt Ltd v ITO – TS-1072-ITAT-2016 (Bang) – TP - IT(TP)A No. 154 / Bang/2015 dated 28.11.2016
610. The Tribunal concurred with the assessee's submissions viz. that it was captive service provider devoid of any significant risks relating to its business operations and provided mere services based on the requirements of AEs in return for a fixed mark up on cost incurred and that all significant risks were borne by AE as all intangibles were owned by its AE as a result of which it was entitled to a risk adjustment. Accordingly, it directed the TPO to make appropriate risk adjustment.
Outsource Partners International P Ltd vs. DCIT - TS-57-ITAT-2017(Bang)-TP - IT(TP).A No.337/Bang/2015 dated 06.02.2017
611. Where the assessee claimed a risk adjustment contending that being a captive service provider, its operations (which were remunerated by a fixed mark up on cost) were devoid of any significant risks and that all the valuable intellectual property rights and other commercial and marketing intangibles were owned by its AE as compared to the independent comparable companies which worked under uncontrolled conditions and bore numerous risks during the course of their business operations, the Tribunal, relying on the decision of the Delhi High Court in Chryscapital Investment Advisors India Pvt. Ltd. [TS-173-HC-2015(DEL)-TP] held that appropriate adjustments should be carried out in situations where there were differences between the tested parties and comparables and in case the differences in the comparables could not be eliminated on account of adjustments or otherwise, then such comparables were to be rejected. Accordingly, it directed TPO to work out an appropriate risk adjustment.
CAPCO IT Services India Pvt. Ltd. v. ITO – TS-1079-ITAT-2016 (Bang) – TP - ITA No. 1340 IBang/2011 dated 09.12.2016
612. Where the assessee, a contract manufacturer claimed risk adjustment contending that its comparables were entrepreneur companies bearing significantly higher risks, the Tribunal held that there was no thumb rule for risk adjustments in accordance with Rule 10C(2)(e), and stated that assessee had to identify and quantify the level of risk involved for the assessee as well as the comparables while undertaking analysis in its TP documents. Despite observing that the assessee did not discharge its initial onus as it failed to provide requisite information pertained to the claim, considering the high degree of risk involved with the comparables, it allowed a risk adjustment at 2% on adhoc basis.
KOB Medical Textiles Pvt Ltd. Vs. DCIT - TS-211-ITAT-2017(CHNY)-TP - I.T.A.No.855/Mds./2015 dated 09-03-2017
613. The Tribunal denied the claim for risk adjustment made by the assessee wherein the assessee contended that since it was a captive service provider it had risk of single customer as compared to uncontrollable comparables, as the assessee had not provided any scientific working justifying its claim.
Syniverse Teledata Systems Pvt. Ltd (Formerly known as MACHTeledata systems Pvt. Ltd) vs. DCIT - TS-217-ITAT-2017(Bang)-TP - IT (TP) A No.1363 (Bang) 2014 dated 15.02.2017

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

Segments

616. Where the assessee had benchmarked its transactions in its manufacturing segment based on a transaction by transaction approach but the TPO proceeded to aggregate the transactions and made addition on the ground that the segmental results of the assessee had not been statutorily audited, the Tribunal relying on the decision of the co-ordinate bench in the assessee's own case for the prior year held that the law did not mandate that the segments be audited and remitted the matter back to the file of the TPO for fresh adjudication.
Fresenius Kabi India Private Limited vs. DCIT-TS-819-ITAT-2017(PUN)-TP dated 22.09.2017
617. Where the assessee had allocated its direct costs as per the actuals and indirect costs based on turnover between the AE and Non-AE segments, the Tribunal held that the TPO was incorrect in rejecting the said bifurcation and allocating all costs (direct and indirect) based on turnover of the two segments. Accordingly, it set aside the issue back to the file of AO/TPO for the limited purpose of proper verification and allocation of cost. Further, in respect of treatment of forex fluctuation gain/loss on AE receivables, it held that the same had to be treated as operating revenue/cost.
Allegis Services India Pvt Ltd vs DCIT-TS-723-ITAT-2017(Bang)-TP - I.T.(T.P) A. No.1370/Bang/2014 dated 15.09.2017
618. Where the assessee applied the generally accepted Costing Principles to allocate expenses between its various segments but the TPO rejected the assessee's approach, without giving any basis or reason and proceeded to re-allocate the subject expenses on the basis of sales ratio and thus, re-worked the cost used for determination of operating margins, the Tribunal noting that certain expenses i.e. depreciation, rent, rates, repairs & maintenance, taxes and other expenses had not been allocated at all to the export division by the assessee for the reason that they were already included in cost of goods sold and non-allocation if any, did not affect cost, held that there was no merit in re-allocation of administrative expenses and selling & distribution expenses by TPO.
Cummins India Limited vs. DCIT - TS-165-ITAT-2017(PUN)-TP - ITA No.115/PUN/2011 dated 03.03.2017
619. Where, for the purpose of computing the margin of its software development service segment, the assessee had allocated a sum of Rs. 7.92 crore as administrative & other expenses and the TPO considered the same to be Rs. 17.61 crore, the Tribunal upheld the assessee's allocation noting that the difference of approximately Rs.10 crore was not included for the purpose of

computing the margin since the expenditure was incurred for a specific purpose and not attributable to the software development services. Accordingly, it remitted the issue to the file of the TPO for re-computation with a direction that if the margin of 31.69% as computed by the assessee was found to be correct, no TP adjustment would survive.

Altair Engineering India Pvt. Ltd. Vs DCIT - TS-206-ITAT-2017(Bang)-TP - LT. (T.P)A. No.279/Bang/2015 dated 22.02.2017.

620. The Tribunal rejected the assessee's apportionment of un-allocable costs among assessee's 3 segments (viz. marketing support services, trading segment and domestic segment which included both services and trading) in the ratio of headcounts and held that that such an allocation without considering staff positions, etc would give distorted results as a well-qualified technician could not be compared to a helper or assistant. It also disagreed with the TPO's allocation based on gross revenue noting that 'trading segment' would have higher revenue than 'service segment' as it would also include cost of goods sold. Accordingly, it held that allocation based on gross profit margin would be more logical and realistic method. However, in the absence of details of un-allocable costs, it remitted the matter to AO/TPO with a direction to examine the same and exclude costs which were directly identifiable to specific segment from the un-allocable costs.

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

621. The Tribunal, accepting assessee's submission that since few of the expenses such as depreciation, wages, consumable, power and fuel etc. were directly allocable to manufacturing sector, they could not to be allocated to assessee's trading activity for computation of OP/OC arising therefrom, directed the AO to exclude expenses directly relating to manufacturing segment while allocating expenses to manufacturing and trading segment in the ratio of turnover.

Silver Oak Laboratories Pvt Ltd vs ACIT-TS-688-ITAT-2017-ITA no. 6197/del/2012 dated 28.08.2017

622. The Tribunal upheld CIT(A) order deleting TP adjustment made by TPO on the basis of reallocation of direct and indirect costs to assessee's three segments (marketing support services, trading functions and AMC of local sales) in proportion to segment turnover. **It held** that allocation **could** be made only in respect of indirect costs **and therefore the** action of TPO in allocating direct as well as indirect costs in ratio of turnover of each segment was not proper and justified.

3D Networks PTE Ltd vs ACIT [TS-372-ITAT-2017(Bang)-TP IT(TP)A No. 544/Bang/2011 dated 18.05.2017

623. Tribunal following the co-ordinate bench ruling in the assessee's own case in AY 2006-07 (wherein the issue regarding allocation of various costs between AE and non-AE segments was restored back to the AO for de-novo consideration after holding that such allocation, consideration of cost records was necessary), directed the AO to verify cost records and ensure reconciliation with books of accounts before passing the order for AY 2003-04 and 2004-05.

Otto Blitz India Pvt Ltd [TS-344-ITAT-2017(Bang)-TP] IT(TP)A Nos.1388 & 1389/bang/2012 dated 12.05.2017

Working Capital Adjustment

624. The Tribunal upheld the order of the DRP and directed the TPO to allow working capital adjustment based on the actual figures of the comparables without restricting it to 1.71 percent being the average cost of capital of comparables selected.

DCIT v Brocade Communications Systems Pvt Ltd – TS-1031-ITAT-2016 (Bang) – TP - IT. (T.P) A. No.71/Bang/2014 dated 9.11.2016

625. Where the TPO computed working capital adjustment at 5% for software development services and 4.64% for ITeS based on actuals but restricted the adjustment to 1.71% for software

development services and 0.91% for ITeS on the basis of the average cost of capital of the comparables, the Tribunal, relying on the decision of ARM Embedded Technologies Pvt. Ltd. [TS-466-ITAT-2015 (Bang)-TP], held that working capital adjustment was to be made on actual basis.

EMC Software and Services India P Ltd [TS-1077-ITAT-2016(Bang)-TP - I. T(TP).A No.324/Bang/20 14, I.T(TP).A No.319/Bang/2014 dated 09.12.2016

626. The Tribunal remitted the TP issues arising in both Revenue's and Assessee's appeals back to the file of DRP for fresh adjudication. Allowing the Revenue's appeal it refused to accept the DRP's 1% risk adjustment to the average margin by arbitrarily relying on Intelligent and Hello Soft rulings to account for the risk differential between assessee and comparable companies. It observed that the risk adjustment working was not provided by the assessee and that the DRP's order was also cryptic in respect of assessee's facts and facts of the aforementioned rulings. Further, upon reviewing the grounds of appeal pressed by Assessee, it noted that the AO had not carried out the necessary corrections to arithmetic miscalculations as directed by DRP and that on the remaining issues relating to comparability, computation of margins & working capital adjustment, DRP's directions were cryptic. Hence, it restored the entire matter to the file of the DRP for fresh adjudication by way of a speaking and reasoned order.

ACIT vs Momentive Performance Materials (India) Pvt Ltd-TS-24-ITAT-2018(bang)-TP dated 08.12.2017

627. Where the DRP had given the AO a specific direction to verify the working capital position between the assessee and the comparables, and the AO did not consider working capital adjustment for advances from customers recoverable in cash or kind from 4 companies, viz. Sparsh BPO Service Ltd, Aditya Birla Minacs Worldwide Ltd, Professional Management Consultants Pvt Ltd and Sundaram Business Services Ltd., on the ground that break up was not available from the downloaded financials of the 4 companies, the Tribunal observing that the breakup of advance recoverable in cash or kind were part of the Audited accounts and annual report of these 4 companies, directed the AO/TPO to rework the working capital adjustment after considering the value of advance and deposits recoverable in cash or kind or for the value to be receivable from the 4 companies as well.

Visual Graphics Computing Services India Private Limited Vs ACIT - TS-129-ITAT-2017(CHNY)-TP - I.T.A. No.2340/Mds/2012 dated 10.02.2017

628. The Tribunal observed that the TPO / DRP was not justified in denying working capital adjustment to the assessee on the ground that the figures given by the assessee did not match with the financials and that working capital adjustments were to be granted only to manufacturers and not service providers and held that the TPO should have corrected the errors himself rather than denying the adjustment altogether. As regards working capital adjustments vis-à-vis service providers, it relied on the decision of Mercer Consulting (TS-170-ITAT-2014 (Del) – TP, wherein it was held that working capital could not be restricted to manufacturers or traders alone and that in case of a service provider working capital adjustments were warranted for higher / lower trade receivables or payables. Accordingly, it set aside the finding of the TPO / DRP and remitted the matter to the file of the TPO directing him to examine the assessee's claim for working capital adjustment.

Comverse Network Systems India v ACIT – TS-33-ITAT-2017 (Del) - TP

629. Where the assessee claimed a working capital adjustment which was denied by the Revenue on the grounds that (a) inventory and accounts payables were absent in case of assessee and that (b) working capital was computed on the basis of daily or monthly averages and not on year end balances, the Tribunal relying on the rulings in the case of United Health Group Information Services (P) Ltd [TS-255-ITAT-2014(DEL)-TP] and Marubeni-Itochu Steel India[TS-56-ITAT-2016(DEL)-TP], accepted the assessee's claim and held that the adjustment was to be granted in order to bring the assessee and the comparables at par. However, it noted that the assessee was to furnish complete details of working capital deployed to identify the differences in margins

earned by assessee vis-a-vis comparables and accordingly remitted the issue to the file of TPO for fresh consideration.

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

630. Where the TPO restricted working capital adjustment to 1.71% (based on the average cost of capital of comparables), instead of considering the actual figures in respect of each and every comparable companies, the Tribunal, relying on the decision in ARM Embedded Technologies Pvt. Ltd. [TS-466-ITAT-2015(Bang)-TP], observed that there was no provision under FAR analysis to restrict the working capital adjustment arbitrarily. Accordingly, it directed the AO/TPO to re-compute working capital adjustment on actual basis without any upper limit.

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

DCIT vs. AMD India Pvt. Ltd - TS-250-ITAT-2017(Bang)-TP - IT(TP)A No.92/Bang/2014 dated 08.03.2017

631. The Tribunal dismissed 3 appeals filed by Revenue for AYs 2007-08, 2008-09 and 2009-10 with respect to grant of working capital adjustment and treatment of forex gains/loss. The Revenue had alleged that the CIT (A) had wrongly issued direction to the TPO to grant working capital adjustment as per the prevailing norms and as per the provisions of Section 251(1)(a) of the Act, the CIT(A) had no power to issue the direction. Rejecting Revenue's contention that CIT(A)'s direction to TPO for granting working capital was beyond jurisdiction held that CIT(A) had not directed the TPO in the way portrayed by Revenue authorities, and held that the direction was only to calculate and grant the working capital adjustment based on final set of comparables. Relying on the decision in the case of SAP Labs India P Ltd, Tribunal noted that TPO neither disputed the quantum of the foreign exchange gain/loss nor had given any finding that such gain / loss was not arising out of assessee's activities and therefore upheld CIT(A) order treating the forex gain / loss as operating in nature.

Sanyo BPL P. Ltd vs. DCIT-TS-537-ITAT-2017(Bang)-TP- I.T(TP)A Nos.1578 to 1580/Bang/2014 dated 09.06.2017

632. The Tribunal upheld DRP's order lifting working capital cap imposed by TPO for AY 2009-10. Observing that the TPO had restricted working capital adjustment to 0.91% which was nothing but the average cost of capital of comparable companies selected by him without considering the capital figures for assessee. The Tribunal held that the TPO could not force the assessee to fund its working capital requirements in a specific way as the same was not in his domain. Accordingly, it held that the DRP was correct in lifting the working capital cap imposed.

DCIT vs. Synchrony International Services Pvt. Ltd (Formerly known as GE Global Servicing Pvt. Ltd)-TS-622-ITAT-2017(BANG)-TP dated 14.07.2017

633. The Tribunal remitted issue of working capital adjustment to the AO with the direction to examine facts with relevance to the decision in the case of Mobis India Ltd ITA No.2212/Mds/2011 wherein it held that adjustment had to be granted for eliminating material effects, if any, arising from out of difference in working capital between tested party and comparables. and allow suitable working capital adjustment to the assessee. It also directed the assessee to furnish the pricing models of AE as well as assessee to verify whether the working capital margin of interest was included in the sales price of the product. Further, noting that the assessee was not a start-up company as it was established in 2008, it rejected assessee's claim for unutilized capacity adjustment to the extent of 46.54% since adjustments relating to unutilized capacity were allowed in the case of startup companies to cover the initial deficiencies and financial implications.

Shipnet Software Solutions India Pvt Ltd vs DCIT-TS-427-ITAT-2017(CHNY)-TP-ITA No.3404/Mds/2016 dated 28.04.2017

634. The Tribunal relying on the decision of ARM Embedded Technologies Private Limited [TS-466-ITAT-2015(Bang)-TP] wherein it was held that there was no rationality in fixing cap on the actual working capital adjustment, dismissed Revenue's ground challenging DRP direction to carry out

working capital adjustment in respect of software development services as per actual figures without putting any cap on the same. Further, it allowed assessee's plea for inclusion of Think Sotd Global Services Limited which was originally selected by the TPO, but subsequently **excluded** as working capital adjustment exceeded 4% of profits.

Genisys Information Systems India Pvt Ltd -TS-267-2017(Bang)-TP-IT(TP)ANo.59/bang/2014 dated 16.05.2017

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

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

636. The Tribunal, relying on the decision in the case of CGI Information System & Management Consultant (wherein it was held that advances received from AEs would reduce the need for borrowings from outsider and would have direct impact on profitability of business, thus should be considered for working capital adjustment calculation), held that advance received from AE should be considered for the purpose of computation of working capital adjustment and accordingly allowed assessee's appeal.

Intellectual Venture India Consulting Pvt. Ltd-TS-884-ITAT-2017(Bang)-TP dated 20.10.2017

+ / - 5% adjustment

637. Where the assessee did not dispute the mean margin of 6.84% of comparables computed by TPO, but requested for a benefit of +/- 5% benefit which was accepted by CIT(A) and Tribunal, the Court held that Tribunal had not committed any error in granting benefit of the +/- 5% adjustment as it was in accordance with second proviso to Section 92CA(2). Accordingly, it dismissed Revenue's appeal.

CIT vs. Kgl Enterprises-TS-852-HC-2017(RAJ)-TP dated 18.09.2017

638. The Tribunal, considering the fact that the circumstances were not identical to the previous year, rejected CIT(A)'s application of filters based on previous year and remitted comparables selection to the file of TPO directing him to verify the various filters (Related party transaction filter, Rs.50 Crores upper-limit sales filter) for assessee's research and development functions to decide the issue afresh. Further, noting that in previous AY the +/- 5% adjustment was granted considering the economic downturn experienced during the year owing to the 11th September disaster, the Tribunal held that the same could not be applied for the AY in question since no economic downfall was experienced.

DCIT vs. Nokia India (P) Ltd.-TS-1017-ITAT-2017(DEL)-TP ITA No. 2380/Del/2010 dated 06.12.2017

639. Where the assessee was established in 1967 and its depreciation ratio was only 0.95% as against 4.72% of comparables and the difference of 0.14% in ALP resulting in Rs.54 lakhs TP-addition was due to AO's reduction of depreciation in the hands of assessee & comparables and if such depreciation ratio was not reduced, the price adopted by assessee would be within the 5% tolerance range, the Tribunal noting that the machineries utilised by comparable companies are latest ones, whereas, the machineries used by the assessee-company are older ones and as a result the efficiency of old machines would be less, held that ignoring the difference of 0.14% over and above +5% of permissible limit would meet the ends of justice and accordingly set aside the order of lower authorities and deleted the TP addition of Rs. 54 lakhs.

Western Thomson (India) Private Ltd vs. DCIT-TS-910-ITAT-2017(CHNY)-TP-ITA no. 1093/Mds/2017 dated 27.10.2017

640. The Court dismissed the Revenue's appeal against Tribunal's order deleting the TP adjustment since as per the proviso to section 92C(2), the transfer price was within the range of 5% of ALP. The TPO had made an adjustment in the case of assessee which was upheld by DRP. The Tribunal, however, deleted the TP adjustment made by AO since as per the proviso to section 92C(2), the Transfer price was within the range of 5% of ALP and accordingly, it directed the AO to consider proviso to section 92C(2) and arrive at **the** conclusion.

CIT vs DHL Danzas Lemuir Pvt ltd-TS-559-HC-2017(BOM)-TP-ITA No.1492 of 2014 dated 05.07.2017

641. Where the DRP accepted assessee's claim for revised working of margin for one of the comparables and subsequently, the AO passed order u/s 154 in view of some basic flaws in AO's computation pointed out by assessee, noting that after considering the revised margin for one of the comparables (as accepted by DRP) the variation from ALP was within 5% of the transaction price and thus no TP adjustment would survive, the Tribunal remitted the matter to the TPO for verification of the working submitted by the assessee with a direction to decide the issue afresh as per law after such verification

BASF Coatings (India) P. Ltd vs ACIT-TS-522-ITAT-2017(Mum)-TP- ITA no.1555/Mum./2012 dated 28.04.2017

642. The Tribunal dismissed the Revenue's appeal challenging DRP's deletion of Rs. 7.47 Cr TP addition for AY 2011-12 and upheld the allowability of benefit of 5% variation as per proviso to Sec 92C in case of the assessee, an authorized foreign exchange dealer, rejecting the Revenue's contention that proviso to Sec 92C, which allows +/-5% range to assessee, could not be applied in case of assessee having transactions on account of trading in foreign exchange, which were benchmarked using RBI rates. Following the decision in assessee's own case for preceding AY 2010-11, it held that RBI rates of foreign exchange were based on averaging and therefore, benefit was available under the proviso to Sec 92C.

UAE Exchange and Financial Services Ltd. Vs DCIT - TS-116-ITAT-2017(Bang)-TP - IT (TP)A No.299 (Bang) 2016 dated 07.02.2017

643. The Tribunal rejected assessee's claim for benefit of +/- 5% range mentioned in proviso to section 92C(2) considering retrospective amendment vide Finance Act 2012, held that the benefit was not allowable as ALP in the present case was in excess of assessee's margin by more than 5%. It rejected reliance on Tribunal decisions in assessee's own case for earlier AY on the ground that they were pronounced prior to the relevant amendment and accordingly dismissed the appeal.

Insilica Semiconductors India Pvt Ltd [TS-346-ITAT-2017(Bang)-TP- ITA No. Dated 15.03.2017

Others

644. Where the assessee's contented that Sec 92 should not have been invoked for making TP-addition as assessee's income had been computed u/s 44 read with First Schedule, the Tribunal referring to the provisions of section 44 held that only provisions relating to the computation of income chargeable under the head "Interest on securities", "Income from house property", "Capital gains" or "Income from other sources", or in section 199 or in sections 28 to 43B' are inoperative and provisions relating to section 92 were applicable to the assessee carrying on insurance business. Further, noting that that there are 2 computations made in determining total income viz. first computation of income under respective heads under Chapter IV (which exercise is undertaken by AO) and second computation of income from international transaction by determining its ALP (which exercise is done by TPO), it held that section 44 simply substitutes the first computation and it has no role whatsoever in so far as the second computation of

determination of ALP of an international transaction u/s 92 of the Act is concerned. Accordingly, it dismissed assessee's appeal.

ACIT vs. Max New York Life Insurance Company Ltd-TS-822-ITAT-2017(DEL)-TP dated 17.10.2017

645. Where the TPO held that prices charged by assessee from its AE were substantially lower than the comparable uncontrolled prices and determined ALP at 125% of the sales price but the CIT(A) considered detailed reasons filed by assessee and concluded that average price difference between the transactions with AE and the domestic transactions would be around 5.1% and if the marketing overheads, selling expenses, packing and material expenses etc. incurred with respect to the non AE export segment are considered, the international transactions undertaken by the assessee with the AE would be at arm's length price, the Tribunal held that the finding of CIT(A) on the issue in dispute was well reasoned and accordingly, deleted the TP adjustment in respect of purchase and sales transactions with AE.

ACIT vs. Unipatch Rubber Ltd-TS-911-ITAT-2017(DEL)-TP ITA No.3267/Del/2014 dated 06.11.2017

646. Where the assessee even on specific request by the TPO, did not provide copies of orders, vouchers, work-sheets etc., but only submitted details of incremental cost of salaries, additional employees in the present year number of employees resigned in each month, number of new employees appointed in each month which was not helpful in finding out as to whether the salary paid to particular employee is to be considered for technical services segment or trade support or other trading segment, the Tribunal upheld TPO's allocation of expenses in the ratio of turnover among various segments like software service segment, trade export segment and domestic transactions segment for AY 2006-07. Noting that assessee was not willing to file these details if the matter was remanded back, the Tribunal refused to interfere with allocation of cost on turnover basis in absence of necessary details to support any other reasonable basis.

Systat Software Asia Pacific Ltd vs. Dy. CIT-TS-846-ITAT-2017(Bang)-TP dated 22.09.2017

647. The assessee had entered into an international transaction in respect of purchase of raw material, return of packing material and sale of finished goods from its AE and applied TNMM for the purpose of benchmarking the international transaction. It had installed windmill for generating power and sold the above power to its manufacturing division in lieu of payment of transmission cost computed at the rate as is charged by the state undertaking and recorded it in its books as an operating income. The TPO and CIT(A) excluded windmill income as non-operating income for the purpose of determining the ALP. On appeal, the Tribunal held that assessee's windmill income had nothing to do with its international transactions. It rejected assessee's contention that it sold its captive power from one division to the other instead of generating revenue from open market and windmill income had already been taken as business income for the purpose of section 80IA deduction and held that both the divisions of the assessee viz., windmill and steel manufacturing were separate without having any interwoven element embedded therein and mere fact of the windmill income accepted under the head of business income would not make it as income derived from manufacturing division forming subject matter of the impugned transfer pricing adjustment.

Rajratna Metal Industries Ltd-TS-521-ITAT-2017(Ahd)-TP-ITA No.1050/ahd/15 and 91/ahd/15 dated 12.05.2017

648. Noting that there was a typographical error in the order of the TPO wherein the OP / OC margin was inadvertently mentioned as 13% as opposed to the correct margin of 15% (as self-evident from the computation produced in the impugned order), the Tribunal remitted the issue back to the file of the AO to verify whether the ALP of international transactions determined by the TPO (18.864% based on 5 comparables) fell within the + / - 5 percent adjustment under proviso to Section 92C(2) of the Act.

Everest Business Advisory India Private Limited vs. DCIT-TS-748-ITAT-2017(DEL)-TP-ITA no. 5211 / del / 2014 dated 25.09.2017

649. The Tribunal rejected the CIT(A)'s ALP computation based on a 'contemporary' resale price method (RPM) for benchmarking Engineering Drawing & design Services rendered to AE for AY 2005-06 and directed AO/TPO to re-compute ALP considering AE's audited financials for March ending furnished as additional evidence. It held that the CIT(A) erred in arriving at a hypothetical ALP figure based on contemporary RPM by trying to correlate AE's sale price for March ending with cost price for December ending arriving at the computation of ALP due to the alleged non-availability of financial figures of AE for period of Jan-Mar period (without giving assessee an opportunity to furnish it). Since the CIT(A) had (i) ignored provisions of Rule 10B(1)(b), (ii) applied contemporary RPM stating that it was internationally recognized, without bringing evidence and citation on record, the Tribunal noted that that audited financial data for March ending was now available and therefore directed the TPO/AO to consider the same for ALP determination. Referring to the working submitted by the assessee before it during the hearing, it clarified that if AE's financial figures were found to be true and correct, assessee's computation should be accepted.

DCIT v Development Consultants Ltd – TS-117-ITAT-2017 (Kol) – TP - ITA No.1591/Kol/2010 dated 15/02/2017

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

RBS Financial Services India Private Limited - TS-24-ITAT-(Mum)-TP

651. The assessee was engaged in providing contract manufacturing services including audit and inspection of the contract manufacturing carried out by third parties for assessee's AE and the said services were benchmarked separately under TNMM for which the assessee made a voluntary upward adjustment of Rs. 10 lakhs. The TPO held that the subject services were similar to the services of 'Business development & Procurement' and 'Support Services' (which were also provided by the assessee to its AEs). Consequently, he aggregated all the services and proceeded to benchmark it under TNMM. The Tribunal held that the TPO was incorrect in ignoring the Rs. 10 lakh voluntary adjustment made by the assessee as income of the assessee. Accordingly, it remitted the issue to the file of the TPO directing him to consider Rs. 29 lakh (Rs.19 lakh considered by the TPO + Rs. 10 lakh offered by the assessee) as the income of the assessee for the purpose of benchmarking the transactions.

Tevapharm India Pvt. Ltd vs Addl CIT – TS-151-ITAT-2017 (Del) – TP ITA No.6707/Del/2016 dated 06.03.2017

652. The Arrow Group had set up a branch office in Singapore, namely, 'Arrow Electronics India Limited', exclusively to service the customers in India which immediately opened a liaison office (LO) in Bangalore in 1994 after obtaining approval from the RBI and later opened LOs in Hyderabad, Mumbai, New Delhi & Pune. In December 2002, the Arrow Group started a fully owned subsidiary of Arrow Asia Pac Limited in the name of 'Arrow Electronics India Private Limited' i.e. the assessee in December 2002. However, till July 2003, no effective operation was carried out by the assessee as the LO itself was taking care of the operations. Pursuant to a search operation conducted at the premises of the liaison office which was where the Indian subsidiary was also located, notices under section 148 of the Act were issued for which the assessee complied with the notices and filed the returns declaring income on the basis of cost + 6%. The AO noted that the LO had carried out income earning activities even though it was not supposed to and attributed 40 percent of the net profit of the Singapore and Indian LOs (based on Functions, Assets and Risks) to the Bangalore LO. The AO referred the international transactions of the to the TPO who proposed certain adjustments. On appeal, the CIT(A) gave the assessee part relief by holding that the percentage of ALP as determined by the TPO should

have been applied only on 40% of the total sales. The Tribunal dismissed the appeal of the Revenue and held that there was no infirmity in the order of the CIT(A).

Arrow Electronics India Ltd vs. Addl. DIT - TS-261-ITAT-2017(Bang)-TP - IT(TP)A.209,210,617 to 619,COs.31 to 33/B/2011dated 31.03.2017

653. The assessee entered into a Market Development Agreement with Microsoft Operations Pte Ltd ('Microsoft Singapore') to provide marketing support services and product support services for Microsoft products in the territories of Bhutan, India, Maldives, Nepal and British Indian Ocean, for which it was entitled to remuneration on cost plus 15% mark-up basis. The TPO proposed an upward adjustment on account of difference in ALP and pursuant to the DRP's directions, the AO assessed total income at Rs. 2.13 Cr as against Rs. 1.76 Cr declared by the assessee. In the meanwhile, the Commissioner of Service Tax ('CST') raised a service tax demand of Rs. 256.07 Cr, rejecting assessee's contention that the services rendered under the Market Development Agreement qualified as 'export of services' and were thus exempt from service tax, pursuant to which the AO issued notice u/s 148 for reassessing assessee's income for AY 2009-10 on the ground that assessee was entitled to a 15% mark up on the service tax element and thus a sum of Rs. 38.41 Cr had escaped assessment, despite the fact that the CESTAT had ultimately held that the service tax demand raised did not hold good. The assessee filed a writ Petition which was allowed by the High Court. It allowed the assessee's writ and observed that the Agreement between assessee and Microsoft Singapore clearly indicated that the compensation payable to the assessee was exclusive of service tax, which would be the responsibility of Microsoft Singapore and therefore held that the reasons recorded by AO for reopening of the assessment viz.that assessee was entitled to 15% mark up on service tax, was clearly erroneous. It also observed that the AO, despite noting that CESTAT had rejected service tax liability on assessee's services, had held that the CESTAT order was likely to be appealed against and therefore observed that the AO had approached the entire matter with the pre-determined mind to raise a demand oblivious of the relevant facts. On further appeal by the Revenue before the Apex Court, the Apex Court issued a notice for the SLP and directed the assessee to file a counter affidavit, if any within four weeks.

DCIT and Anr. vs. Microsoft Corporation (I) Pvt. Ltd - TS-290-SC-2017-TP] - Petition(s) for Special Leave to Appeal (C)...../2017 CC No(s). 3936/2017 dated 07/04/2017

654. The Tribunal dismissed Revenue's appeal challenging reduction of TP-adjustment pursuant to DRP's direction to re-compute comparables' margin in respect of ITeS and software development services provided to AE after considering the the workings provided by the assessee for AY 2009-10. It noted that the TP-adjustment of Rs 8.54cr was proposed in the draft assessment order which was reduced to Rs 6.11cr by TPO (pursuant to DRP directions) recalculating comparables' margin based on OECD TP Guidelines. It held that it could not be said that the DRP had allowed any relief amounting to Rs.2,43,80,550/- (Rs.8,54,98,108 – Rs.6,11,17,557) rather the TPO himself on being satisfied after proper verification worked the adjustment which has been made by the AO. Therefore, it held that the Revenue's appeal was without basis and not maintainable.

DCIT vs. Xchanging Technology Services India Pvt. Ltd - TS-291-ITAT-2017(DEL)-TP - ITA No. 991/Del/2014 dated 31.03.2017

655. The Tribunal, relying on the decision of the co-ordinate bench in in Motonic India Automotive allowed the assessee custom duty adjustment in principle in respect of assessee's manufacturing segment for AY 2009-10, noting the fact that the raw material import content of the assessee was 99% as against 30% import content for comparable companies. It held that custom duty was to be eliminated from the comparable price also to arrive at correct PLI in order to bring uniformity and therefore remitted the issue to AO for fresh consideration.

Gates Unitta India company P Ltd. Vs DCIT TS-360-ITAT-2017(CHNY)-TP - /I.T.A.Nos.1041/Mds./2014 dated 26-04-2017

e. **Specific Transactions**

Advertisement, Marketing and Promotion expenses

656. The Tribunal deleted TP adjustment of Rs. 14.11 Cr on account of Advertising, Marketing and Promotion (AMP) expenses incurred by assessee for alleged promotion of the brand 'Nippon' in India as it was not an international transaction u/s 92B since the Revenue had failed to demonstrate existence of an agreement with AE (legal owner of the brand) to promote the 'Nippon' brand in India and had also failed to prove that benefits of AMP expenses were for improving the brand in India. It held that the AMP spend was not obligated by AE, but was incurred by assessee as sales promotion expenses for its own cause.
Nippon Paint India Pvt Ltd v ACIT- TS-102-ITAT-2017 (Chny) – TP - /ITA No.779/Mds/2016 dated 10.02.2017
657. The Court, set aside Tribunal's order restoring AMP issue to the file of AO/TPO for fresh consideration. It noted assessee's submission that the Tribunal did not have the benefit of rulings of Sony Ericsson Mobile Communications India Pvt Ltd [TS-543-HC-2016(DEL)-TP], Bose Corporation (India) Pvt. Ltd. [TS-702-HC-2016(DEL)-TP] wherein the Court had held that prior to commencement of TP exercise, existence of international transaction involving assessee and its AE had to be first established. Accordingly, the Court restored the matter to the file of Tribunal directing it to decide the assessee's appeal afresh **itself** without being influenced by anything said in any of the previous order of the Tribunal ***Louis Vuitton India Retail Pvt. Ltd. vs. DCIT- TS-794-ITAT-2017(DEL)-TP ITA No. 980/Del/2017 dated 06.10.2017***
658. Considering assessee's submission that AMP expenses had been incurred unilaterally by the assessee (engaged in manufacturing and selling malted nutritional food products and drinks under brand names, Horlicks, Maltova, Viva and Boost) on its own discretion through unrelated Indian parties for the purpose of its own business in order to cater to local market needs and since no arrangement had been shown to exist between assessee and its AE, the Tribunal held that the transaction cannot constitute an international transaction u/s 92B and remitted the AMP-issue back to TPO directing it to adjudicate the issue afresh in accordance with law.
GlaxoSmithKline Consumer Healthcare Ltd vs. ACIT-TS-998-ITAT-2017(CHANDI)-TP dated 17.11.2017
659. The Tribunal relying on the conclusion of the Delhi High Court in assessee's case for AY 2008-09 held that in the absence of an agreement or arrangement between the assessee and the associated enterprise with regard to development of brand, it could not be inferred that there existed an international transaction between assessee and the associated enterprise. Therefore, it held that the question of determination of ALP does not arise and accordingly deleted TP adjustments of Rs. 311.88 crores on account of AMP.
Maruti Suzuki India Pvt Ltd vs ACIT-TS-974-ITAT-2017(DEL)-TP dated 09.11.2017
660. The Tribunal, relying on the decisions in the case of Essilor India (wherein the Sony Ericsson Delhi Hc was followed) and Toshiba India (wherein the issue of existence of international transaction regarding AMP expenditure had been set aside to the file of TPO to undertake fresh TP analysis), remanded the issue of existence of international transaction for distributor assessee's AMP expenditure and consequent determination of ALP back to the file of AO/TPO for de-novo adjudication.
Transitions Optical India Pvt Ltd vs DCIT-TS-1015-ITAT-2017(Bang)-TP dated 22.11.2017
661. The Tribunal, relying on the decision in the case of AMD India Private Limited [TS-840-ITAT-2017(bang)-TP] (wherein it was held that extra credit allowed could be considered as an independent international transaction and the same be compared with the internal CUP being average cost of the total funds available to the assessee) dismissed assessee's appeal against DRP/TPO's order imputing notional interest on outstanding receivables from AEs and restored the matter to the file of TPO for the purpose of ascertaining the agreed period and determination of arm's length interest pertaining to the excess credit period.

Ingersoll Rand (India) Ltd. vs. DCIT-TS-1061-ITAT-2017(Bang)-TP 251/Bang/2014 dated 10.11.2017

662. Where the TPO had made protective addition in respect of AMP expenses by following Bright Line test (BLT) (which was struck down as a method for imputing adjustments by the High Court), the Tribunal held that the very concept of protective addition would not apply to the instant case as it was relevant only when an income was to be added in the hands of one of the two taxpayers and where there was an element of ambiguity as to in whose hands the said income could be rightly brought to tax, which was not so in the present case. Accordingly, it deleted AMP adjustment of Rs. 23.83 cr made by TPO/DRP on protective basis and held that the mere fact that the appeal against the High Court judgment declaring BLT as unsustainable was pending before the Apex Court would not take away from precedent value of the High Court decision.

MSD Pharmaceuticals Private Limited vs. Addl. CIT-TS-896-ITAT-2017(DEL)-TP SA No.619/Del/2017 dated 10.11.2017

MSD Pharmaceuticals Private Limited vs. Addl.. CIT-TS-888-HC-2017(DEL)-TP -ITA 971/2017 dated 13.11.2017

663. Where on perusal of the agreement between assessee & AE, the DRP observed that nothing was discernible from the said documents that could be construed as an agreement between the assessee and the AEs for AMP expenses on behalf of AEs, the Tribunal relying on the decision in assessee's own case for AY 2008-09 to 2010-11 (wherein it was held that the impugned transaction was not an international transaction and TPO had wrongly invoked provisions of Chapter X), upheld DRP's deletion of AMP-adjustment in the case of assessee for AY 2011-12.

DCIT vs. Heinz India Pvt. Ltd- TS-881-ITAT-2017(Mum)-TP ITA No. 2101/MUM/2016 dated 06.11.2017

664. Where the TPO proposed AMP adjustment of Rs. 33.08 cr on substantive basis and Rs.42.09 cr on protective basis following bright line test and the DRP deleted adjustment on substantive basis but retained the adjustment on protective basis, the Tribunal relying on the decision in the case of Sony Ericsson Mobile Communications India Private Limited [374 ITR 118], held that BLT has been discarded as a method for computing arm's length price for international transactions of AMP and therefore no addition could be sustained applying the BLT even on protective basis. Accordingly, it deleted AMP adjustment in respect of the assessee for AY 2013-14.

Nikon India Pvt. Ltd vs. DCIT-TS-893-ITAT-2017(DEL)-TP ITA No. 6299/Del/2017 dated 06.11.2017

Toshiba India Pvt. Ltd. vs. ACIT-TS-961-ITAT-2017(DEL)-TP ITA No. 6531/Del/2017 dated 30.11.2017

665. The Court upheld the Tribunal's order deleting the adjustment on account of AMP expenses by relying on the decision of jurisdictional High Court in the assessee's own case wherein it was held that AMP expenses unilaterally incurred by the assessee could not be construed as an international transaction

Pr. CIT vs. HONDA SIEL POWER PRODUCT LTD-TS-930-HC-2017(DEL)-TP ITA 118/2017, C.M. APPL.4660/2017 dated 01.03.2017

666. The Apex Court admitted Revenue's SLP against High Court judgment wherein it had relied upon its own judgment for previous years in assessee's own cases to hold that since Revenue was unable to demonstrate with tangible material the existence of an international transaction involving AMP expenses between assessee and foreign AE, the question of determining ALP did not arise.

CIT vs. Honda Siel Power Product Ltd-TS-931-SC-2017 dated 27.11.2017

667. Noting that in the immediately preceding AY 2009-10, the coordinate bench had held that in absence of agreement, arrangement or understanding between the assessee and its AE for sharing AMP expenses or for incurring AMP expenses, payments made by assessee to the domestic parties cannot be termed as an international transaction specifically when the TPO had not been able to prove that the expenses incurred were not for business carried out by assessee in India, the Tribunal directed the AO to delete the TP addition on account of AMP expenses.
Amadeus India Private Limited vs ACIT-TS-898-ITAT-2017(DEL)-TP- ITA No. 1835/Del/2015 dated 23.10.2017
668. Where pursuant to agreement with AE. it was the responsibility of the assessee to undertake the performance of advertisement and sales functions, the Tribunal held that they were pointers to the fact that the assessee undertook AMP functions. Accordingly, it upheld the existence of international transaction of AMP-expenses. However, it remitted the ALP-determination back to TPO directing examination of distribution & AMP 'functions' carried out by the assessee and the probable comparables in light of Sony Ericsson HC ruling.
BMW India Private Ltd. vs. DCIT-TS-880-ITAT-2017(DEL)-TP ITA No.1406/Del/2015 dated 10.11.2017
669. The Apex Court admitted Revenue's SLP against Delhi High Court judgment dated 6.5.2016 in case of Bausch and Lomb Eyecare (India) (assessee engaged in distribution activities) wherein marketing intangibles adjustment was deleted absent existence of an international transaction involving AMP expenses between assessee and foreign AE and tagged it with the case of Canon India Private Limited Vs DCIT.
Pr CIT v Bausch and Lomb Eyecare India Pvt Ltd – TS-69-SC-2017 – TP - Special Leave to Appeal (C)...../2017 (CC No.3014/2017) dated 10.02.2017
670. The Tribunal held that the payment towards Advertising, Marketing and Promotion (AMP) made by assessee (manufacturer & distributor of digital hearing aids) to domestic parties during AY 2011-12 was not an international transaction. It observed that AMP spend had been treated as international transaction by the Revenue merely because it was found to be benefiting the AE which was owner of brand, whereas there was no finding of any arrangement between assessee and AE obliging assessee to incur AMP expenditure on behalf of the AE. Accordingly, it concluded that the payment made by assessee under AMP head to domestic parties could not be termed as an international transaction and that no imaginary price could be attributed by allocating AMP costs and then adjusting the same by applying TP provisions. Consequently, the Tribunal concluded that the TPO had wrongly invoked Chapter X provisions, and deleted TP-addition of Rs. 4.59 Cr on AMP spend.
Widex India Pvt Ltd vs. ACIT – TS-60-ITAT-2017 (Chand) – TP - ITA No.117/Chd/2016 dated 06.02.2017
671. The Court refused to admit Revenue's appeal challenging Tribunal's deletion of TP-adjustment on account of Advertising, Marketing and Promotion (AMP) expenses in the case of Goodyear India for AYs 2007-08 to 2009-10, which had been deleted by the Tribunal by following HC decisions in Maruti Suzuki [TS-595-HC-2015(DEL)-TP] and Honda Siel[TS-627-HC-2015(DEL)-TP]. Since the AMP expenditure was not subjected to adjustments in all the previous years, although it had been part of the Transfer Pricing exercise, it refused to admit the appeal. However, it admitted question of law raised by Revenue against Tribunal's deletion of TP-addition on payment of trademark fee to AE and application of TNMM over CUP method for benchmarking the trademark fee paid.
Pr. CIT vs. Goodyear India Limited – TS-115-HC-2017 (Del) – TP - ITA 77/2017 & CM Nos. 3072-73/2017 + ITA 78/2017 & CM Nos. 3074-75/2017 + ITA 79/2017 & CM No. 3076/2017 dated 13.02.2017
672. The Apex Court admitted the SLP filed by the Revenue against the order of the Delhi High Court in Maruti Suzuki Ltd wherein the High Court, distinguished the judgment passed by the coordinate bench in Sony Ericsson Mobile Communications India P. Ltd [TS-543-HC-2016(DEL)-TP] (on the ground that the impugned judgment was rendered in the context of distributors and not manufacturers and the assessee in the instant case was a manufacturer) had held that AMP

expenses incurred by Maruti Suzuki did not qualify as an international transaction under Section 92B of the Act.

CIT v Maruti Suzuki India Ltd – TS-159-SC-2017- TP - PETITION(S) FOR SPECIAL LEAVE TO APPEAL (C) NO(S). 22181/2016 dated March 10, 2017

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

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

674. The Tribunal in the second round of proceedings, remitted AMP-adjustment back to AO/TPO in case of the assessee engaged in distribution of watches etc for determining the existence of international transaction. In the first round of proceedings, the Delhi High Court had directed Tribunal to adjudicate the core issue as to whether there existed an international transaction entered with assessee's AE in respect of AMP expenses. Examining the facts, Tribunal noting that TPO had not given any finding w.r.t actual expenditure incurred and had analyzed terms and conditions set out in only one of the several agreements with AE, held that it had to be examined in detail whether the services rendered by appellant of incurring expenditure incurred by assessee had really resulted into any benefit to the foreign AE. Accordingly, it restored the matter back to the AO/TPO for determining the existence of international transaction with the direction to determine ALP if the existence of international transaction was proved.

Casio India Company Pvt Ltd vs DCIT-TS-586-ITAT-2017(DEL)-TP-ITA no. 4726/del/2010 dated 03.04.2017

675. The Apex Court admitted Revenue's SLP filed against the judgment of the Delhi High Court in case of Bose Corporation India Pvt Ltd on the issue of AMP-adjustment wherein the Court dismissed the Revenue's appeal against the Tribunal order remitting the AMP-adjustment back to the file of TPO for fresh consideration following SB ruling in LG Electronics. The High Court had held that since L.G. Electronics itself was been partially reversed the matter that was remitted was to be reconsidered in light of the directions in Sony Ericsson Mobile Communications India Private Limited.

Pr. CIT vs. Bose Corporation India Pvt. Ltd- [TS-556-SC-2017-TP]- ITA No. 635/2016 dated 03.07.2017

676. The Court allowed assessee's appeal against Tribunal order remanding marketing intangibles issue to the file of AO/TPO since the Revenue had failed to show existence of an international transaction with its AE. Distinguishing coordinate bench ruling in the case of Le Passage to India Tour & Travels case wherein the matter was remanded absent determination by TPO as to existence of international transaction, the Court held that TPO had applied his mind as to existence of international transaction involving advertising, marketing and brand promotion ('AMP') expenses and his conclusion as to this issue was solely on the ground that assessee's AMP expenses were in excess of that incurred by comparable. Noting that TPO had applied Bright Line test and made an adjustment of Rs. 23.98 crores which was confirmed by CIT(A), The Court held that Bright Line Test' ('BLT') was not an appropriate yardstick for determining the existence of an international transaction and the mere fact that the Assessee was permitted to use the brand name 'Valvoline' would not automatically lead to an inference that any expense

that the Assessee incurred towards AMP was only to enhance the brand 'Valvoline. Further, it held that Tribunal was not justified in remanding the matter to the AO/TPO when in fact, Revenue had failed to discharge its onus to show the existence of any arrangement or agreement inferring that the AMP expense incurred by the assessee was for the benefit of AE.

Valvoline Cummins Private Ltd vs DCIT-TS-610-HC-2017(DEL)-TP-ITA no.158/2016 dated 31.07.2017

677. Noting that the co-ordinate bench had in assessee's own case for AYs 2004-05 and 2005-06 confirmed deletion of AMP adjustment, the Tribunal deleted AMP adjustment of Rs. 5.29 cr in respect of assessee engaged in the business of blending, bottling and trading of India made foreign liquor. Noting that the AO had disallowed 10% of total brand expenses on the contention that expenses incurred by assessee was for increasing brand popularity of parent company it held that benefit arising to AE was purely incidental and since the product manufactured and sold by the assessee was India specific it could not be said that any benefit could have accrued to the AE on account of AMP spend in India in respect of such brand.

Pernod Ricard India Pvt Ltd vs ACIT-TS-618-ITAT-2017(DEL)-TP-ITA No.4626/del/2010 dated 24.06.2017

678. The Court, following the **ruling of the** coordinate bench in assessee's own case for AY 2009-10, dismissed Revenue's appeal against Tribunal's order remanding AMP issue to the file of AO **by holding** that the Revenue had failed to establish existence of international transaction between assessee and AE involving AMP expenses.

Pr.CIT vs Valvoline Cummins Ltd-TS-613-HC-2017(DEL)-TP-ITA no. 1031/2015 dated 31.07.2017

679. The Court, set aside Tribunal's order restoring AMP issue to the file of AO/TPO for fresh consideration. It noted assessee's submission that the Tribunal did not have the benefit of rulings of Sony Ericsson Mobile Communications India Pvt Ltd [TS-543-HC-2016(DEL)-TP], Daikin Air-conditioning India Pvt. Ltd. [TS-533-HC-2016(DEL)-TP] wherein the Court had held that prior to commencement of TP exercise, existence of international transaction involving assessee and its AE had to be first established. Accordingly, the Court restored the matter to the file of Tribunal directing it to decide the assessee's appeal afresh without being influenced by anything said in any of the previous order of the Tribunal that had been set aside by this order.

Haier Appliances (India) P. Ltd vs. DCIT-TS-684-HC-2017(DEL)-TP-ITA no. 563/2017 dated 01.09.2017

680. The Tribunal, relying on the coordinate bench's ruling in assessee's own case for AY 2007-08, deleted AMP adjustment **in the case of the assessee** (engaged in manufacturing & marketing of international alcoholic brands) and held that in the absence of an agreement/arrangement between the assessee and its AE and considering the fact that the assessee mainly made payments to unrelated domestic parties, AMP expenses incurred did not constitute an international transaction.

Diageo India Private Limited vs. ACIT-TS-699-ITAT-2017(Mum)-TP- ITA No. 981/Mum/2017 dated 18.08.2017

681. The Tribunal, referring to assessee's exclusive distribution agreement with AE, held that since the assessee undertook brand promotion of Toshiba in India and AEs reimbursed a substantial sum, it constituted an international transaction for AY 2012-13. Referring to the decision of Sony Ericsson, it held that distribution and AMP functions were two separate international transactions and due to their inter-twinning nature, both transactions could be aggregated only for the purpose of benchmarking so that surplus from one could be adjusted against deficit from other in the overall approach. Accordingly, it held that in the absence of suitable comparables carrying out similar functions or where adjustment could be made to iron out differences between functions performed by assessee and comparables, ALP of international transaction of AMP-function should be determined in segregated manner, however a proper set off, if any, available from the distribution activity, should be allowed.

Toshiba India Pvt Ltd vs DCIT-TS-686-ITAT-2017(DEL)-TP- ITA No.1357/Del/2017 dated 01.09.2017

682. The Tribunal, in the second round of proceedings, deleted Rs. 22.30 cr AMP adjustment made on protective basis. Noting that TPO had proposed AMP-adjustment on protective basis by applying bright line test (BLT), the Tribunal, relying on the decision in the case of Perfetti Van Melle India Pvt Ltd [ITA No. 1073 / del / 2017] and Sony Ericsson Mobile Communications India (P) Ltd [55 taxmann.com 240 (Delhi)] held that Bright Line test had no statutory mandate and it was illogical to consider non-routine AMP-expenses as a separate transaction.

Nikon India Pvt Ltd vs DCIT-TS-749-ITAT-2017(DEL)-TP-ITA no. 4574 / del / 2017 dated 20.09.2017

683. The Apex Court admitted Revenue's SLP against High Court order remitting AMP issue for comprehensive decision on whether AMP expenditure in assessee's outbound travel business i.e., engaged in the business of organizing tours and arrangements for foreign tourists coming to India and going out of India) constituted an international transaction. The AO had made TP addition in respect of AMP expenses incurred in outbound segment by comparing them with expenses of inbound segment, which was remitted by the Tribunal on the ground that the segments were materially different and required different level of expenditure for promotion. On appeal, the High Court had remitted the matter to the Tribunal holding that the Tribunal should have first decided whether in the circumstances of the case, the nature of AMP reported could lead to the conclusion that there was an international transaction and then remitted the matter to the file of AO for fresh examination.

DCIT vs Le Passage To India Tour & Travels P Ltd-TS-687-SC-2017-TP IA No. 80934/2017 dated 04.09.2017

684. The Tribunal, following the decision in assessee's own case for earlier AY 2007-08 (wherein Tribunal, relying on the decision of Johnson & Johnson Limited [TS-19-ITAT-2016(Mum)-TP] and by Delhi HC in the case of Perfetti Van Melle India Pvt Ltd. [TS-246-ITAT-2015(DEL)-TP] had restored the matter to AO as the AO had made TP additions on account of the Bright Line Test which was no longer valid), remanded the issue of benchmarking the reimbursement of AMP expenses received by the assessee (engaged in marketing Cobra brand of products in India) for AYs 2008-09 and 2009-10.

Molson Coors Cobra India Private Limited (erstwhile Cobra Indian Beer Pvt. Ltd.) Vs DCIT - TS-213-ITAT-2017(Mum)-TP - /I.T.A./7576/Mum/2013 & I.T.A./4306/Mum/2015 dated 15.03.2017

685. Where during the assessment proceedings, the TPO applying the bright line test held that AMP expenses incurred by the assessee were subject to TP adjustment which was confirmed by DRP and on appeal by the assessee, the Tribunal remitted the matter to TPO for reconsideration, the Court, relying on the decision in the case of Passage to India Tour & Travels (P.) Ltd. v. DCIT [TS-15-HC-2017(DEL)-TP], directed the Tribunal to decide whether AMP expenditure constituted an international transaction requiring TP adjustment by applying the ratio laid down in Sony Ericsson Mobile Communications case [TS-96-HC-2015(DEL)-TP].

Pepsico India Holding Pvt. Ltd [TS-178-HC-2017 (Del)-TP] [ITA 100/2017]

686. The Court upheld the Tribunal's order deleting the adjustment on account of AMP expenses by relying on the decision of jurisdictional High Court in the assessee's own case wherein it was held that AMP expenses unilaterally incurred by the assessee could not be construed as an international transaction.

Honda Siel Power Product Ltd. [TS-182-HC-2017(DEL)-TP]

687. The Tribunal remitted AMP-issue in the case of the assessee (engaged in trading of all kinds of leather bags, fashion apparels and accessories etc). for AYs 2009-10 and 2010-11, observing that the TPO/DRP had proposed AMP-adjustment by applying Bright Line Test which was overruled by Delhi HC in Sony Ericsson's case. Noting that neither TPO nor DRP had benefit of

Sony Ericsson HC ruling, it set-aside the issue relating to the adjustment on account of AMP to the file of TPO/AO to decide the issue afresh and in accordance with law.

Christian Dior Trading India Pvt. Ltd. vs. DCIT - TS-233-ITAT-2017(Mum)-TP- ITA No.1045/Mum/2014 dated 22.03.2017

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

Grohe India Private Ltd. Vs ACIT TS-280-ITAT-2017(DEL)-TP - ITA No.479/Del./2015

Nikon India Pvt. Ltd. vs. DCIT - TS-272-ITAT-2017(DEL)-TP - ITA No.719/Del./2017 dated 31.03.2017

Bose Corporation India Pvt. Ltd. vs. ITO - TS-337-ITAT-2017(DEL)-TP - ITA No.1509/Del./2014 dated 30.03.2017

689. The Tribunal remitted the TP-issue of Advertisement, Marketing and Promotion ("AMP") expenses incurred by assessee (distribution of watches in India) during AYs 2007-08 and 2008-09 to the AO / TPO and directed them to re-determine ALP in accordance with directions in Sony Ericsson ruling and not as per the Bright Line Test adopted by the TPO. However, it rejected assessee's contention that since its profit margin was favourable when compared with that of comparables, the AMP expenses stood subsumed in the overall profit and no TP-adjustment was warranted, and held that that such an argument was contrary to the findings of the High Court. It stated that the examination of assessee's Distribution and AMP functions vis-a-vis probable comparables was sine qua non in the ALP determination process and held that if the assessee's argument was taken to a logical conclusion, it would make the AMP spend a non-international transaction, which, would not be appropriate. Considering the observations of the High Court with respect to bundling of transactions, it observed that the essence of the judgment was that the two international transactions of Distribution and AMP was to be examined as per transfer pricing provisions, but on an aggregate basis and clarified that the Distribution and AMP expenses, were being aggregated only for ALP determination purposes, and the same did not take away the separate character of the AMP transaction.

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

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

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

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

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

692. The Tribunal remitted AMP adjustment back to the TPO to determine whether incurrence of AMP expenditure was an international transaction for assessee engaged in the business of manufacturing confectionary products. It noted that the TPO presumed existence of international transaction of AMP by adopting bright line test by relying on special bench ruling in LG Electronics. It observed that while considering AMP expenses as an international transaction, the TPO did not have the benefit of judicial precedents now available for consideration, whereas some judgments consider the transaction of AMP expenses as an international transaction, and some others have held otherwise. Referring to recent HC rulings in Rayban Sun Optics India, Toshiba India and Bose Corporation, it restored the matter to the file of TPO/AO for fresh consideration.
Perfetti Van Melle India Pvt Ltd -TS-403-ITAT-2017(DEL)-TP-I.T.A.No.789/DEL/2016 dated 28.04.2017
693. The Tribunal, upheld deletion of TP-adjustment on account of brand promotion expenses incurred by assessee engaged in blending, bottling and trading of Indian Made Foreign Liquor ('IMFL') on the ground that if the product manufactured and sold by the assessee was India specific then it could not be said that any benefit could have accrued to the AE on account of AMP spend in India in respect of such brands. Further, it rejected Revenue's plea for remanding the issue in view of Delhi HC decisions on this issue, clarifying that its adjudication on AMP issue was specific to present case and should not be enunciated as a legal principle or precedent.
Pernod Ricard India Pvt. Ltd (formerly known as Seagram India Pvt Ltd) Vs DCIT TS-354-ITAT-2017(DEL)-TP ITA No.3525/Del/2009 and ITA No. 2770/del/2011 dated 02.05.2017
694. The Court, relied on the decision in the case of Sony Ericsson Mobile Communications India Pvt. Ltd [TS-96-HC-2015(DEL)-TP] and held that where the facts pertaining to existence of international transactions of AMP expenses had already been analyzed and considered by the Tribunal and no new facts had emerged, the Tribunal could not remand the matter back to the TPO. It accordingly set aside Tribunal's order remitting issue regarding existence of international transaction of AMP expenses incurred by the assessee (engaged in the business of manufacturing, distribution, selling and marketing of alcoholic beverages in India) and restored the matter back to it to decide the issue on merits.
Bacardi India Pvt. Ltd vs DCIT-TS-418-HC-2017(DEL)-TP-I.T.No.417/2017 dated 24.05.2017
695. The Court, directed the AO/TPO to decide AMP issue in case of the assessee for AY 2009-10 in conformity with the High Court decision in the case of Sony Ericsson Mobile Communications 374 ITR 118 and not Special Bench decision in LG Electronics [152 TTJ (del) (SB)] as the opinion in the case of LG Electronics was no longer good in law.
Ray Ban Sun Optics India Ltd [TS-423-HC-2017(DEL)-TP] ITA No.942/2016 dated 15.05.2017
696. The Court, relying on the decision in assessee's own case [TS-627-HC-2016(DEL)-TP] dismissed Revenue's appeal challenging Tribunal's order in respect of TP-adjustment on advertising, marketing and promotion (AMP) expenses. It held that the Revenue had been unable to demonstrate with any tangible material the existence of an international transaction. Mere existence of technical collaboration agreement whereby license granted to Honda for use of brand name would not imply arrangement with the foreign AE for promoting brand of foreign AE.
Pr.CIT vs Honda Seil Power Products Ltd-TS-421-HC-2017(DEL)-TP-ITA 291/2017 dated 16.05.2017
697. The Court, relying on the decision in the case of Bausch & Lomb Eyecare (India) Pvt Ltd [381 ITR 227 (Del)] dismissed Revenue's appeal challenging deletion of Rs 75.40 Crores TP-adjustment on account of Advertising, Marketing and Sales Promotion Expenses (AMP

expenses) on the ground that since the issue was covered by earlier High Court decisions, there was no substantial question of law involved in the issue.

Amadeus India Private Ltd vs Pr.CIT-TS-422-HC-2017(DEL)-TP-ITA-154/2017 dated 26.04.2017

698. The Tribunal following the principle of consistency, remitted the issue of AMP-adjustment back to the TPO to determine the existence of international transaction for AY 2012-13 in light of the decision of the coordinate bench in the assessee's own case of AY 2011-12. In AY 2011-12 the Tribunal remitted the AMP adjustment back to the TPO to determine whether incurrence of AMP expenditure was an international transaction for assessee engaged in the business of manufacturing confectionary products. The TPO had applied bright line test to determine the routine advertising, marketing and promotional expenses and proposed transfer pricing adjustment using a markup 38.27% (assessee's gross profit rate) and calculated the same at Rs. 308.19 crores under cost plus method. The assessee relied on the decision in the case of Maruti Suzuki India Ltd [TS-595-HC-2016(DEL)-TP] and Whirlpool of India Ltd [TS-622-HC-2015(DEL)-TP] to contend that AMP expenses could not be considered as an international transaction. Observing that the TPO had benefit of only some High Court judgments while passing its order, Tribunal held that several other judgements on the same issue had been delivered, thus the judicial position of the High Court was required to be applied to the facts of this case. Further, quoting Rule 10B(1)(c) containing the modus operandi for determining the ALP of an international transaction, it rejected TPO's approach of considering assessee's own gross profit rate (38.27%) instead of the comparables for TP adjustment under cost plus method. **Perfetti Van Melle India Pvt Ltd vs DCIT -TS-432-ITAT-2017(DEL)-TP-ITA No.1073/del/2017 dated 24.05.2017**

699. The Tribunal relying on coordinate bench's ruling in assessee's own case for AY 2010-11, remitted TP-adjustment in respect of AMP expenses relating to selling and distribution activities. For AY 2010-11, the TPO had made an addition in respect of AMP expenses incurred by the assessee. The assessee had contended that all expenses incurred by it were in the nature of selling expenses and it was prohibited under the Drugs and Magic Remedies (Objectionable Advertisement) Act, 1954 from incurring any expenditure on advertisement, marketing and promotion. Further, it also placed reliance on the ruling in the case of CIT vs Whirlpool of India Ltd [(2015) 94 CCH 156 Delhi HC] to contend that AMP expenses could not be considered as an international transaction. The Revenue relying on the decisions in the case of Rayban Sun Optics India Ltd, Toshiba India Pvt Ltd and Bose Corporation contended that there was no blanket rule of AMP expenses as a non-international transaction and that the High Court had restored the issue for fresh consideration. Further, the Tribunal had in several cases restored the matter to the file of TPO to be decided in light of the decision in the case of Sony Ericson Mobile Communications (India) Pvt. Ltd in which the question as to whether AMP expenses was an international transaction had been restored to the file of TPO/AO for fresh determination. Accordingly, the Tribunal restored to the file of AO/TPO the issue relating to transfer pricing i.e. AMP expenses for fresh adjudication. **MSD Pharmaceuticals Pvt Ltd vs DCIT-TS-435-ITAT-2017(DEL)-TP-ITA Nos. 1383 & 1563/del/2016 dated 25.05.2017**

Loans

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

701. The Tribunal deleted TP-addition on account of interest paid on Compulsorily Convertible Debentures (CCDs) issued by assessee to its AE on the ground that TPO had wrongly treated issuance of CCDs as external commercial borrowing without appreciating that the CCD is hybrid

instrument basically categorized as equity in nature and as per Govt and RBI policy, issue of CCD is part of FDI being quasi-equity in nature. Further, it rejected LIBOR+2% benchmark adopted by the TPO on the ground that assessee had justified 12% interest rate on the basis of SBI PLR and also data from NSDL website.

ADAMA India Private Limited - TS-16-ITAT-2017(HYD)-TP

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

Dr Reddy's Laboratories Limited - TS-8-ITAT-2017(HYD)-TP

703. Where the assessee had entered into an international transaction of providing loans to its AE at 2% and established that loans were given for the purpose of carrying on the business and to build the brand image globally and there was no intention of earning interest, the Tribunal relying on the decision in the case of Cotton Naturals (I) Pvt Ltd-TS-117-HC-2015(DEL)-TP held that since interest charged by the assessee i.e., 2% was more than LIBOR rate, it was arm's length and accordingly dismissed the Revenue's appeal.

ACIT vs. CCL Products (India) Limited-TS-777-ITAT-2017(VIZ)-TP I.T.A.No.192 & 193/Vizag/2017 dated 21.09.2017

704. The Tribunal following coordinate bench's ruling in assessee's own case upheld CIT(A)'s restriction of interest rate ALP from 4.31% **as adopted by TPO** to 2.40% in respect of loan given by assessee to AE for AY 2010-11 on the ground that the calculation of arm's length interest rate for an interest-free unsecured loan to a French AE should be done using the average French interest rate spread as conditions in entire European financial market are not the same and without any adjustment for foreign exchange risk as exchange fluctuations are inherent in comparable transactions.

DCIT vs. Jyoti CNC Automation Pvt. Ltd-TS-968-ITAT-2017(Rjt) ITA No. 301/Rjt/2015 & CO No.57/Rjt/2015 dated 28.11.2017

705. Where the DRP had in the subsequent AY i.e AY 2012-13, accepted LIBOR based rate for benchmarking interest on loan granted by assessee to its AE, the Tribunal rejected Revenue's application of flat rate of 13.25% of bank rate for benchmarking and applying the principle of consistency, remitted the interest adjustment on loan to the file of AO to verify the same and decide the issue afresh.

Autoline Industries Ltd vs DCIT-TS-1000-ITAT-2017(PUN)-TP dated 24.11.2017

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

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

707. The Tribunal accepted LIBOR + 2% as arm's length interest rate for benchmarking loan advanced by assessee to its 100% subsidiary. The TPO, contended that if the subsidiary was to obtain loan from bank, owing to its lower credit rating, it would have required a guarantee from assessee, and thus worked out effective borrowing rate of assessee at 8.7% i.e. LIBOR + 2% (bank's margin) + 2% (guarantee fees). The Tribunal rejected the additional 2% rate considered by TPO and held that the adjustment made by TPO on account of guarantee fees was invalid as no such guarantee had been given by assessee. Further relying on the decision of the co-ordinate bench in UFO Movies [TS-7-ITAT-2016(DEL)-TP], the Tribunal held that the fiction of assuming a corporate guarantee and then proceeding to benchmark the same was unsustainable in law. Further, even otherwise an adjustment due to assumption about lower credit rating of the subsidiary was not warranted. Noting that for the earlier AY, the TPO himself had adopted LIBOR + 2% which had been accepted by Tribunal, and there was no material change in facts and circumstances for the current year, the Tribunal allowed the assessee's appeal.

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

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

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

709. The assessee availed unsecured loan in foreign currency from its AEs as external commercial borrowing of USD 500 million until 2020, as unsecured loan for financing its oil and gas operation in India at the interest rate of US dollar Libor +2%. As a result of the 2008 crisis, the assessee availed additional loan amounting to USD 300 million and the interest rate was changed from floating rate of interest to a fixed rate of interest of 6.18% for 5 years as an amendment to the existing loan facility agreement. Consequently, the assessee paid interest at Libor + 2% for the period from 01/04/2009 to 21/10/2009 and at the rate of 6.18% for the period from 22/10/2009 to 31/03/2010. Though the TPO accepted CUP method adopted by assessee, he held that the assessee had not provided any documentary evidence or convincing argument for shift in the interest rates from floating rate of interest to fixed rate of interest mechanism and no independent party would have agreed to such an increase and opined that the interest paid at the rate of 6.18% was excessive, and determined effective rate at 2.33%, being the interest rate paid by assessee from 01/04/2009 to 21/10/2009. Accordingly, he proposed adjustment an of Rs. 42.72 Cr. The Tribunal disagreed with TPO's finding that there was no reason for assessee to increase the interest rate from 2.33% to 6.18% and noted that the assessee had given detailed rational behind its own decision for shifting from floating rate of interest regime to fixed rate of interest viz. it reduced the risk of changes in the interest rates. Based on the a well settled proposition of law it held that the TPO was not supposed to question the business decision of the assessee, and further observed that assessee had given ample reasons for its business decision, even stating that most of the reported loans in that particular period were having a clause of fixed rate of interest. Accordingly, it held that it was beyond the authority of the TPO to question the wisdom of the assessee, and it was not the prerogative of revenue to direct assessee to conduct its business in a particular manner, despite heavy business risk. It also held that the TPO had not performed his duty of determining ALP of interest payment made by assessee, but had only analyzed and questioned the international transactions. It stated that the TPO was duty bound to

apply one of the methods specified in Sec 92C to determine ALP and that it was not proper to benchmark both the transactions of payment of interest with respect to two different loans governed by two different agreements which has different terms and conditions as 'one transaction. Consequently, it remitted the matter to the TPO with a direction to examine ALP computation strictly in accordance with the provisions of Sec 92C considering the evidences placed by the assessee.

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

710. The assessee had subcontracted EPC contracts to its AE viz. Lanco International Pte. Ltd (LIPL) and paid mobilization/ material advance for the execution of projects. The TPO considered these as loans and advances granted/ receivables and treated them as international transaction. The TPO made an addition of Rs 145Cr towards the advances at 12.25%. Aggrieved, the assessee filed an appeal before Tribunal. The Tribunal deleted the adjustment of Rs 145 cr towards interest on mobilization advances. It noted that mobilization of advances was a well-known practice in the construction industry and there was complete uniformity in assessee's act in not charging interest from both AE and Non-AE and also not paying interest on advances received. Further, it deleted TP adjustment on account of interest received on loans observing that the assessee had received interest at 6.37% which was more than average Singapore PLR of 5.38% relying on the decision in the case of Tata Autocomp Systems Ltd [TS-45-HC-2015(BOM)-TP] and Cotton Naturals India Pvt. Ltd [TS-117-HC-2015(DEL)-TP]. The Tribunal also rejected assessee's contention that provision of corporate guarantee did not fall within the scope of International Transaction as per section 92B. However, considering Asian Paints Ltd [TS-868-HC-2016(BOM)-TP] case, it directed the AO/TPO to consider only 0.27% as the guarantee commission on the amount involved and clarified that if any of the corporate guarantees were provided in earlier year, they would not be subjected to transfer pricing during the year under consideration. Accordingly directed the AO/TPO to appropriately quantify the guarantee commission after considering those in earlier year or withdrawn during the year.

Lanco Infratech Limited vs DCIT –TS-328-ITAT-2017(HYD)-TP ITA No. 404/hyd/2016 dated 03.05.2017

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

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

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

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

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

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

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

714. The assessee had provided a loan to its Singapore based AE and charged interest @ LIBOR + 5.25 percent and benchmarked the same under CUP adopting the Singapore PLR of 5.38 percent as comparable. The TPO made an addition adopting PLR in India @ 14.75 at ALP which was confirmed by the DRP on the ground that the assessee did not respond to the query of the TPO. The Tribunal relying on the order of the co-ordinate bench in the assessee's own case for the prior assessment year (wherein the benchmarking adopted by the assessee had been accepted) deleted the addition and held that the DRP erred in confirming addition merely because the assessee did not respond to the query of the TPO.

Lanco Infratech Ltd vs. ACIT - TS-1022-ITAT-2017(HYD)-TP - ITA Nos. 221 /Hyd/2017

715. Where the TPO recharacterized outstanding debts exceeding 6 months as a loan and determined ALP on the basis of B-rate bond yield rate of 13.46%, the Tribunal applying the provisions of subclause (c) of clause (i) of explanation to section 92B inserted by Finance Act 2012 held that deferred payments or receivables or any other debt arising during the course of business fell under the expression 'international transaction. Accordingly, it confirmed the TP adjustment made in respect of outstanding receivables from AE and dismissed assessee's appeal. Further, regarding assessee's plea that adoption of 13.46% interest rate on receivables

was excessive and unreasonable, the Tribunal held that it was not raised before the lower authorities and did not emanate from the orders of the lower authorities and therefore dismissed the same.

Nuance Transcription Services India Pvt. Ltd vs DCIT-TS-1009-ITAT-2017(Bang)-TP dated 28.11.2017

716. Where the TPO made a TP adjustment relating to interest on assessee's foreign currency loan to AE for AY 2010-11, the Tribunal relying on the co-ordinate bench's ruling in assessee's own case for AY 2008-09 (wherein it was held that when loan advanced to foreign subsidiary in foreign currency, LIBOR and not the domestic prime lending rate would be appropriate for benchmarking the international transaction) deleted the TP adjustment related to the interest on foreign currency loan to AE.

Cotton Natural (I) Pvt Ltd vs DCIT-TS-1068-ITAT-2017(DEL)-TP dated 04.12.2017

717. The Tribunal, relying on the decision in the case of Geodesic Ltd [62 taxmann.com 383] and Ion Exchange [ITA No. 5109/Mum/2013] held that where the interest payment made by the assessee on ECB to its AE was at EURIBOR+500 basis points i.e within the range of interest payment sanctioned by RBI in its master circular i.e LIBOR +500 basis points, the interest payment was at arm's length. Accordingly, it deleted the TP addition in respect of interest paid by assessee on ECBs.

Tuppadahalli Energy India Pvt. Ltd vs. DCIT-TS-829-ITAT-2017(Bang)-TP-IT(TP)A No. 2207/Bang/2016 dated 13.10.2017

718. Where the assessee had received interest on loan provided to its AE and the TPO had taken the annualized average yield rate as provided by CRISIL i.e. 14.47%, the Tribunal, relying on the decision in the case of Tata Autocomp Systems Ltd [TS-45-HC-2015(BOM)-TP] held that in case of loans advanced to an Associate Enterprise situated abroad, the rate of interest to be applied is the rate prevailing in the country where the loan has been consumed and therefore the TPO erred in benchmarking the interest based on the CRISIL rates. Accordingly, it remitted the interest adjustment on loan granted by assessee to AE for AY 2012-13 to the file of AO/TPO for fresh decision.

Subex Limited vs. DCIT-TS-843-ITAT-2017(Bang)-TP IT(TP)A No.572/Bang/2017 dated 26.10.2017

719. Where the TPO determined interest ALP at 9% (6% domestic cost of borrowing plus 2% exchange risk and 1% being charged as administrative cost) and computed adjustment at Rs. 79.20 lakhs, the Tribunal, relying on the decision in the case of Cotton Naturals (I) Pvt Ltd [TS-117-HC-2015(DEL)-TP] and Firestar International Pvt Ltd [TS-355-ITAT-2015(mum)-TP] held that the CIT(A) had rightly held that interest rate be charged at LIBOR + 300 bps as an ALP rate of interest and there was no infirmity in the order of the CIT(A).

Roha Dyechem Pvt Ltd vs ACIT-TS-867-ITAT-2017(Mum)-TP ITA No. 1991/MUM/2016 dated 27.10.2017

720. The assessee granted loans to 3 AE's, i.e. Mauritius (interest-free loan as the AE was 100% subsidiary), USA (6% interest) and Bangladesh (6% interest). In respect of the interest free loan to the Mauritius subsidiary, the TPO determined ALP at SBI PLR plus 350pbs which was restricted by the DRP SBI PLR as on 30 June of the previous year plus 150bps. The Tribunal rejected the plea of the assessee that if it charged interest to the AE, it would reduce the AEs profits and in turn reduce the dividend received by it noting that there was no correlation between the two Tribunal also relied on the ruling of Delhi Tribunal in Perot Systems TSI (I) Ltd. vs. DCIT (ITA No. 2320, 2321, 2322/DEL/2008) and Mumbai Tribunal in VVF Ltd. vs. DCIT (2010-TIOL-55-ITAT-MUM) and Tata Autocomp Systems Ltd. vs. ACIT (ITA No. 7354/MUM/2011), wherein assessee's contention that it was commercially expedite to provide interest free loans was rejected holding that international transactions could not be equated with ordinary business transactions. Further, noting that the TPO accepted the interest rate earned by the assessee from its USA and Bangladesh subsidiaries to be at ALP, it held that the TPO could not have

inconsistency in its view in respect of the same tested party vis-à-vis benchmarking the loan from Mauritius. Accordingly, it directed the AO to re- compute the ALP of the interest at 6% in respect of loans granted to all three AEs.

House of Pearl Fashions Limited [TS-926-ITAT-2017(DEL)-TP] ITA No.-1589/Del/2014 dated 8.11.2017

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

Epsilon Real Estate Private Limited - TS-1038-ITAT-2016(Bang)-TP

722. Where the assessee, a promoter of Haldia Petrochemicals Ltd ('HPL') had made interest free advances to HPL, and the AO, noting that on the one hand the assessee had been suffering interest liability on loans taken by it and on the other hand it was providing interest free loans to HPL, made an addition of notional interest income @ 12 percent of the amounts advanced, the Tribunal taking into consideration the submissions of the assessee viz. that notional income could not be brought to tax and that the interest free loans were to be adjusted against the equity contribution, relied on the order passed by its co-ordinate bench in the case of the assessee for another AY and set aside the matter to the file of the AO with direction to decide the same afresh in accordance with law.

Tata Global Beverages Ltd v DCIT – TS-48-ITAT-2017 (Kol) - TP - I.T.A No.511/Kol/2010, I.T.A No.2105/Kol/2010 dated 03.02.2017

723. Where the assessee had advanced interest free loans to its AE and benchmarked the same under TNMM along with its other transactions as the loan was to ensure supply of raw materials to the assessee by the AE and the AO rejecting the benchmarking adopted by the assessee computed interest at the rate of LIBOR + 2 percent, the Tribunal accepted the additional evidence sought to be filed by the assessee. i.e. the letter given to SBI in respect of remittance of funds to its AE with a view to demonstrate that the funds were advanced to the AE to avail economies of scale and remitted the matter to the TPO to decide the issue afresh considering the additional evidence filed as well. It dismissed the Revenue's contention that additional evidence could not be filed and held that the letters, being filed with the SBI assumed a regulatory character.

Rubamin Ltd vs ITO – TS-113-ITAT-2017 (Ahd) - TP - ITA Nos. 664/Ahd/2012, ITA Nos. 665/Ahd/2012, ITA Nos. 795/Ahd/2012 dated 17.02.2017

724. The Tribunal, relying on its order in the case of the assessee for the prior years, held that where the assessee had provided interest free loans to its AE as a temporary advance to facilitate the AE in meeting operational requirements and the same was given out of own funds, no adjustment could be made without identification of comparable transactions. Accordingly, it directed the TPO to follow the directions issued for the earlier years.

Wipro Ltd v DCIT – TS-126-ITAT-2017 (Bang) – TP - I.T. (T.P)A. No.1665/Bang/2012 dated 04.01.2017.

725. The Tribunal deleted the TP-adjustment towards interest on optionally convertible loans given by the assessee to its Irish subsidiary during AY 2009-10, whereby the assessee lender had either the option for repayment (in which case the cumulative interest payable by the borrower was LIBOR plus 290 basis points) or for conversion of loan into equity at par at any time during the 5 year tenure of the loan. It held that the assessee's transaction was quasi capital in the nature and could not be characterized as debt and the true reward of this loan was not interest simpliciter but the opportunity and privilege to own the borrower's capital (by way of conversion

into equity) on certain favourable terms and therefore could not be compared with a simple loan transaction where the sole motivation and consideration for the lender was interest on loans and that the right comparable for this transaction was a loan transaction with a similar option to convert the loan into capital and granting similar privilege and opportunity to the lender. Noting that it was not the case of lower authorities that no independent enterprise would have given an interest free loans even if there was an option, coupled with such a deal, to subscribe to the AE's capital on the terms as offered to the assessee, it held that there was not even a prima facie case made out for ALP adjustment. It also noted that on lapse of assessee's right to exercise the option of converting the loan into equity, the assessee was entitled to interest on the commercial rates, and that it was not the case of lower authorities that interest so charged by the assessee was not at ALP. Consequently, it deleted the TP adjustment on the optionally convertible loan granted to the AEs.

Cadila Healthcare Limited Vs ACIT - TS-241-ITAT-2017(Ahd)-TP - IT (TP) No. 898/Ahd/2014 and 694/Ahd/2015 dated 03.03.2017

726. The Tribunal, following the decisions in Cotton Naturals (I) P. Ltd [TS-117-HC-2015(DEL)-TP] and TTK Prestige [TS-242-ITAT-2014(Bang)-TP], dismissed the Revenue's appeal and confirmed the CIT(A)'s and held that the Prime Lending Rate (PLR) could not be considered for benchmarking interest on foreign currency loan. Accordingly, where the assessee advanced foreign currency loans to its subsidiaries in China & Japan at 4% & 3% rate of interest respectively using LIBOR, it held that the TPO was incorrect in making an adjustment of Rs. 35.01 lakhs by considering PLR as benchmark and it rejected the Revenue's submission that since the assessee was the tested party, interest rate prevailing in the Indian market i.e PLR was to be taken as comparable and not LIBOR.

DCIT vs. Steer Engineering Pvt. Ltd – TS-1087-ITAT-2016 (Bang) – TP – IT. (T.P) A. No.965/Bang/2015 dated 09.12.2016.

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

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

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

DCIT vs. Devgen Seeds & Crop Technology Pvt. Ltd - TS-222-ITAT-2017(HYD)-TP - ITA No. 399/Hyd/2016 dated 24-03-2017

729. Where the assessee had advanced interest-free loans and share application money to its AEs out of proceeds of zero coupon convertible bonds, the Tribunal rejected the TPO's benchmarking of the said transaction on the basis of net margin on borrowing costs of assessee. It applied the

ratio of the decision of Bombay High Court in CIT vs. Tata Autocomp Systems Limited [TS-45-HC-2015(BOM)-TP] wherein it was held that where taxpayer advances loans to its AE in Germany, the rate of interest for TP purposes would be applied based upon rates prevailing in Germany (where loans were consumed). Accordingly, it remitted the matter to the AO for de-novo ALP determination in light of Tata Autocomp ruling, and directed the assessee to produce all necessary and relevant evidences and explanations before the AO to substantiate its claim.

Geodesic Limited Vs DCIT - TS-131-ITAT-2017(Mum)-TP - I.T.A. No. 1234/Mum/2014 dated 27-02-2017

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

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

731. The Tribunal upheld DRP's order directing AO to compute interest rate at LIBOR +200 points on advances given by assessee to US AE for AY 2010-11. Noting that the assessee had charged interest based on LIBOR on similar advances to Hong Kong AE but not charged interest on advances to US AE, it held that these were advances given to AEs and not for any capital investment for which there was no allotment of shares and therefore dismissed the plea of the assessee that it was a capital advance on which it received no income, not subject to the TP provisions. The Tribunal following the decision in the case of Transport Corporation directed the AO to compute interest rate at LIBOR +200 points. Further, relying on the decision in the case of Four Soft, it deleted the TP-addition in respect of corporate guarantee and held that providing corporate guarantee would not amount to an international transaction where no cost was incurred by the assessee. Further, relying on the decision in the case of Siro Clinpharm held that the amendment to section 92B in respect of corporate guarantee was only prospective and applicable from AY 2013-14 and accordingly deleted the TP-addition.

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

732. The Tribunal rejected 'nil' ALP determined by TPO in respect of transaction for import of fixed assets from AE and held that ALP could not be 'nil' unless it was brought on record by the TPO that in third party situation, the cost to such an asset would also be 'nil'. Further, in respect of delay in receipt of payments from its AE, the AO/TPO treated it as an unsecured loan advanced to the AE and charged interest on the same by taking SBI base rate and adopted interest rate of 11.69%. The assessee contended that the credit period extended to third parties was much longer and since no interest had been charged on delayed payments made by third parties, no interest should be imputed in respect of receivables outstanding from the AEs also. Relying on the decision in the case of Bechtel India Private Limited [ITA No. 1478/del/2015], it held that once it was an accepted fact that assessee did not have any interest bearing borrowed funds for extending any kind of loan to its AE, then it could not be reckoned that assessee had given any benefit to the AE by blocking its interest-bearing funds to the AE by extending the credit period. Further, it held that if a similar credit period was given to the AE as given to third parties, then under the arms-length scenario and looking into the similar conditions prevailing between controlled transaction and comparable uncontrolled transaction, there could not be any adjustment, as there would be a direct CUP to analyze such transaction and accordingly, it deleted the TP adjustment.

BC Management Services Pvt Ltd vs DCIT-TS-438-ITAT-2017(DEL)-TP- ITA Nos. 6134/Del/2015, 5829/Del/2015 & 6572/Del/2016- dated 25.05.2017

733. The Court referring to the decision of the coordinate bench in Tata Autocomp [TS-45-HC-2015(BOM)-TP] held that arm's length price in the case of loans advanced to AE would be determined on the basis of rate of interest charged in the country where the loan was

received/consumed. Therefore, where the assessee was paying interest @ 4.79% on loans taken by it in the US, the interest of 7.5% charged by it on its loan to AE was at ALP. It held that the TPO was incorrect in adopting 14% as ALP based on interest rates prevalent in India.

CIT vs The Great Eastern Shipping Co Ltd- TS-534-HC-2017(BOM)-TP-ITA No. 1455 of 2014 dated 28.06.2017

734. For the purpose of determining the ALP of services rendered by the assessee to its AE i.e for arranging borrowers for obtaining foreign currency loans from AEs, the interest earned by the foreign AE could not be considered as the income of the assessee as the assessee had not contributed to the loan amount on which the foreign AEs had earned interest income.

DIT vs Credit Lyonnais-TS-608-HC-2017(BOM)-TP-ITA No.4433/mum/2009 dated 18.06.2017

735. The assessee had advanced loans to its AE in Australia and charged interest rate of 10% p.a, which was rejected by the TPO who held that the 'BB' Corporate Board rate of 14.77% was to be adopted to determine the ALP under CUP method. Noting that assessee's finance cost were available on record, DRP issued directions that the bank overdraft interest rate should be adopted as the internal CUP. Following the order of the Tribunal in the assessee's own case for AY 2008-09(TS-305-ITAT-2016(Bang)-TP), the Tribunal held that LIBOR rate should be applied for the interest on the said loan transactions and if the interest rate of 10% p.a charged by the assessee was higher than the LIBOR applicable, the adjustment towards interest on the said loans advanced by assessee to its AEs was not tenable. Accordingly, it remitted the issue to the TPO for verification of LIBOR vis-à-vis rate charged by the assessee.

Indegene Pvt. Ltd (formerly known as Indegene Life Systems Pvt. Ltd) vs ACIT-TS-645-ITAT-2017(Bang)-TP-IT(TP)A no. 591/B/17 dated 02.08.2017

736. Relying on the decision of coordinate bench in assessee's own case for AY 2011-12 [TS-522-ITAT-2016(DEL-TP)], the Tribunal deleted the TP adjustment of Rs. 17.62 crores towards interest on compulsorily convertible debentures issued by the assessee following the principle of consistency. Noting that in the remand proceedings for AY 2011-12, TPO had not made any adjustment holding interest rate of 12% to be at ALP, wherein the coordinate bench directed TPO to consider additional evidence submitted by assessee giving analysis of BSE database as per which average rate of return on comparable instruments was 13.66%, the Tribunal held that since the interest paid by assessee during the relevant year at 12% was at ALP. It accordingly deleted the addition in respect of interest on CCDs.

Brahma Center Development Pvt Ltd vs ACIT-TS-658-ITAT-2017(DEL)-TP-ITA no. 1215/del/2017 dated 02.08.2017

Receivables

737. The Tribunal relying on the decision in the case of Bechtel India wherein it was held that where the assessee was a debt free company, the question of receiving interest on receivable would not arise, deleted TP adjustment in respect of interest on account of delay in recovering outstanding AE-receivables by assessee (engaged in manufacturing thread rolling dies, milled flat dies and milled ground dies and sale of screws). It held that the TPO was not justified in making adjustment of interest on account of alleged delay in recovering the outstanding toward receivables from the AE as per the provisions of section 92CA(3) of the Income Tax Act.

Kadimi Tool Manufacturing Co. Pvt Ltd vs DCIT-TS-781-ITAT-2017(DEL)-TP dated 25.09.2017

738. The Tribunal, relying on the decision in the case of Patni Computer Systems [TS-51-HC-2013(Bom)], Ameriprise India [TS- 382-ITAT-2015(DEL)-TP] and Techbooks International [TS-317-ITAT-2015(DEL)-TP] held that once any debt arising during the course of business had been ordained by the legislature as an international transaction, if there was any delay in the realization of such debts arising during the course of business, the same was liable to be

considered as an international transaction. Further, it rejected CIT(A)'s approach of netting of interest payable with interest receivable only for 1 AE and accepted assessee's contention that aggregate of amounts receivable and payable from all 3 AEs should have been considered for the purpose of computing the TP addition and held that since the balances with all 3 AEs were on account of trading transactions i.e. same class of transaction, they should be aggregated.

AVL India Private Limited vs DCIT-TS-963-ITAT-2017(DEL)-TP- ITA No.4529/Del/2014 dated 07.11.2017

739. Where the sales to AE constituted 64% of the total sales and a uniform credit period of 145 days had been granted to the AEs as well as the non-AEs and no interest was charged on delayed realization of sale proceeds from both AEs as well as non-AEs, the Tribunal held that since there was complete uniformity in the act of the assessee, no ALP adjustment could be made and accordingly upheld the CIT(A)'s deletion of notional interest adjustment in respect of outstanding AE receivables for assessee.

KGK Enterprises (now known as KGK Diamonds (I) Pvt Ltd) vs ACIT-TS-943-ITAT-2017(JPR)-TP dated 28.11.2017

740. Where the TPO treated the outstanding AE-receivables as an international transaction and determined ALP of receivables exceeding 6 months at 16% based on SBI prime lending rate + 300 bps and the CIT(A) directed AO/TPO to charge LIBOR based interest rate, the Tribunal relying on the decision in the case of Tech Mahindra [(2011) 12 taxmann.com 13 (mum)] and Cotton Naturals (I) (P) Ltd [(2015) 55 taxmann.com 523 (Delhi)] held that since the outstanding AE receivables was an international transaction, interest rate ALP should be taken from the country of the borrower/debtor and accordingly remitted the issue back to the file of AO/TPO to compute interest rate by applying LIBOR prevalent during the relevant period in case of Australian Dollar/US Dollar plus suitable basis point keeping in view the credit score of the AEs.

DCIT vs. Delhi Call Centers Pvt. Ltd-TS-1019-ITAT-2017(DEL)-TP ITA No.6132/Del/2014 dated 30.11.2017

741. The Tribunal relying on the decision in the case of Kusum Healthcare wherein it was held that the expression "international transaction" shall include "capital financing, including any type of long-term or short-term borrowing, lending or guarantee, purchase or sale of marketable securities or any type of advance, payments or deferred payment or receivable or any other debt arising during the course of business" added in Explanation to Sec 92B does not mean that de hors the context, every item of receivables appearing in the accounts of an entity, which may have dealing with foreign AE, would automatically be characterized as an international transaction, and noting that the assessee had made no distinction between AE and non-AE in charging interest on outstanding receivables, deleted the TP adjustment in respect of interest on account of delay in recovering outstanding AE receivables by assessee.

Global Logic India Ltd. (Formerly known as Global Logic India Private Limited) vs. DCIT-TS-1028-ITAT-2017(DEL)-TP ITA No.1104/Del./2015 dated 12.12.2017

742. The Tribunal, noting that the co-ordinate bench had taken a similar view in the earlier year after examining all the facts and records and the order was not reversed by the High court, reversed CIT(A)'s order and upheld Revenue's contention to apply Indian rate for determining interest on outstanding AE-receivables and directed that the arm's length interest rate should be determined at 5% as against 10.25% adopted by the AO/TPO.

DCIT vs Izmo limited (formerly known as logix Microsystems Ltd)-TS-806-ITAT-2017(BANG)-TP dated 28.09.2017

743. Where the Assessee allowed an extra credit period to AEs beyond the agreed credit period (30 days in the present case), the Tribunal held that to the extent of agreed credit period, the sale price to AE or non AE is inclusive of possible interest on such agreed debt but when extra credit is allowed beyond the agreed credit period, the same is a subsequent, independent event and interest for such extra credit period cannot be factored in the price agreed and accordingly amounted to an international transaction. Accordingly, it held that the extra credit period allowed by the assessee's to its AE (30 days) was an international transaction, requiring separate benchmarking. Further, relying on the decision in the case of M/s Goldstar Jewellery Ltd. vs. JCIT in ITA No. 6570/Mum/2012 directed the AO to ascertain the cost of the total funds available

to the assessee and adopt it as internal CUP for benchmarking of this independent international transaction.

AMD India Private Ltd vs. DCIT-TS-840-ITAT-2017(Bang)-TP dated 26.10.2017

744. The Tribunal, relying on the decision in the case of Kusum Healthcare citation wherein it was held that working capital adjustment takes into consideration the outstanding receivables and therefore no fresh ALP adjustment of interest on the outstanding receivables was called for, accepted assessee contention that no separate addition of interest on outstanding AE receivables was required after allowing working capital adjustment. However, in the absence of details, it directed the AO to examine if the final margin of the comparables and the assessee arrived at after granting WCA.

EPAM Systems India P Ltd vs ACIT-TS-858-ITAT-2017(HYD)-TP dated 24.10.2017

745. Where the invoices raised by the assessee on its AE were outstanding for a period of more than 300 days, the Tribunal observing that no independent 3rd party would allow its outstandings to drift to such an extent and also noted that the assessee claimed that it did not absorb any credit risk, held that the outstandings constituted sale as well as loan. Accordingly, observing that the receivables or any other debt arising during the course of the business was included in the definition of capital financing as an international transaction as per explanation 2 to section 92B of the Act w.r.e.f 01.04.2002 inserted by the Finance Act 2012, upheld the addition on account of interest on such receivables made by the TPO @ 14.88%. It rejected assessee's reliance on the fact that the RBI Master Circular does not prescribe any conditions for repatriation of exports proceeds for SEZ, held that the RBI circular could not be the basis for determination of ALP.

BT e-Serv (India) Pvt Ltd vs ITO-TS-849-ITAT-2017(DEL)-TP dated 30.10.2017

746. Where the assessee had shown outstanding balance due from its AE and the assessee was not charging interest on debit balance due to bad financial condition of the AE, the Tribunal noting that even if the assessee would have provided for interest on outstanding balance from its AE, it could not have recovered the same as the AE had not honoured its commitments to the lenders, as well as it had incurred heavy losses year after year, held that the outstanding debit balance with the AE could not be regarded as an international transaction within the meaning of section 92B of the act as they had arisen mainly on account of reimbursement of the counter guarantee fee and not in the course of business. It observed that the outstanding debit balances with the associates was not directly covered within the ambit of international transaction and held that the terms 'any other transaction having a bearing on the profits, income, losses or assets of such enterprises must be interpreted ejusdem generis with the transactions mentioned in the preceding clause or at least analogous to it and therefore would not include the provision of guarantee for loans taken by associate enterprises.

Bombay Dyeing & Mfg. Co Ltd vs DCIT-TS-834-ITAT-2017(mum)-TP dated 27.10.2017

747. Where the TPO failed to consider assessee's contentions that i) adjustment towards notional interest for delayed payment made by the AEs is not an independent and standalone international transaction, and ii) it had already factored in the impact of the receivables of the working capital in TNMM analysis and thereby on its pricing/profitability vis-a-vis that of its comparable, the Tribunal remitted interest adjustment on account of delay in realization of export receivables to the file of AO for fresh assessment.

Siro Clinpharma Pvt. Ltd-TS-882-ITAT-2017(mum)-TP ITA No. 7294/MUM/2016 dated 07.11.2017

748. Where the sales to AE constituted 64% of the total sales and a uniform credit period of 145 days had been granted to the AEs as well as the non-AEs and no interest was charged on delayed realization of sale proceeds from both AEs as well as non-AEs, the Tribunal held that since there was complete uniformity in the act of the assessee, no ALP adjustment could be made and accordingly upheld the CIT(A)'s deletion of notional interest adjustment in respect of outstanding AE receivables for assessee.

KGK Enterprises (now known as KGK Diamonds (I) Pvt Ltd) vs ACIT-TS-943-ITAT-2017(JPR)-TP dated 28.11.2017

749. The Tribunal, applying the provisions of section 92C read with section 92B held that since after factoring in notional interest calculated with respect to overdue receivables from associated enterprises, the reduced margin of the assessee was more than average margin of comparables selected, no further adjustment was required to be made to the stated transactions.
Agilisys IT Services India (P.) Ltd - [2017] 77 taxmann.com 16 (Mumbai - Trib.)
750. The TPO made an ALP adjustment on account of outstanding receivables from AE beyond a period of 60 days by re-characterizing outstanding receivables as unsecured loans advanced by assessee to its AEs and imputing notional interest based on SBI PLR + 300 basis points. The Tribunal noting the submission of the assessee (- that it had made a factual mistake in TP study that it was receiving payments from AE in Indian currency though actually the same was received in foreign currency), held that the LIBOR rate should be applied and not SBI PLR, opined that this fact required verification and therefore remitted the issue to AO for fresh consideration. As regards the assessee's contention that its average days of realization period of receivables was 206.95 days as compared to the average realization period of 446.71 days of the comparables companies, it held that this aspect also required verification and therefore directed the AO / TPO to verify this as well.
Target Sourcing Services India Pvt. Ltd. Vs ACIT - TS-237-ITAT-2017(DEL)-TP - ITA No.6040/Del/2016 dated 24-03-2017
751. The Tribunal dismissed the assessee's appeal challenging TP-adjustment towards notional interest on receivables outstanding from AE beyond 90 days and rejected the arguments of the assessee that it was a debt free company and profit margin from provision of software development services was much higher than comparables, not warranting any adjustment on account of notional interest. It distinguished the ruling of the Court in Bechtel India relied on by the assessee, stating that credit period in that case was 60 days while for assessee it was 1 year and rejected the assessee's contention that there was no benefit to AE since it immediately remitted the amount on receipt from its customers and held that assessee could not be a party for delayed payment by AE customers. Observing that the assessee was financing its AE by accommodating the delayed remittance and that the huge funds so parked with AE, if repatriated, could have been invested to earn better profits for assessee, the Tribunal concluded that this potential loss was a factor for consideration while evaluating financial impact of this transaction. Accordingly, it upheld the addition made by the TPO.
Professional Access Software Development Pvt Ltd v DCIT – TS-103-ITAT-2017 (Chny) – TP - I.T.A.No.3305/Mds./2016 dated 09.02.2017
752. The Tribunal, relying on the decisions of the coordinate bench in Goldstar Jewellery [TS-14-ITAT-2015(Mum)-TP] and Avnet India [TS-629-ITAT-2015(Bang)-TP], deleted TP adjustment on account of notional interest on overdue receivables, computed @17.22 percent by the TPO and held that the transaction of non-realization of dues from AEs was not an independent transaction and had to be considered along with main transaction viz. sales, as it was an integral part of sales transaction to AE.
Millipore (India) Ltd. Vs ACIT – TS-83-ITAT-2017 (Bang) – TP - IT(TP)A No.327/Bang/2015 dated 07.03.2017
753. Where the assessee had provided extended credit period facility to its AEs for amounts due against export of IC engines and had charged interest at LIBOR + 290 basis points in case of USD billing and LIBOR + 280 basis points in case of billing in GB pounds and the credit period was extended by 80 days over the original credit period of 90 days allowed to AEs pursuant to which the TPO rejected assessee's application of the rates of packing credit in foreign currency for the purpose of benchmarking and adopting the Prime Lending Rate as ALP, made an adjustment of Rs. 1.41 crores on account of differential interest amount, the Tribunal noted that a similar issue was considered before Pune Tribunal in iGATE Computer Systems Ltd. [TS-250-

ITAT-2015(PUN)-TP], wherein the use of LIBOR + rates had been upheld by Tribunal. Thus, it applied the ratio laid down in this ruling to uphold the use of LIBOR + rates for amounts (in foreign currency) due from AEs for the extended period of credit.

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

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

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

755. The Court, upheld Tribunal's deletion of notional interest adjustment on delayed AE-receivables in the hands of the assessee on the ground that the since assessee had earned significantly higher margin than its comparables, it compensated for credit period extended to its AEs and thus the TP-adjustment on receivables outstanding from AE beyond the stipulated credit period of 180 days was unwarranted and wholly unjustified. Further, it held that the inclusion in the explanation to section 92B of the Act, the expression 'receivables' would not mean that de hors the context every item of 'receivables' appearing in the accounts of an entity which may have dealings with foreign AEs would automatically be characterized as an international transaction. It observed that, assessee had already factored in the impact of receivables on working capital and thereby on its pricing/profitability vis-a-vis that of comparables, and adjustment purely on the basis of outstanding receivables would amount to re-characterizing the transaction which was impermissible as per High Court ruling in the case of EKL Appliances [TS-206-HC-2012(DEL)-TP].

Kusum Helath Care Pvt. Ltd [TS-412-HC-2017(DEL)-TP- I.T.A.No.765/2016 dated 25.04.2017

756. Relying on the decision in the case of Tally Solutions [TS-620-ITAT-2016(Bang)-TP and assessee's own case [TS-865-ITAT-2016(Bang)-TP], the Tribunal held that extending credit period for realization of sales to AE could not be treated as an individual and separate transaction of advance or loan and accordingly, remitted the ALP determination for outstanding AE receivables to the file of AO/TPO to consider the credit period allowed in realization of sale proceeds as closely linked transaction to the transaction of providing services to AE. Rejecting Revenue's contention based on Delhi HC ruling in Kusum Healthcare Pvt. Ltd that TPO had to analyze the statistics over a period of time (and not merely for one AY) to discern a pattern which would indicate whether the receivables arrangement reflected an international transaction intended to benefit the AE in some way, it held that there may be delay in collection of monies for supplies made even beyond the agreed time limit due to a variety of factors which had to be investigated on a case to case basis.

Lotus Labs Pvt. Ltd. vs. DCIT-TS-574-ITAT-2017(Bang)-TP IT(TP)A Nos.92 & 98/Bang/2016 dated 07.07.2017

757. The Apex Court, relying on co-ordinate bench ruling in Kusum Healthcare Pvt. Ltd, and noting Tribunal's findings that the assessee was a captive service provider and a debt free company and that the Revenue had also not brought on record that the assessee had paid any interest to its creditors or suppliers on delayed payments, it directed that no separate adjustment for interest

on receivables was warranted in the hands of the assessee and accordingly upheld the order of High Court.

Bechtel India Pvt Ltd-[TS-591-SC-2016-TP-ITA No. 379/2016 dated 21.07.2016

758. The Tribunal, following the decision of the Court in Kusum Health Care [TS-412-HC-2017 (DEL)-TP] wherein it was held that once working capital adjustment was factored into ALP no separate adjustment on account of outstanding receivable was tenable, allowed the assessee's appeal and deleted the TP adjustment made towards notional interest on receivables and held that the TPO was unjustified in re-characterizing the receivable as a loan and imputing interest thereon at SBI + 300 basis points.

Teradata India Pvt Ltd v ITO – TS-655-ITAT-2017 (Del) – TP-ITA No. 87/del/2017 dated 08.08.2017

759. The Tribunal relying on co-ordinate bench's ruling in assessee's own case for AY 2010-11[TS-865-ITAT-2016(Bang)-TP] held that the credit period allowed in realization of sale proceeds was a closely linked transaction with the transaction of providing services to AE, could not be treated as an international transaction. Accordingly, it remitted the issue to the file of AO/TPO directing it to reconsider the issue of transfer pricing by clubbing and aggregating the transaction with the main transaction of providing service to the AE.

Lotus Labs Pvt. Ltd vs ACIT-TS-624-ITAT-2017(Bang)-TP-IT(TP)A no.2295/bang/2016 dated 12.07.2017

760. Where the assessee was charging interest on extended credit period (beyond 90 days) to non-AEs but not to its AEs, the Tribunal held that the CIT(A) was justified in making notional interest adjustment on excess credit period allowed to AEs by assessee beyond 90 days.

Ingersoll Rand India Ltd vs DCIT-TS-637-ITAT-2017(BANG)-TP-ITA No. 6&7/bang/2014 dated 02.08.2017

761. The Court, admitted assessee's appeal on TP-issue relating to trade receivables and admitted 2 questions of law (1) whether Tribunal erred in setting aside matter to AO/TPO to verify certain calculations without first adjudicating on the primary legal issue of whether a trade receivable per se could be characterized as an international transaction u/s 92B. (2) whether Tribunal ought to have held that even if a trade receivable per se was to be regarded as an international transaction, it was inextricably linked to and arose from the transaction of provision of services and therefore the two formed a bundle of transactions, which ought to be benchmarked.

Target Sourcing Services India Pvt. Ltd vs. ACIT-TS-697-HC-2017(DEL)-TP-ITA no. 741/2017 dated 01.09.2017

762. Where the assessee had outstanding receivables from AEs as well as advance to AEs and the TPO made an adjustment of Rs. 2.05 crore at 7.25%, the Tribunal relying on the decision in the case of Bentley Systems [TS-559-ITAT-2015(DEL)-TP] and Cotton Naturals [TS-117-HC-2015(DEL)-TP] held that extending credit period for realization of sales to its AE was a closely linked transaction with the transaction of providing services to the AE and accordingly directed the AO/TPO to determine the ALP in respect of interest on receivables considering it as a closely linked transaction with the provision of services to AE and make necessary TP adjustment at the rate of LIBOR+1% as the arm's length interest rate. Further, in respect of Loans and advances, the Tribunal held that it amounted to an international transaction and directed the TPO/AO to compute the arm's length at LIBOR+1.5%.

Och-Ziff Real Estate India Pvt Ltd vs DCIT-TS-693-ITAT-2017(Bang)-TP-IT(TP)A no. 358/bang/2016 dated 24.08.2017

763. The Tribunal set aside the issue relating to adjustment on account of interest on receivables from AE considering assessee's contention that as a policy, it did not charge interest to unrelated party even in cases where receivables were outstanding for more than 6 months. However, it rejected the assessee's contention that outstanding AE receivables do not constitute an international transaction and held that it would fall under the purview of clause (i)(c) of Explanation to Sec. 92B(1). Accordingly, it directed the TPO to examine the issue afresh in light

of assessee's contention while directing assessee to support its contention with documents and working.

AT & T Global Network Services (India) Pvt Ltd vs. DCIT-TS-736-ITAT-2017(DEL)-TP-ITA No. 1059 / del / 2015 dated 18.09.2017

764. Where the TPO had made an addition on account of notional interest on receivables, the Court relying on the decision in the case of Kusum Healthcare Pvt Ltd [TS-412-HC-2017(DEL)-TP] directed the CIT(A) to study the impact of the receivables appearing in the accounts of the assessee, looking into the various factors as to the reasons why the same were shown as receivables and also as to whether the said transactions could be characterized as international transactions.

Avenue Asia Advisors Pvt. Limited vs. DCIT-TS-737-HC-2017(DEL)-TP ITA No. 350 / 2016 dated 18.09.2017

Corporate Guarantee

765. The Tribunal relying on the decision in assessee's own case for AY 2009-10 (heard alongwith this appeal) which had in turn relied on the ruling of Micro Ink (wherein it was held that issuance of corporate guarantees was in the nature of 'shareholder activities' / 'quasi-capital' and thus could not be included within the ambit of 'provision for services' under the definition of 'international transaction' u/s 92B) upheld CIT(A)'s deletion of TP-adjustment in respect of corporate guarantee for AY 2010-11.

DCIT vs. Jyoti CNC Automation Pvt. Ltd-TS-968-ITAT-2017(Rjt) ITA No. 301/Rjt/2015 & CO No.57/Rjt/2015 dated 28.11.2017

DCIT vs. Jyoti CNC Automation Pvt. Ltd-TS-981-ITAT-2017(Rjt)-ITA No. 435/Rjt/2015 dated 28.11.2017

766. The Tribunal, relying on the decision in the case of Micro Ink Ruling [176 TTJ 8] (wherein it was held that issuance of corporate guarantees was in the nature of 'shareholder activities' / 'quasi-capital' and thus could not be included within the ambit of 'provision for services' under the definition of 'international transaction' u/s 92B), deleted the TP adjustment in respect of corporate guarantee proposed by the TPO/DRP. Further, noting that TPO treated excess credit (beyond 60 days) allowed to AE as an international transaction and proceeded to benchmark the same at 3.37% on the basis of LIBOR+90bps, the Tribunal relying on Micro Ink ruling –(176 TTJ 8) (wherein it was held that when such an interest was includible in operating income and the operating income itself has been accepted as reasonable under the TNMM), held that there could not be an occasion to make adjustment for notional interest on delayed realization of debtors and accordingly deleted the TP adjustment in respect of outstanding receivables.

Dorf Metal Speciality Catalyst Pvt. Ltd vs. ACIT-TS-993-ITAT-2017(Rjt)-TP ITA No. 16/Rjt/2017 dated 28.11.2017

767. Vis-à-vis the corporate guarantee provided by the assessee to its AEs, the Tribunal following the decision of the co-ordinate bench in the assessee's own case for the prior assessment year held that the TPO was not justified in computing ALP of the corporate guarantee provided based on the bank guarantee rate (2 percent) and accordingly adopted 0.27 percent (based on the rate applied in the decision of Asian Paints Ltd. Vs. CIT (ITA No. 7801/Mum/2010) as the ALP of corporate guarantee.

Lanco Infratech Ltd vs ACIT-TS-1022-ITAT-2017(HYD)-TP-ITA No. 221/hyd/2017 dated 30.11.2017

768. The Tribunal considering the retrospective amendment brought in by Finance Act, 2012, by which corporate guarantee was included in the definition of international transaction by virtue of explanation i(c) to section 92B, upheld TPO/DRP's treatment of corporate guarantee extended by assessee to AEs as an international transaction.

TAKE Solutions Limited vs ACIT-TS-1070-ITAT-2017(CHNY)-TP dated 04.12.2017

769. The Tribunal, relying on the decision in the case of Micro Ink Ruling (wherein it was held that issuance of corporate guarantees was in the nature of 'shareholder activities' / 'quasi-capital' and thus could not be included within the ambit of 'provision for services' under the definition of 'international transaction' u/s 92B), deleted the TP adjustment in respect of corporate guarantee as the relevant AY 2012-13 was outside the scope of the international transaction since the amendment applied from 2013-14.

Autoline Industries Ltd vs DCIT-TS-1000-ITAT-2017(PUN)-TP dated 24.11.2017

770. The Tribunal, relying on the decision in the case of Dr. Reddy's Laboratories Limited [TS-331-ITAT-2017(HYD)-TP wherein it was held that amendment by Finance Act, 2012 to include corporate guarantees under the purview of international transaction was to be treated as prospective, thus applicable from AY 2013-14, deleted the TP adjustment on corporate guarantee rejecting it as an international transaction for AY 2012-13.

Bartronics India Ltd vs DCIT-TS-814-ITAT-2017(HYD)-TP ITA No. 259 /Hyd/2017 dated 27.09.2017

771. The Tribunal, relying on the decision in the case of Micro Ink ruling (wherein it was held that issuance of corporate guarantees was in the nature of 'shareholder activities' / 'quasi-capital' and thus could not be included within the ambit of 'provision for services' under the definition of 'international transaction' u/s 92B) upheld CIT(A)'s deletion of TP adjustment in respect of corporate guarantee and held that though corporate guarantee issue in Micro Ink's case was currently in appeal before HC, that did not dilute binding nature of the decision as now. Accordingly, it dismissed revenue's appeal.

DCIT vs. Jyoti CNC Automation Pvt. Ltd-TS-955-ITAT-2017(Rjt)-TP ITA No. 183/Rjt/2015 & CO No.48/Rjt/2015 dated 28.11.2017

772. The Tribunal adopted ALP of 0.50% for benchmarking corporate guarantee / letter of undertaking given by the assessee in respect of credit facilities availed by its AEs for AY 2011-12 while refusing to enter into semantics of whether corporate guarantee was an 'international transaction' as the assessee's argument was mainly restricted to the commission rate. It noted that the security for loans was primarily covered by pledged securities, hypothecation of debtors' balances and other assets of AE, which indicated that entire security of loan was not based only on corporate guarantee and after considering bank guarantee commission rate at 0.875% after 50% concession given to assessee by SBI and after evaluating various factors like country risk, currency risk and entity risk etc, it determined arm's length rate at 0.50% as it constituted an internal CUP available to the assessee. Noting that the assessee had recovered corporate guarantee at 0.25 percent, the Tribunal directed AO/TPO to make TP adjustment applying 0.50% rate of corporate guarantee commission as against the 3% rate applied by the AO / TPO.

Videocon Industries Ltd Vs. DCIT - TS-127-ITAT-2017(Mum)-TP - ITA No.1310/M/2016 dated 24.02.2017

773. Where during the year under consideration, the assessee provided guarantee to banks on behalf of its AEs worth Rs. 670.57 Cr without treating the corporate guarantee as an international transaction within the meaning of Sec 92B and the TPO disregarded this approach and held that assessee ought to have charged corporate guarantee fee from its AEs thereby adopting the guarantee fee at 4.43 percent which was reduced by the DRP to 3 percent, the Tribunal noting the assessee's submission that it had recovered guarantee fee @1% of outstanding guaranteed amount from its AEs which had been recognized in the financial statements, followed the decision in assessee's own case for AY 2009-10 and directed the AO/TPO to benchmark the guarantee fee by adopting the rate at 1% of the outstanding guaranteed amount for maintaining consistency with the precedent in the assessee's own case.

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

774. The Tribunal, relying on the ruling of *Micro Inks Limited vs. ACIT* [TS-568-ITAT-2015(Ahd)-TP], held that as issuance of corporate guarantee did not have bearing on profits, income, losses or assets it did not constitute an international transaction under section 92B. It further held that issuance of guarantees could be said to be in the nature of shareholder activities and hence could not be included in the "provision of services" under the definition of 'international transaction under section 92B.
Rubamin Ltd vs ITO – TS-113-ITAT-2017 (Ahd) – TP - ITA Nos. 664/Ahd/2012 , ITA Nos. 665/Ahd/2012, ITA Nos. 795/Ahd/2012 dated 17.02.2017
775. Where the assessee issued a corporate guarantee on behalf of its subsidiary in Thailand, in order to enable the subsidiary to avail financing from Bank of India, despite not being very credit worthy and the TPO applied external CUP and considering 1% guarantee fee charged by banks in India, proposed TP adjustment of US\$ 16000 equivalent to approximately Rs.6.4 lacs, the Tribunal relying on the decision of the co-ordinate bench in the case of *Manugraph India Ltd* [TS-113-ITAT-2015(Mum)-TP] (wherein the rate of 0.5% was accepted to be at ALP) and directed the AO to apply the rate of 0.5% as the charges for providing the impugned guarantee to the AE and to restrict TP addition accordingly.
Endurance Systems (India) Pvt. Ltd. vs ACIT - TS-114-ITAT-2017(PUN)-TP - ITA No.2567/PUN/2012 dated 15.02.2017
776. The Court, relying on the decision of co-ordinate bench in *Everest Kanto Cylinders Ltd*, dismissed the appeal of the Revenue and held that that the guarantee commission fee charged by the assessee to its AE @ 0.53 percent in relation to bank loans and @ 1.47 percent in relation to L/C facilities was at ALP. It upheld the finding of the Tribunal that guarantee commissions rates could not be compared to the rates of bank guarantee.
CIT v Glenmark Pharmaceuticals Ltd – TS-61-HC-2017 (Bom) – TP - INCOME TAX APPEAL NO.1302 OF 2014 dated 02.02.2017
777. The assessee provided certain corporate guarantees to the bankers, in respect of borrowings by its AEs, and on 2 corporate guarantees issued to ICICI Bank in respect of Zydus Netherlands BV and Bank of Baroda in respect of Zydus Inc USA, it did not charge any guarantee fees, as the loans had been availed by AEs for strategic acquisitions in furtherance of Cadila's inorganic expansion strategy, which had benefited Cadila itself rather than the AEs. The Tribunal, observing that that the issue was covered by the coordinate bench ruling of the Tribunal in case of *Micro Ink* [TS-568-ITAT-2015(Ahd)-TP], wherein it was held that corporate guarantees issued in nature of 'shareholder activities' / 'quasi capital' could not be included within ambit of 'provision for services' under definition of 'international transaction' u/s 92B, as they did not have "bearing on profits, income, losses or assets" deleted the addition made by the DRP who had adopted a corporate guarantee fee of 1 percent to be at ALP.
Cadila Healthcare Limited Vs ACIT - TS-241-ITAT-2017(Ahd)-TP - IT (TP) No. 898/Ahd/2014 and 694/Ahd/2015 dated 03.03.2017
778. The assessee had extended a corporate guarantee in respect of loan of Rs. 101.48 Cr taken by its subsidiary *Suzlon Energy BV Netherland* for which it had not charged any guarantee fee, contending that the guarantee was granted in the course of its stewardship activities for its subsidiaries and that it did not constitute an international transaction under section 92B of the Act. The TPO, ignoring the alternate contention of the assessee that if the corporate guarantee was considered as an international transaction, a corporate guarantee fee of 0.75 percent was to be adopted as ALP under CUP, adopted 2 percent as the ALP fee and made a TP addition. The Tribunal, relying on the decisions of the Mumbai Tribunal in *Micro Ink Ltd.* [(2016) 176 TTJ (Ahd)].and *Siro Clinpharm Pvt. Ltd* [TS 144 ITAT (2016) TP], held that when the assessee had provided the guarantee in the course of its stewardship activities for its subsidiaries, it would not constitute an international transaction, and, as such, no ALP adjustment could be made in respect of the same. Accordingly, it deleted the addition made by the TPO.
Suzlon Energy Limited [TS-311-ITAT-2017(Ahd)-TP] - ITA No.1369/Ahd/2013 dated 21.04.2017

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

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

780. The assessee had not charged any fee or commission for providing corporate guarantee as collateral for the aforesaid borrowing on behalf of its AE. Considering it as an international transaction, TPO worked out addition of Rs. 1.63 crores being 3% of the average amount of loan outstanding during the year. The CIT(A) affirmed the order. The Tribunal noted that the assessee had issued corporate guarantee on behalf of its AE for loan facility availed by it from the bank. It opined that TPO's approach to determine ALP based on fees charged by the bank was inconsistent with Bombay High Court ruling in Everest Kanto Cylinders Ltd [TS-200-HC-2015(BOM)-TP]. Accordingly, it upheld the rate of 0.50% for the purposes of determining arm's length rate of corporate guarantee commission/fee. The Tribunal rejected assessee's plea for guarantee commission rate below 0.5% (on the basis that the loan raised by AE had adequate primary security in the shape of the net worth of the AE itself and therefore the risk of devolvement on assessee was minimal) on the ground that it was not a peculiar situation so as to warrant a rate lower than 0.50%. ATL Mauritius had availed credit facilities from Barclays Bank.

Zee Entertainment Enterprises Ltd vs ACIT -TS-382-ITAT-2017(Mum)-TP ITA No.3406/Mum/2014 dated 05.05.2017

781. The Tribunal deleted TP-adjustment towards corporate guarantee commission for AY 2009-10 and 2010-11 on the ground that corporate guarantee was outside the ambit of definition of international transaction under section 92B. It relied on the coordinate bench's ruling in the case of Bharti Airtel Limited [TS-76-ITAT-2014(DEL)-TP] and Siro Clinpharm Ltd [TS-144-ITAT-2016(Mum)-TP] and held that explanation to section 92B could not be applied retrospectively for the years under consideration **and since** the assessee **had** not incurred any costs in providing corporate guarantee, **it would not constitute** an international transaction within the meaning of section 92B. Further, relying on coordinate bench's ruling in assessee's own case directed the TPO to compute ALP based on LIBOR rate applicable for the years under consideration + 200 basis points.

Dr Reddy's Laboratories Limited – ACIT TS-331-ITAT-2017(HYD)-TP- TA.No.294/Hyd/2014 dated 28.04.2017

782. The Tribunal relying on the ratio laid down in Siro Clinpharm [TS-144-ITAT-2016(MUM)-TP] held that corporate guarantee provided by the assessee (engaged in the business of manufacturing and trading of cement, calcined petroleum coke (CPC) and generation of electricity) on behalf of its AEs in USA during AY 2011-12 were not international transactions as the amendment to the definition of international transaction under section 92B was applicable prospectively. Further, relying on the decision in the case of Four soft Limited and Siva Industries & Holdings Ltd upheld the adoption of LIBOR+200 basis points as arm's length rate for benchmarking interest on loans provided to its US subsidiary.

Rain Cements Ltd vs DCIT -TS-330-ITAT-2017(HYD)-TP-222/Hyd/2014, 309/hyd/2015, 344/hyd/2015, 259/hyd/2016, 260/hyd/2016, 315/hyd/2015, 433/hyd/2016, 434/hyd/2016 dated 26.04.2017

783. The Tribunal rejected Revenue's request for constituting Special Bench to decide the issue relating to TP-adjustment on corporate guarantee fees for AY 2007-08 noting that the issue was admitted in appeal by Gujarat HC. The Tribunal remitted the matter to AO with a direction to consider it afresh after the HC decision. The assessee had given corporate guarantee to banks on behalf of its AEs without charging any commission/fee. Noting that the legislature had inserted Explanation to section 92B vide Finance Act, 2012 with retrospective effect, it held that the assessee could not benchmark its transaction retrospectively. Further, with respect to interest free advances given by the assessee to its AEs, the AO made an addition of notional interest @ LIBOR + 2 percent which was confirmed by the CIT(A). The Tribunal noted that in the immediately preceding assessment year in the assessee's own case where the CIT(A) had adopted LIBOR + 0.25 percent to benchmark the impugned transaction, it had held that only the LIBOR rate without any mark-up, was to be considered while making the addition. Accordingly, the Tribunal, following its previous order held that the addition made by the AO / CIT(A) was to be made only on the basis of LIBOR without any mark-up.

Sun Pharmaceutical Industries Ltd [TS-357-ITAT-2017(AHD)-TP- ITA 2076 & 2067/AHD/2013 dated 27.04.2017

784. The Apex Court admitted Revenue's SLP challenging Gujarat High Court's decision in respect of deletion of TP-adjustment on corporate guarantee absent actual pledging of shares in favor of the AE. Assessee's AE, Adani Global Pvt. Ltd Singapore had raised a term loan from ICICI Bank for which assessee had intended to provide guarantee by way of by pledging 23.5% shareholding of Mundra Port and SE2 Limited (owned by the assessee), subject to RBI approval. Since the RBI denied the assessee the approval, the guarantee was not provided and consequently the assessee did not charge any guarantee fee from its AE. The TPO applied CUP method and proposed TP adjustment of Rs. 3.65 cr based on market rate of 2% of guarantee fees. The TPO rejected assessee's submission that it had intended to provide a guarantee by pledging of shares and that since the same was not approved by RBI, no guarantee had been provided to the AE. The TPO held that RBI letter was regarding pledging of shares in favor of IDBI Trusteeship Services Ltd and therefore may have been referring to some other transaction. CIT(A) reversed AO's decision observing that IDBI Trusteeship Ltd was security trustee of ICICI Bank Limited, Singapore and thus, RBI's letter refusing permission for pledge of the shares pertained to the same transaction. The Tribunal confirmed the decision of CIT(A) and held that since the assessee had not furnished guarantee to AE, no adjustment was warranted. The High Court upheld Tribunal's order.

Adani Enterprises Ltd [TS-408-SC-2017-TP] –CC No.6814/2017 dated 07.04.2017

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

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

786. The Tribunal determined 0.25% as ALP of commission on corporate guarantee given by assessee (engaged in the business of fabrication, supply, erection and maintenance of telecom towers) to its AE in Afghanistan for AY 2010-11 and AY 2011-12. The DRP had computed the ALP of the guarantee commission at 6% of outstanding loan based on difference between bank loan given to AE at 12% and provisional interest rate in Afghanistan at 18%. It rejected DRP's

computation of ALP and held that the parameter for obtaining loan at a particular interest rate was different from providing corporate guarantee and there was no basis for DRP's determination of ALP at 6%. Relying on the decision in the case of Asian Paints [41 taxmann.com 71] and the assessee's own case for AY 2006-07, it held that the difference in interest rate charged on the loan could not be considered as a guarantee commission fee.

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

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

787. The Tribunal restricted TP-adjustment towards guarantee commission at 0.385% for AY 2007-08 to 2009-10 in respect of corporate guarantee provided by assessee to Bank of America in connection with loans taken by its AE. The assessee had not charged any guarantee commission fee to the AE for providing the said guarantee and contended that the transaction did not fall within the definition of an international transaction u/s 92B of the Act as it had no bearing on income of the assessee. The TPO did not accept the above contention and held that providing guarantee to its AE was a clear evidence of benefit being provided. If the AE had requested any bank or third party to provide such guarantee for its loans, it would have had to pay guarantee fee/commission. The Tribunal relying on the decision in assessee's own case for AY 2005-06 and 2006-07, upheld CIT(A) ALP determination based on average guarantee commission rate i.e **0.385%** paid by assessee to various third-party banks. Further, the assessee had given interest free loans to two of its subsidiaries since the amounts had been given as temporary advances for the purpose of meeting their urgent business requirements. Further, the companies **were** 100% subsidiaries of the assessee which contributed to furthering the business interest of the assessee. The TPO has not accepted the explanation given by the assessee and held that the assessee ought to have charged the interest on the said loans at the prevailing market rate and made an adjustment of Interest at 5.3% of the amount advanced. The Tribunal relying on the decision in the case of Taurian Iron & Steel Co. Pvt Ltd vs ADCIT [ITA No. 5920/mum/2012] and Golawal Diamonds vs ACIT [ITA No. 518/mum/2014] directed the AO to restrict the adjustment at LIBOR+1.50%.

ACIT vs Reliance Industries Ltd-TS-528-ITAT-2017(Mum)-TP-ITA no.4361/mum/2012 dated 12.04.2017

788. The Tribunal, noting that the question whether corporate guarantee was an international transaction was pending before the special bench, remitted TP-issues in respect of corporate guarantee to the file of AO/TPO for assessee (engaged in the business of television new broadcasting and producing customized software, programs for broadcasters) for AY 2009-10 with the direction to decide the issue after decision of the special bench of the Tribunal. Further, in respect of working capital adjustment, it remitted the issue back to the file of TPO with a direction to the assessee to submit details of working capital adjustment to the TPO and directed the TPO to grant the adjustment after verifying the details if it was found to be in accordance with law.

New Delhi Television Ltd vs ACIT-TS-579-ITAT-2017(DEL)-TP- ITA No. 1212/Del/2014 & 2658/Del/2014 C.O. No. 233/Del/2014 dated 14.07.2017

789. Relying on the decision in the case of Videcon Industries Ltd [TS-127-ITAT-2017(mum)-TP] wherein 0.5% rate was determined as guarantee fee ALP for benchmarking corporate guarantee transaction, the Tribunal directed the AO to compute ALP of guarantee fees at 0.5% in respect of corporate guarantee given by the assessee to its UAE based AE.

Mahindra Intertrade Ltd vs DCIT-TS-607-ITAT-2017(Mum)-TP-ITA no. 269/mum/2014 dated 15.03.2017

790. Where the assessee had provided corporate guarantee on behalf of its AEs in respect of a term loan obtained by the AE, and the TPO made an adjustment on the ground that an economic

benefit had been provided by the assessee. The Assessee contended that no real benefit had been provided to the AE and after provision of corporate guarantee, the interest liability of the AE had increased. Since the DRP had not dealt with the assessee's objections relating to effect of increased interest rates and overall debt position of AE after corporate guarantee was given, the Tribunal, relying in the decision of the coordinate bench in assessee's own case for AY 2010-11 the TP issue in respect of corporate guarantee to the file of DRP for fresh consideration.

Apollo Tyres Ltd vs DCIT-TS-628-ITAT-2017(COCH)-TP-ITA No. 35/coch/2017 dated 24.07.2017

791. The Apex Court admitted Revenue's SLP against High Court order confirming deletion of guarantee fee adjustment for AY 2008-09. The Assessee had charged guarantee fee at 0.53% in respect of bank loan and 1.47% in respect of guarantee for L/C facility obtained by 2 AEs while TPO determined ALP at 3% based on guarantee commission rates charged by banks. The Tribunal, relying on the decision in the case of Everest Kanto Cylinders Ltd, had deleted impugned adjustment holding that bank guarantee was not the same as corporate guarantee which was confirmed by the High Court.

CIT vs Glenmark Pharmaceuticals Ltd-TS-698-SC-2017-TP - I.R. AND IA NO.81058/2017-AND IA NO.81060/2017 dated 08.09.2017

Royalty / Management fees / Intra Group services / Reimbursements

Royalty

792. The Tribunal set aside CIT(A)'s order on ALP determination of royalty and import transactions in case of assessee. It rejected CIT(A)'s deletion of royalty adjustment on the basis that no TP-adjustment in respect of such royalty was proposed for previous AY 2002-03 and the Tribunal had allowed deduction for royalty as revenue expenditure and held that allowance of expenditure operated in altogether different provisions of the law and the determination of arm's length price of international transaction operated in different provisions of law. It held that the AO's adjustment of Rs. 4.67 crore on the basis of benefit test and TPO's comparability analysis based on the past year as impermissible and accordingly, set aside the whole transaction of ALP determination of royalty back to the AO for fresh determination.

ACIT vs. Denso India Ltd-TS-957-ITAT-2017(DEL)-TP ITA No. 1751 and 4365/Del/2011 dated 05.11.2017

793. Where the assessee had benchmarked the royalty payment under TNMM after aggregating the same with other transactions, but the TPO determined the ALP at NIL by benchmarking royalty separately under CUP method holding that royalty and other transactions were not closely linked, the Tribunal, noting that issue as to payment of royalty and technical fee by the taxpayer to its AE had already been decided in assessee's favour in AYs 2002-03 and 2004-05 by the Tribunal, and an appeal preferred by the Revenue before the Hon'ble Delhi High Court had been dismissed, restored the matter to the file of TPO directing it to decide the issue qua payment of royalty and technical fees qua AY 2009-10 in accordance with the decision taken in earlier years.

Munjal Showa Limited vs. ACIT-TS-960-ITAT-2017(DEL)-TP-ITA No.1030/Del./2014 dated 22.11.2017

794. Where the TPO initially determined ALP as NIL by holding that no benefit etc accrued to the assessee because of Royalty payment and the AO made the addition without applicability of section 37(1) of the Act, the Tribunal remitted ALP determination of royalty payment by assessee to the file of TPO for fresh consideration since the ratio laid in down Cushman & Wakefield had not been followed

Honda Motor India Pvt. Ltd vs. DCIT-TS-966-ITAT-2017(DEL)-TP dated 28.11.2017

795. The Tribunal, noting that co-ordinate bench ruling in assessee's own case in AY 2009-10 had held that RBI and SIA approved 'royalty' payment to AE was at ALP and had rejected TPO's determination of Nil ALP held that since the assessee's royalty payment to AE for subject AY

was germinating from same agreement which was subject matter of dispute in AY 2009-10, the CIT(A) was justified in rejecting the TPO's determination of ALP at NIL.

ACIT v Spicer India Private Limited - TS- 971-ITAT-2017(PUN)-TP -ITA No.1321/PUN/2015 dated 27.10.2017

796. Where the assessee's Rs. 33.29 lakhs royalty payment to AE was on the basis of RBI-approved agreement which was initially entered into in 1992 between two unrelated parties, the Tribunal, relying on the decision in the case of Ballast Nedam Dredging held that since the price paid to associated enterprise was the same as entered when the entities were independent entities the same had to be considered as uncontrolled transaction. Further, noting that the assessee had paid royalty to its associated enterprises as per the rates which were approved by RBI, the Tribunal held that the said transaction was at arm's length. Further, observing that assessee's royalty payment in all preceding years from AYs 1997-98 to 2002-03 were allowed and Revenue had not brought any evidence to show change in facts, Tribunal upheld deletion of royalty payment to AE.

DCIT vs Kalyan Hayes Lemmerz Ltd- TS- 1001-ITAT-2017(PUN)-TP ITA Nos.999 & 1000/PUN/2013 dated 11.12.2017

797. The Tribunal, relying on the decision in assessee's own case wherein the High Court had restored the matter to the file of TPO for reconsideration of aggregation of royalty/ FTS Transaction with other transactions remitted the issue of aggregation vs segregation of payment of royalty/fees for technical services (FTS) from other transactions for deciding the issue afresh.

Gruner India Pvt. Ltd vs ACIT-TS-996-ITAT-2017(DEL)-TP ITA No. 6801/Del/2017 dated 30.11.2017

798. Where the assessee was receiving royalty from its AE in prior years for provision of expertise and brand name, the Court held that a mere change of ownership structure of the AE would not justify the contention that no royalty was charged in the current year. It rejected assessee's contention that mere absence of consideration for use of the Dabur brand per se could not amount to an international transaction. It held that if the assessee's contention was to be accepted any omission by a party to indicate an initial income, which was concededly being shown in the past as an international transaction, could not be scrutinized at all, which would lead to absurd results and therefore could not be accepted. Accordingly, the assessee's appeal was dismissed.

Dabur India Ltd vs Pr.CIT – TS- 979-HC-2017(DEL)-TP- ITA No. 1142/ 2017 & CM No. 45221/ 2017

799. The Tribunal, following jurisdictional ruling of the High Court in assessee's own case for AY 2010-11[TS-1091-HC-2016(AP)-TP] (wherein deletion of similar royalty adjustment was upheld after holding that TPO was unjustified in reducing the royalty rate from 3% to 2% without substantiating it with an appropriate alternate TP analysis) deleted the TP adjustment arising from TPO's reduction of arm's length royalty rate.

RAK Ceramics India Private Limited vs DCIT-TS-1054-ITAT-2017(HYD)-TP dated 29.11.2017

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

Frigoglass India Pvt Ltd [TS-180-HC-2017(Del)-TP] [ITA 123/2017]

801. Where the TPO had arbitrarily restricted royalty payment for technical know-how from 2% to 1%, the Court upheld the Tribunal's finding that TPO's restriction was arbitrary and adhoc and that the TPO had not carried out the exercise to determine the ALP by following one of the methods

prescribed under Section 92C. Further, where the assessee had entered into agreement to pay royalty @1% on brand usage for the period 1st July, 2001 – 31st March, 2002 which was executed on 14th March, 2002 and where the TPO had allowed the royalty paid on brand usage, but the CIT(A) disallowed the said payment for the period 1st July, 2001-14th March, 2002 as the assessee had failed to produce minutes of its board meeting recording the decision to make the payment of royalty w.e.f. 1st July, 2001, the Court upheld the Tribunal's order of allowing the royalty payment since the assessee had entered into commercial agreement with its AE which was also approved by RBI.

Johnson & Johnson Ltd [TS-171-HC-2017(BOM)-TP] [ITA No. 1030 of 2014]

802. The Court admitted Revenue's appeal against the Tribunal's order in the case where the TPO disallowed the tax borne by the assessee on the royalty paid on brand usage & technical know-how since there was no specific provision in the agreement providing that the assessee was to bear the taxes, but, the same was allowed by the Tribunal on the ground that the agreement entered into by the assessee mentioned that the royalty was to be remitted net of taxes and for which requisite RBI approval was obtained and accordingly, deleted the disallowance of tax made by the TPO on royalty paid.

Johnson & Johnson Ltd [TS-171-HC-2017(BOM)-TP] [ITA No. 1030 of 2014]

803. Where the assessee had entered into a Drive Shaft Technology Licensing Agreement and Technology License Agreement with its AE, under which it was granted license, patents and design information in respect of drive shafts for which it paid royalty at 2.85% of the net sales of license products, which had been approved by the Secretariat of Industrial Approval, Ministry of Industry, Government of India (SIA), vide letter dated 28/31.01.2003. and royalty was being paid for AY's 2005-06 to 2008-09, which was considered to be at arm's length by the authorities, the Tribunal noting that the AEs were supporting the assessee in technology upgradation by bringing the latest technology in drive train systems to India and that assessee had submitted the required documentation in support of the payment and relying on the rulings of ACIT Vs. Dow Agrosciences India Pvt. Ltd [TS-489-ITAT-2016(Mum)-TP] and Bombay HC ruling of CIT Vs. SGS India Pvt. Ltd [TS-569-HC-2015(BOM)-TP], held that where the royalty was approved by the RBI and the SIA, the same constituted CUP data and thus, the royalty could be considered to be at arm's-length. Further, it held that the jurisdiction and power of TPO was to determine arm's length price of royalty and the order of TPO holding that the assessee had not derived any benefit under the said agreement was beyond the scope of TPO

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

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

RAK Ceramics India PvtLtd – TS-1091-HC-2016 (AP) – TP - I.T.T.A.NO.595 OF 2016 dated 23.12.2016

805. Where the assessee had entered into a license and assistance agreement with its Associated Enterprise (AE) for access to license and technical know-how for the purpose of manufacture of power components, pursuant to which it paid a royalty at 5% of net sales and the TPO had determined the ALP of royalty as NIL, the Tribunal noting that that the power components, in turn, were sold to the AE and that the royalty was considered as part of operating cost for the

purpose of benchmarking other international transactions of the assessee, the ALP of which had been accepted by the TPO and relying on the decision of Luwa India Pvt. Ltd. [TS-687-ITAT-2016(Bang)-TP] deleted the addition made by the TPO.

It noted that the assessee had produced the agreement under which it was granted technical know-how belonging to AE for the purpose of manufacturing activity and that the alleged royalty was paid in accordance with this agreement and held that ideally the royalty payment should have been benchmarked with reference to uncontrolled comparable price (CUP) but since neither assessee nor TPO had been able locate appropriate CUPs and the royalty transaction had been aggregated along with other related international transactions of the assessee and benchmarked under TNMM, the ALP of which was accepted by the TPO, no addition could be made.

Siemens VDO Automotive Ltd vs DCIT - TS-79-ITAT-2017(Bang)-TP - I,T.{T.P} A. No.923/Bang/2012 dated 25.01.2017.

806. The Court, upheld the Tribunal order deleting TP-addition on account of royalty payment for technical know-how made by assessee to AE for AY 2008-09. It followed coordinate bench ruling in assessee's own case and held that TPO's restriction of royalty payment from 2% to 1% without giving reasons or justification was arbitrary and adhoc. It noted that the TPO had not carried out exercise to determine the ALP by following one of the methods of section 92C. However, it admitted Revenue's appeal on deletion of adjustments on brand usage royalty and royalty payment on traded finished goods and deletion of disallowances of withholding taxes, R&D cess and service tax on royalty payments to consider whether on facts and in circumstances of the case and in law, Tribunal was justified in deleting the addition on account of tax on brand usage royalty without appreciating the fact that approval taken from RBI cannot be taken to be augmenting the terms of agreement with the principals.

Johnson & Johnson Ltd TS-397-HC-2017(BOM)-TP- ITA No.1671 of 2014 dated 03.04.2017

807. The Tribunal upheld TPO/DRP's NIL ALP in respect of administrative service fees and royalty payment by assessee to AE for AY 2006-07 and 2007-08 on the ground that the assessee had only described the nature of technical knowhow and administrative services received without conclusively proving their use in the manufacturing. It held that although Delhi High Court ruling in the case of EKL Appliances stressed that TPO/AO cannot question the necessity of incurring the expenditure or the benefits of the expenditure incurred, the onus lied on the assessee to prove that the actual services for which administrative services fess were paid were actually rendered.

Herbalife International India Pvt Ltd [TS-364-ITAT-2017(Bang)-TP- IT(TP)A No.1406(bang)/2010 and IT(TP)A No. 924/bang/2012 dated 17.04.2017

808. The Tribunal relying on the decision in the case of Toyota Kirloskar Motors Private Limited [TS-650-ITAT-2016(BANG)-TP] held that where no comparable had been found in respect of royalty payment made by the assessee to its AE, the ALP may be determined by considering the royalty as part of operating cost for the purpose of computing the margin in the trading segment. Accordingly, it remitted the issue back to the file of AO/TPO for fresh consideration.

DCIT vs Wipro GE Medical Systems Pvt Ltd-TS-429-ITAT-2017(BANG)-TP- IT(TP)A.No.40/bang/2011 & 1647/bang/2013 dated 21.04.2017

809. The Tribunal deleted Rs 7.5 cr. adhoc adjustment made by the AO in respect of royalty payment as the assessee had undertaken a similar transaction for succeeding AY 2010-11 which was accepted at arm's length. Relying on the decision in the case of Spicer India Limited [TS-569-HC-2015(BOM)-TP, it held that the Revenue had failed to show difference between the two transactions and the procedure laid down under the transfer pricing provisions had not been followed because it made an adhoc adjustment which was not as per law. Further, it noted that the no addition on account of royalty had been made in the TPO's order and that AO had made the addition on account of royalty on the basis of the show cause notice of the TPO. Additionally, the Tribunal relying on the ruling in the case of SGS India Pvt Ltd wherein rate of royalty approved by SIA/RBI was upheld as CUP data and Spicer India Limited [TS-99-ITAT-2017(PUN)-TP] wherein rate of royalty lesser than 3% was considered to be at arm's length as it

was as per RBI approved rate, held that since royalty payment in the instant case was also less than 3%, the same could be considered to be at ALP.

John Deere India Pvt Ltd [TS-398-ITAT-2017(PUN)-TP- ITA No.828/PUN/2014 dated 17.05.2017

810. Relying on the decision of co-ordinate bench in assessee's own case for AY 2007-08, 2008-09 and 2010-11, the Tribunal remitted to the file of the TPO the ALP determination in respect of royalty paid by assessee to its AE since the AO applying CUP method had not brought any comparables on record to arrive at ALP but had only applied the benefit test to determine the ALP at 'NIL'.

Toyota Kirloskar Auto Parts Pvt Ltd vs. DCIT-TS-828-ITAT-2017(bang)-TP dated 13.09.2017

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

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

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

Further, with regard to the part disallowance of publicity and sales promotion expenses paid by the assessee to the AE, it upheld the finding of the Tribunal that the TPO was incorrect in making such disallowance on the ground that AE should have borne a part of such cost considering it received higher royalty due to higher sales. It noted that the TPO had not determined ALP by following any of the methods prescribed u/s 92C(1) read with Rule 10B of the Income Tax Rules, 1962 and accordingly held that the adjustment had been rightly deleted. It stated the determination of the ALP had to be done only by following one of the methods prescribed under the Act and since the Revenue had not acted in accordance with the clear mandate of law, it held that the appeal of the Revenue did not give rise to any substantial question of law.

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

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

meant to achieve objectives in different areas, it opined that independent ALP-determination needed to be done to find out ALP of royalty and accordingly remitted the issue to the file of AO / TPO.

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

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

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

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

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

816. Relying on the decision of co-ordinate bench in assessee's own case for AY 2007-08, 2008-09 and 2010-11, the Tribunal remitted to the file of the TPO the ALP determination in respect of royalty paid by assessee to its AE since the AO applying CUP method had not brought any comparables on record to arrive at ALP but had only applied the benefit test to determine the ALP at 'NIL'.

Toyota Kirloskar Auto Parts Pvt. Ltd V. ACIT-TS-636-ITAT-2017(BANG)-TP-IT(TP)A No.

Management Fees / Intra-group services

817. The assessee had entered into an international transaction with its Sharjah AE for payment of technical fees for achieving operational and technical competencies, relating to the know-how and technology licensed to the assessee by Woco Germany. The TPO comparing the transaction of Sharjah AE with the transaction of royalty-free licensing of manufacturing process intangibles by German AE, determined the ALP as Nil, ignoring the contention of the assessee that the services provided by Woco Sharjah and Germany were distinct. (as the technical services agreement with Woco Sharjah was for achieving operational and technical competencies, whereas Woco Germany had granted the assessee a non-exclusive license to manufacture, use, exercise or sell licensed products/use its know-how and inventions). The Tribunal noted that the Revenue's comparison of technical fees to Woco Sharjah with royalty free licensing of manufacturing process intangibles from German AE was not valid since transaction with the German AE was an intra-AE transaction, rejected the TPO's Nil ALP determination and deleted the TP addition. However, the Court admitted the appeal of the Revenue against the impugned Tribunal order.

Woco Motherson Advanced Rubber Technologies Limited [TS-173-HC-2017(GUJ)-TP] (Tax Appeal No. 129 of 2017)

818. Where the TPO/DRP rejected assessee's contention that the transaction of payment of management, technical and professional fees should be aggregated with software development services under TNMM and proceeded to determine ALP at Nil by applying CUP-method on the basis that assessee failed to demonstrate benefit derived out of such payment for such services, the Tribunal, relying on the decision in the case of 3M India Ltd [TS-293-ITAT-2016(Bang)-TP] (wherein it was held that it is incumbent on the assessee to prove that services are actually received by the assessee and failure to do so may result in ALP adjustment), upheld the TP

adjustment on account of payment of management, technical and professional fees paid by assessee to AE for AY 2011-12.

Safran Engineering Services India Pvt. Ltd vs. ACIT-TS-990-ITAT-2017(Bang)-TP dated 11.12.2017

819. The Tribunal deleted TP adjustment on payment of fees for advisory and other services rendered by AE. Noting that the assessee had filed contemporaneous and highly technical documentary evidence to demonstrate benefits of services such as support for new product, marketing material, training material and technical support etc and the AE had provided similar services to other group entities, the Tribunal held that the examination of qualification of AEs to provide services and costs incurred by AE was beyond the scope of TP provisions and accordingly deleted the adjustment.

Emerson Climate Technologies (India) Limited vs DCIT-TS-1065-ITAT-2017(PUN)-TP dated 29.12.2017

820. Where the assessee had availed services from its AE in respect of only 5 areas out of 11 mentioned in the agreement, consequent to which the TPO made proportionate disallowance for services not availed by the assessee and the Tribunal following its earlier year's decision in the assessee's own case, deleted the TP addition since the TPO had made disallowance without applying the method prescribed under TP Regulations, the Court, following its earlier order in the case of assessee, dismissed the Revenue's appeal as neither any specific TP-method was applied nor was any benchmarking with comparables carried out.

Merck Ltd [TS-130-HC-2017(BOM)-TP] [ITA No. 909 of 2014]

821. Where the assessee had made payments of management fee and IT support fee ('SAP') to its AE in accordance with an agreement at a mark-up of 1% for management fees (mainly in respect of deputation of personnel whose salaries were paid by assessee) and 5% for SAP fee and TPO considered the ALP as NIL contending that assessee failed to demonstrate benefit derived there from, the Tribunal upheld the contention of the assessee that the TPO's analysis on benefit test and determination of NIL ALP could not be accepted. In this regard, it held that the Revenue could not question the reasonableness of expenditure incurred by assessee. Since the benchmarking of the other transactions undertaken by the assessee were being remitted to the TPO for reconsideration, the Tribunal remitted this issue to the file of the TPO as well.

JT International (India) vs DCIT – TS-107-ITAT-2017 (Hyd) – TP - I.T.A. No. 422/HYD/2014 dated 17.02.2017

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

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

823. Where the assessee paid a sum of around Rs. 2 crores as technical service fees toward various services rendered by the AE viz. machinery expansion and sourcing support, test work support, quality support, preparation of response cost sheet for new order procurement, ECB Loan related work etc out of which, the TPO / DRP only accepted the sum paid towards ECB loan related work and determined the ALP for rest of the services as NIL on the ground that (a) no specific services were provided by AE (b) there was lack of details and evidence in support of the subject services (c) the payments were beyond the scope of the agreement which only provided for royalty and fees for technical services, the Tribunal relying on an earlier ruling in the

assessee's own case [TS-454-ITAT-2016(CHNY)-TP], remitted the issue to the TPO after observing that the issue had not been examined with respect to the correct factual matrix. It held that when the assessee made payments to its parent company, it had to establish and justify the nature of payment and the nature of service received for the purpose of determining Arm's length price in Transfer pricing matters and just because the operating cost incurred by the assessee company was less than the operating cost of the comparable companies, the claim of expenses incurred could not be justified. Therefore, it remitted the issue to TPO for fresh consideration.

Infac India P. Ltd vs DCIT - TS-120-ITAT-2017(CHNY)-TP - I.T.A.No.3182/Mds./2016 dated 17.02.2017

824. The Tribunal remitted the issue relating to TP-adjustment of Rs. 6.19 Crore on payment made by assessee to its AEs towards management fee for AY 2007-08 for which TPO had determined ALP at 'Nil' and accepted the assessee's contention that certain evidence filed by it was not examined by the TPO while determining the ALP. It followed the decision for earlier AY 2006-07 in the case of the assessee wherein it was held that the AO could not disallow entire management fee expenditure on the ground that assessee has not proved the commercial benefit from such payment. Consequently, it remitted matter to AO/TPO to re-examine the evidence filed by the assessee and to re-determine ALP after analyzing the same.

Safran Engineering Services India Pvt. Ltd. (formerly Safran Aerospace India Pvt. Ltd.) Vs DCIT – TS-93-ITAT-2017 (Bang) – TP - IT(TP)A No.1169/Bang/2011 dated 25.01.2017

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

SKF Technologies India Pvt Ltd – TS-52-ITAT-2017 (Bang) - TP

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

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

Eaton Industries Manufacturing GmbH -TS-1051-ITAT-2016(PUN)-TP

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

Lever India Exports Ltd - TS-23-HC-2017-(Bom)-TP

829. The Tribunal remitted the matter to the DRP to re-adjudicate the issue relating to the computation of ALP of the international transactions of the assessee's payment of corporate service charges (legal services, treasury and credit, purchasing, transportation and logistics, travel co-ordination services, internal audit, human resources services, etc) to the AEs, on which the TPO made an addition by rejecting the TNMM adopted by the assessee and applying CUP, by considering man hours of various services rendered by the AE. Observing that the DRP had not passed a speaking / reasoned order, the Tribunal directed the DRP to re-adjudicate the issue after allowing assessee opportunity of being heard.
Huntsman International (India) Private Limited vs DCIT – TS-65-ITAT-2017 (Mum) – TP - ITA No.5637/Mum/2015, ITA No.382/Mum/2016 dated 31.01.2017
830. Where the TPO had rejected assessee's approach of aggregating intra-group services paid by it to its AE with other international transactions under its manufacturing segment and determined its ALP at NIL contending that assessee could not furnish evidence relating to services received from AEs, the Tribunal, relying upon the ruling in assessee's own case for AYs 2006-07 & 2007-08, remanded the matter back to TPO for fresh consideration, observing that assessee ought to establish receipt of benefits on account of services rendered by its AEs and thereafter the TPO was to determine ALP of such services with reference to similar payments made by independent enterprise in uncontrolled transactions.
SKF Technologies India Pvt. Ltd vs. ACIT – TS-52-ITAT-2017 (Bang) – TP - IT(TP)A No.1563/Bang/2012 dated 31.1.2017
831. The Tribunal deleted the TP-adjustments for AYs 2009-10 and 2011-12 on account of payment made by assessee to its AEs on account of intra-group management services. It rejected the TPO/DRP's determination of ALP at Nil under the CUP and held that whether a particular expense on services received actually benefitted an assessee, could not have any role in determining ALP of that service. Observing the nature of services rendered on random sample basis, it concluded that there was reasonable evidence of rendition of services and held the ALP could not be determined at Nil based on subjective perceptions, without anything on record to show that the ALP of the services were in fact Nil.
Further, noting that that no specific comparables had been considered by Revenue, it also deleted the TP-adjustment on payment towards information management support made by TPO by applying 3% mark-up on costs vis-a-vis the 10% mark-up applied by assessee. It rejected the reasoning of the TPO i.e. that the services rendered by AE was more of infrastructure support than software development, because the software was being procured from outside and distributed to AEs and held that the variation in the mark-up proposed by the TPO was based on the perceptions of the TPO and not any cogent material.
Sabic Innovative Plastics India Pvt Ltd [TS-234-ITAT-2017(Ahd)-TP] - ITA No. 1125/Ahd/2014 and IT (TP) No. 427/Ahd/16 dated 17.03.2017
832. The Tribunal, relying on the ruling of Tecnimount ICB (P.) Ltd [TS-557-ITAT-2012(Mum)], and held that an internal comparable having related party transactions was unacceptable for ALP computation and therefore deleted the adjustment made by the TPO on the commission on sale of imported DG sets, earned by the assessee from one of its AEs by comparing the same with the commission earned by the assessee from another AE. Accordingly, it directed AO to delete the adjustment.
Cummins India Limited vs. DCIT - TS-165-ITAT-2017(PUN)-TP - ITA No.115/PUN/2011 dated 03.03.2017
833. The Tribunal allowed assessee's appeal for AY 2008-09, (wherein the CIT(A) applied the CUP method to benchmark payment of management fees) by noting that the Tribunal in the prior AY [TS-503-ITAT-2016(Bang)-TP] had considered the identical issue in the assessee's own case and had accepted the benchmarking of management fees along with ITES, on a composite transaction basis, under TNMM. It also noted that the Department had accepted the

management fees on the basis of TNMM along with other services under the Advance Pricing Agreement.

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

834. Where the assessee showed no inextricable link between the transactions of intra-group services viz., business planning, project review board and reimbursement of related travel and accommodation expenses from different AEs and there was no package deal as the transactions were valued separately, the Tribunal relying on the decision in the case of Knorr Bremse [TS-558-HC-2015(P&H)-TP (wherein it was held that several transactions between two or more AEs can form a single composite transaction if they are closely linked transactions and the onus is always on the assessee to establish that such transactions are part of an international transaction pursuant to an understanding between various members of a group), upheld the rejection of aggregation approach adopted by assessee (engaged in exploring and drilling, producing, refining and marketing of minerals, oils and related by-products) for benchmarking receipt of intra-group services from different AEs and held that it was not permissible to combine all the international transactions for determining their ALP in a unified manner when such transactions were diverse in nature.

Cairn India Ltd vs. DCIT-TS-767-ITAT-2017(DEL)-TP- ITA No.1459/Del/2016 dated 09.10.2017

835. Where the assessee benchmarked the payments made to its US based AE for selling agent services received by it under CUP method adopting the payments by the AE to independent third parties in the USA for similar services as comparable, the Tribunal held that since the commission paid by the assessee to AEs was also for services rendered in respect of sales in USA and the scope of services rendered by the AEs was much more than the scope of services being rendered in such cases of uncontrolled comparable cited by the assessee, no adjustment could be made.

Pr.CIT vs Paxar India Private Limited-TS-780-HC-2017-TP ITA 771/2017 dated 27.09.2017

836. The AE's employee was transferred to assessee's rolls as a whole-time director with responsibility for scientific business and infrastructure operations of certain sister concerns/affiliates, for which the assessee reimbursed the AE with the apportioned salary and other direct expenses incurred on a cost-to-cost basis. The TPO suggested that a markup of 10% should be charged which was upheld by CIT(A) observing that the transaction was not routed through the books. The Tribunal held that in case, the transaction was not routed through the books, the action of TPO may be sustained and remitted the issue back to the file of AO to verify the transaction. However, if the transaction was routed through books of accounts, it clarified that it was a normal practice in the multinational companies to utilize the expertise of the various executives in the group companies and since there were no comparable cases in the market, and it was a business decision of the assessee to share the employee cost with other sister concerns on cost to cost basis the addition of markup was to be deleted. Accordingly, it remitted it to the file of AO for the limited purpose of verification of whether the transactions were routed through books of accounts.

DCIT vs. United States Pharmacopeia India Pvt. Ltd-TS-857-ITAT-2017(Hyd)-TP dated 27.10.2017

837. The Tribunal, relying on the decision in the case of BG Exploration & Production wherein it was held that time writing charges were neither duplicative in nature nor were shareholder activities, remitted the matter to the file of TPO (who had determined ALP at Nil) directing him to examine the issue following the above mentioned ruling.

BG India Energy Solutions Private Limited -TS- 878- ITAT-2017(DEL)-TP dated 30.10.2017

838. Where the TPO had made an adjustment by treating ALP of service fee as NIL on the ground that assessee had failed to prove receipt of actual services/justify payment of fees, which was deleted by the DRP after considering services of managing director to the company, the Tribunal

relying on Volvo India ruling (wherein it was inter alia held that onus always lies on the assessee to prove receipt of services from AE), held that DRP had not referred to any evidence or dealt with the aspect of receipt of services by the assessee from AE towards management support services and further, assessee had also not filed any evidence to substantiate receipt of services from AE. Accordingly, allowing Revenue's appeal, it rejected assessee's request for remand of issue relating to payment of management technical support and professional fee to AE for de-novo adjudication and confirmed the adjustment made by the TPO.

ITO vs Safran Engineering Services India Pvt. Ltd – TS- 949-ITAT-2017(bang)-TP- IT(TP)A NO. 451/BANG/2015 dated 20.11.2017

WM India Technical and Consulting Services Pvt Ltd vs. ACIT-TS-877-ITAT-2017(DEL)-TP- ITA No. 5875 / del / 2017 dated 13.10.2017

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

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

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

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

841. The assessee availed support services / management services from its AEs for which it paid a fee and benchmarked the said payment under TNMM. The TPO adopting CUP method determined the ALP of the said services at Nil on the ground that the assessee was unable to substantiate its claim of expenditure. On submission of evidence by the assessee, the DRP reduced the addition from Rs.2.65 crore to Rs.2.26 crore and observed that many of the services were duplicative in nature as the assessee failed to explain how payments were made to its employees as well as its AEs for similar services. The Tribunal relying on the decision in the case of Control Techniques India Pvt. Ltd. [TS-1024-ITAT-2016(CHNY)-TP] and noting the assessee's submission that the assessing authorities had not considered the documentary evidence submitted in support of the services availed by it, remitted the issue to DRP with direction to provide the assessee with an opportunity to substantiate its claim with supporting the details of expenditure in the nature of management fees paid to the AEs.

Cook India Medical Devices Private Limited vs. JCIT - TS-306-ITAT-2017(CHNY)-TP - /ITA No.: 2546/Mds/2016 dated 30.03.2017

842. The Tribunal, noting that the assessee had not produced proper evidences for substantiating actual rendering of various services by foreign AE during AY 2012-13, remitted the matter to AO/TPO for fresh verification. The TPO had applied the CUP method and determined Nil ALP of the services contending that assessee had failed to substantiate actual receipt of the services or

the benefit received from these services. It held that while evaluating the intra-group services availed by the assessee, the TPO was required to assess (a) need test, (b) benefit test, (c) rendition test, (d) duplication test and (e) shareholder activity test. Noting that the Tribunal in earlier years had held that the need/benefit test was satisfied for services rendered under the same agreement, it held that TPO was not right in questioning satisfaction of such tests. Further, it held that rendering of intragroup services was subject to determination for each AY independently based on the evidences for rendering of the services, and that assessee was required to demonstrate it with the credible evidence. Since the assessee had not filed proper evidences with respect to each class of services with corresponding manner of rendering of the services it directed the assessee to provide proper and credible evidence.

Avery Dennison (India) Pvt. Ltd. Vs DCIT - TS-282-ITAT-2017(DEL)-TP - ITA No. 5578/Del/2016 dated 31/03/2017

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

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

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

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

845. The Assessee engaged in the business of manufacturing and marketing of paints, special chemicals and starch, entered into a service level agreement (SLA) with another Akzo Nobel Group company whereby it was to receive services relating to (i) Advice/support in the area of human resources to attain functional excellence, (ii) Advice and assistance on operation relating to plant, (iii) advice and support on strategies to optimize cost structures in purchasing, (iv) wide range of market support services (v) information technology, (vi) advice and assistance on reporting/accounting, financial control and planning activities and (vii) other ancillary **business support functions** including public affairs advise or public relations. The Tribunal rejected **the TPO's** classification of support services received from its AE as stewardship services. It relied on OECD Guidelines and US regulations to observe that co-ordination activities qualified as services unless a particular subsidiary did not need the activity and would not be willing to pay an unrelated party to perform it. Accordingly it deleted the TP addition relating to support services. The Tribunal further upheld the deletion of TP adjustment on account of SAP implementation services received from another AE on the ground that the TPO had erroneously construed these services as stewardship services without considering the plethora of facts, justifications and details. It observed that the assessee had submitted documentary evidence such as sample evidences of communications, training manuals and other relevant documents with TPO showing valuable commercial services received. Observing that SAP implementation leads to improved

productivity and reduce costs through flexibility as well as increased profitability, improved financial control as well as optimization of IT spending, it noted that the assessee had used SAP software for integrating the process at varied locations for the business. The manner of allocation of cost was scientific and correct. It accordingly concluded that the transaction was at ALP and dismissed Revenue's appeal.

Akzo Nobel India Limited [TS-379-ITAT-2017(Kol)-TP I.T.A No. 335/Kol/2014 dated 03.05.2017

846. The Tribunal, relying on co-ordinate bench ruling in the assessee own case for AY 2007-08 allowed payment for intra group services to the extent cost was substantiated and upheld DRP's order for AY 2011-12 that intra-group managerial services rendered by the AE to the assessee were at ALP. It rejected Revenue's contention that the assessee could not establish that services were rendered by AE against which assessee had made payment.

Essentra India Pvt Ltd [TS-368-ITAT-2017(Bang)-TP- I.T.(TP).A No.311/BANG/2016 dated 31.03.2017

847. The assessee under a cost sharing arrangement had paid management fees to its French parent company and applied TNMM as the most appropriate method. However, the TPO determined ALP of management fees at NIL contending that the assessee had failed to justify the payment on the basis of receipt and benefit test and that the services were in the nature of stewardship or shareholder activities and the same should not have been charged by the AE. Accordingly, he made TP addition. The CIT(A) upheld the AO's TP addition on the ground that the assessee had not provided details regarding the experts/professionals who had actually rendered the specific services. The Tribunal deleted the TP adjustment on the ground that TPO had not adopted any permissible method for determining ALP at NIL. It further observed that the assessee had submitted evidence for the visits by representatives of AE for rendition of services and had also furnished cost allocation agreement. Accordingly, it held that it was not open for TPO to bother about the business expediency and held that for the purpose of determining ALP at NIL, the TPO had to demonstrate that the said services were available for NIL consideration in an uncontrolled situation. As the TPO failed to do so, it deleted the TP addition made by the TPO.

Schneider Electric India Pvt Ltd [TS-433-ITAT-2017(Ahd)-TP] ITA No. 209/Ahd/2015

848. The Tribunal upheld ALP adjustment made by the TPO in respect of payment of management fee by assessee (engaged in the business of manufacturing, trading and marketing) to its AE as the assessee had failed to provide proof of actual rendition of services by AE. The assessee had submitted transfer pricing study report adopting TNMM at entity level to justify ALP of all its transactions. Considering the fact that when no management fee was paid in the year 2004-05, the profit was 48% and that in FY 2005-06, after payment of management fee, the profit was 35.95%; the TPO accepted all other transactions except the transaction of management fee at arm's length and considered it as a separate transaction. The TPO accordingly inferred that the above payment had not resulted in any tangible benefit or economic value to the assessee. Accordingly, held that the transaction was a sham transaction which could not be bundled with others and held that the arm's length price was 'nil'. Relying on the decision in the case of EKL Appliances Ltd [TS-206-HC-2012(DEL)-TP] and Volvo India Private Limited [TS-993-ITAT-2016(Bang)-TP], the Tribunal held that ALP of management services fee could not be determined at 'nil' by questioning the necessity or the benefits out of expenditure incurred, but the onus to furnish proof of actual receipt of services by appellant from its AE was on the assessee. It held that in the present case, it was not discernible that the appellant made any attempt to furnish the proof of rendition of services. In respect of additional evidence submitted by assessee in the form of email correspondence and EDP (Electronic data processing) screenshot, the Tribunal opined that the additional evidence could be admitted by the Tribunal at its discretion only in the event that the party submitting the additional evidence satisfied the Tribunal that it was prevented by sufficient cause from providing such evidence before lower authorities and this evidence would have a material bearing on the issue which was to be decided by the tribunal. In the present case, the appellant had not explained as to how it was prevented

from furnishing the additional evidence before lower authorities and how it proved the rendition of services. Accordingly, it held that the TPO was justified in making ALP adjustment.

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

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

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

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

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

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

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

852. Where the TPO had imputed a TP adjustment on account of notional commission income in respect of alleged marketing and distribution activities carried out by the assessee on behalf of its AE who supplied medical devices directly to hospitals in India, the Tribunal, relying on its earlier years order held that since the TPO failed to bring any material on record or to apply any of the approved methods for determining ALP, the addition made being on a notional basis, was

invalid. Following the prior year's Tribunal order, it remanded the matter to the AO / TPO to determine ALP by applying one of the prescribed methods.

India Medtronic Pvt Ltd vs ACIT- [TS-531-ITAT-2017(Mum)-TP]- ITA No.812/Ahd/2008 and other three appeals dated 25.05.2017

853. Noting that there was a close nexus between all international transactions undertaken by assessee, the Tribunal held that the aggregation of these transactions with other transactions was required, and the most appropriate method was to adopt TNMM at entity level for the purpose of the bench marking the transactions and accordingly remitted the matter to the file of AO/TPO directing it to aggregate the transactions. The TPO had questioned the payment of benchmarking of payment of management fees and technical fees and held that there was no basis for assessee's adoption of 10% and 15% markup respectively. Accordingly, it made an adjustment which was confirmed by CIT(A). The assessee contended that the TP study report adopting TNMM at entity level was accepted by the TPO and therefore, there was no need of separate bench marking in respect of transactions of royalty and technical fee as the same formed part of operating expenditure. Observing that the Revenue had no objection if the matter was remitted back to the TPO to adopt TNMM at entity level, the Tribunal remanded the matter back to the file of AO/TPO.

Fosroc Chemicals India Pvt Ltd vs. ACIT-TS-572-ITAT-2017(bang)-TP IT(TP)A No.1813/Bang/2013 dated 21.06.2017

854. The Tribunal, rejecting TPO's nil ALP determination in respect of selling commission paid to US/UK AE in respect of ITES orders procured from end customers and passed on to the assessee, remitted the issue of ALP determination to the file of TPO for fresh consideration. It held that ALP could not be nil in view of the fact that assessee procured the entire business from US region only through its AE for which the AE in turn charged the assessee a selling commission of 7% of sale and therefore the actual rendering of service by the AE had been established.

Msource (India) Pvt. Ltd vs. ACIT-TS-581-ITAT-2017(bang)-TP-ITA No. 420/bang/2015 dated 23.06.2017

855. Noting that the Tribunal had followed co-ordinate bench's ruling in assessee's own case for AYs 2007-08 and 2008-09 wherein similar TP-adjustment was deleted allowing aggregation of intra-group services closely linked to manufacturing business under TNMM, the Court, dismissed Revenue's appeal against Tribunal's order holding that there was no substantial question of law for consideration.

Pr. CIT vs Avery Dennison (India) Pvt Ltd-TS-589-HC-2017(DEL)-TP-ITA No. 516/2017 dated 18.07.2017

Pr. CIT vs. Avery Dennison (India) Pvt. Ltd - TS-590-HC-2017(DEL)-TP - ITA 517/2017 dated 18.07.2017

856. Where the assessee availed only certain services out of bunch of services mentioned in an agreement and the TPO did not doubt the arm's length price of the services availed, the Tribunal held that no TP adjustment could be made vis-à-vis the balance services. It held that if the assessee availed only few services of the bouquet of services, the TPO should not reject the TP study on the ground that the assessee did not avail all the services or majority of services as provided in the agreement.

Dimension Data India Private Limited vs DCIT-TS-644-ITAT-2017(Mum)-TP-ITA no. 2280/mum/2016 dated 16.08.2017

857. The Tribunal, rejected TPO's 'NIL' ALP determination for services provided by AE and restored the issue back to the file of TPO for verification and examination of evidence submitted by assessee. It noted that an identical issue for AY 2007-08 was remitted back to AO/TPO and Revenue's appeal against the Tribunal's order was dismissed by the High Court, and in the second round of litigation, Tribunal had again remanded the issue for giving a specific decision. For the relevant year, the Tribunal carried out a prima facie examination of the assessee's agreement with its AE which had an enabling provision for payment by assessee for brief visit of

personnel, specialized technical services management team and held that the assessee had to establish basis for payment along with rendition of services by AE. Accordingly, It held that the TPO/AO was required to examine the evidence produced and give a speaking order.

Fosroc Chemicals India Pvt Ltd vs ACIT-TS-547-ITAT-2017(Bang)-TP-IT(TP)A no. 279/bang/2014 dated 31.05.2017

858. Assessee's parent formed a joint venture with an Indian entity to secure 3 highway projects in India under a contract with NHAI and part of the work was allotted to assessee through supplementary arrangement which was reported as international transaction by assessee. Due to a delay in completion of project, the assessee had incurred losses as a result of which, the TPO made an addition to the income of the assessee contending that the transaction was not at ALP. Following the order of the co-ordinate bench for AY 2004-05 to 2007-08 in the assessee's own case, the Tribunal held that where the TPO had accepted the transaction to be at ALP in the hands of the AE, then he could not take a different stand in the case of the other party to the transaction i.e. Assessee herein. Accordingly, it deleted the TP adjustment.

UE Development India Pvt Ltd v DCIT – TS-550-ITAT-2017 (Bang) – TP - IT(TP)A No.1506 /Bang/2012 -dated 14.6.2017

859. Following the order of the co-ordinate bench in the assessee's own case for the prior assessment years, wherein the Tribunal had restored the determination of ALP of the assessee's international transactions (receipt of IT, network engineering, project management, service delivery and other support services from its AE) to the file of AO / TPO (who had determined ALP at Nil), the Tribunal restored the ALP determination to the file of the AO for the impugned year as well as there was no material difference in the facts vis-à-vis the earlier years.

AT & T Global Network Services (India) Pvt. Ltd vs. DCIT-TS-728-ITAT-2017(DEL)-TP dated 18.09.2017

AT & T Global Network Services (India) Pvt. Ltd vs. DCIT-TS-724-ITAT-2017(DEL)-TP dated 21.09.2017

Reimbursements

860. The Tribunal, relying on the decision of the coordinate bench in the assessee's own case for AY 2009-10 and 2010-11 held that the TPO erred in imputing a mark-up of 5 percent of the reimbursements from AEs without appreciating that the corresponding cost was not debited to the P&L account and was only a balance sheet entry.

Cambridge Technology Enterprises Ltd vs. DCIT-TS-1048-ITAT-2017(HYD)-TP ITA No.1708/Hyd/2016 dated 29.12.2017

861. The Tribunal deleted TP-adjustment on account of reimbursement of software cost by assessee (engaged in production and sale of readymade garments) to its AE for AY 2009-10. Noting that AE charged assessee for use of software in its manufacturing process on a cost-to-cost basis, relying on the decision in assessee's case for AY 2007-08 and 2008-09, it held that the TPO was not justified in questioning the commercial expediency of such reimbursements Further, it held that even otherwise, there was no data available with the Revenue to prove that the ALP of the transaction was NIL. Noting that TPO/CIT(A) did not dispute the incurring of software cost in the earlier year, Tribunal held that rule of consistency was required to be followed by the Revenue particularly when there was no change in facts and circumstances of the case. When the Revenue has extended relief to the taxpayer in AY 2007-08 and 2008-09 the Id. CIT (A) had no reason to decline the same qua the year under assessment. Accordingly, it allowed assessee's appeal.

Benetton India Private Ltd vs. DCIT-TS-835-ITAT-2017(DEL)-TP dated 27.10.2017

862. Where the assessee had reimbursed certain technical and commercial administrative expenses to its AE at actuals in respect of which TPO made an addition of Rs. 2.67 crores by determining the ALP of the said payments at Nil under the CUP method on the ground that there was no proof of assessee having received any service and also there was no benefit derived therefrom the Tribunal observed that the assessee had not provided any evidence either before TPO or

DRP in support of the service having been rendered by the AE and accordingly remitted the issue back to the file of TPO to examine (i) whether any service was actually rendered by the AE and (ii) to ascertain whether the reimbursement was at actuals without involving any profit element and (iii) also whether the same was incurred for the purpose of business only.

Trianz Holdings Pvt. Ltd. vs. DCIT - TS-204-ITAT-2017(Bang)-TP - IT(TP)A No.415 / Bang/2016 dated 23. 02. 2017

863. The Tribunal deleted transfer pricing adjustment in respect of reimbursement of salary & travelling expenses of an employee seconded in the capacity of Managing Director by the associated enterprise to the assessee noting that the assessee was the economic employer of the MD and that there was adequate proof of the work performed by the MD and quantum of salary paid viz. sample emails, minutes of meeting and nature of services provided, and therefore it could not be held that no activities had been carried out by MD for the assessee in India. It rejected transfer pricing officer's determination of arm's length price at Nil and held that if a person to whom salary has been paid was not an equity shareholder in either of the associate entities, he did not qualify to be a related party and therefore the payment of salary to an independent person could not be subject matter of benchmarking. It further noted that the Revenue had accepted that the reimbursement was a pure cost to cost transaction without any markup and that the only contention of the Revenue was the legitimacy of the expenditure which was a commercial decision of the assessee and not within the powers of the TPO.
- Royal Canin India Pvt Ltd vs ACIT-TS-782-ITAT-2017(Mum)-TP ITA No.640/Mum/2017 dated 25.09.2017***

864. Where a TP adjustment was made by AO/TPO on account of reimbursement of software cost by the assessee to its AE treating its ALP at NIL, the Tribunal, relying on the decision in assessee's case for AY 2007-08 and 2008-09 held that certain transactions entered into by the assessee for business expediency need not necessarily attract financial benefits and Revenue cannot dictate that certain transactions should not be entered into and accordingly deleted the TP adjustment.
- Benetton India Private Ltd vs. DCIT-TS 835-ITAT-2017(DEL)-TP ITA No.4329/Del./2014 dated 27.10.2017***

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

866. The Tribunal remitted the benchmarking of the reimbursements paid by the assessee to its AEs to the file of the AO / TPO for verification. It noted that the assessee had reimbursed its AE for salary expenses relating to two expatriate employees seconded to it by its AEs, which were paid by AEs outside India for administrative convenience and subsequently reimbursed by the assessee. The Tribunal noted that for immediately preceding AY 2005-06, assessee had paid the AEs for the reimbursement of one of the employees, which had been assessed u/s 143(3) and no disallowance in respect of such reimbursement had been made by AO. Further, it noted that the assessee in its TP report had benchmarked the reimbursement by applying CUP method, therefore, TPO's statement that assessee had not benchmarked these transactions was without basis. The remuneration had been agreed upon between two independent parties, i.e. the assessee and expatriate employees, and the same had actually been paid to the employees (initially by the AEs which were subsequently reimbursed by the assessee a). Accordingly, it held that the payment made by the assessee towards reimbursement of salary of seconded

employees had to be accepted to be at arm's length. As regards TPO's finding that assessee had been unable to demonstrate that the salary paid to the expatriates was in line with the salary paid to its own senior management personnel, the Tribunal took note of assessee's submission that the employees were rightfully entitled to the same level of salary as they were earning in their country of origin.

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

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

867. The Tribunal, relying on the coordinate bench's ruling in assessee's own case [TS-18-ITAT(Bang)-2016-TP] held that reimbursement of paid/ received expenditure could not to be treated as part of operating cost or operating revenue, and remanded the matter back to the file of AO to examine whether any profit element was involved in the reimbursement transaction and whether it was in the nature of pure reimbursement of expenditure.

FCG Software Services (India) Pvt Ltd [TS-409-ITAT-2017(Bang)-TP IT(TP)A No. 994 /bang/2011 dated 21.04.2017

868. The Tribunal deleted TP-adjustment in respect of reimbursement received from AE for AY 2011-12.

relying on the coordinate bench's ruling in the case of Cambridge Technologies and Mylan Laboratories, held that no ALP adjustments could be made to reimbursement of expenditure (viz. travel and miscellaneous expenses) received by the assessee on costs to cost basis without markup.

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

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

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

Share capital / share issue / share transactions

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

MSC Crewing Services Pvt Ltd – TS-38-ITAT-2017 (Mum) _ TP

871. Where the TPO had re-characterized the advance given by assessee to AE towards investment in shares as loan and imputed interest of Rs. 48.10 cr., the Tribunal noting the disclosure of share application money as loans and advances in assessee's balance sheet, held that it was only a classification of accounting entry in the books and since the assessee received share

certification in following AY, held that as the transfer of funds were duly accounted by the AE and there was no restriction on the part of the AE to allot shares in the same AY of receipt of funds. It held that as long as the shares were allotted, there was no profit element and therefore it could not be regarded as an international transaction. Further, relying on the decision in the case of GSS Infotech [TS-298-ITAT-2016(HYD)] held that as the assessee was not charging interest to AE as well as non-AE, deleted the TP-adjustment towards notional interest on mobilization advance to AEs.

Bartronics India Ltd vs DCIT-TS-814-ITAT-2017(HYD)-TP ITA No. 259 /Hyd/2017 dated 27.09.2017

872. The assessee had invested Rs. 1343.76 cr. in its Jersey based 100% subsidiary by way of the preference shares which was recharacterized by the TPO as unsecured loan advanced to Cairn India Holding Limited (CIHL) and interest at 14.88% was treated as at arm's length and the TPO made an adjustment of Rs. 84.36 c. The Tribunal, noting that the instant transfer pricing addition has its foundation in the immediately preceding assessment year, held that it cannot adjudicate on the issue independently unless the preceding year on the same issue is decided. Accordingly, it held that if the re-characterization is held to be valid, then the addition will be required to be made in this year and if re-characterization is held to be invalid, this addition will have to be deleted. Accordingly, it remitted the matter to the file of AO/TPO for fresh adjudication.

Cairn India Ltd vs. DCIT-TS-767-ITAT-2017(DEL)-TP ITA No.1459/Del/2016 dated 09.10.2017

Cairn India Ltd vs. DCIT-TS-775-ITAT-2017(DEL)-TP dated 09.10.2017

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

Patel Engineering Ltd - TS-12-ITAT-2017(Mum)-TP

874. Where the assessee subscribed to 1,85,03,468 redeemable preference shares of Essar Services Mauritius (AE) and also redeemed 1,81,00,000 of such shares at par and the shares were non-cumulative and redeemable on par without dividend and also had a running account with the AE, the TPO considering the nature and frequency of the transactions in the running account, re-characterized the subscription and redemption of the shares as a loan and computed notional interest on the alleged loan, the Tribunal following the decision in assessee's own case for AY 2009-10 held that the TPO could not disregard an apparent transaction and substitute it with a transaction as per his own perception. Accordingly, it set aside the addition made.

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

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

however disallowed its claim for grace period of 180 days from date of remittance for computing interest.

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

876. The Tribunal, rejecting TPO/CIT(A)'s recharacterization of subscription of equity share capital of its AE as loan/advance, deleted TP-adjustment of Rs 6.56cr on account of interest on share application money advanced towards subscription of shares in AE (incorporated in British Virgin Island. Noting that shares worth Rs. 462.3 million were allotted to assessee during the year while balance was allotted in subsequent years and assessee remained 100% shareholder in AE prior & post allotment, the Tribunal held that merely because allotment of shares was delayed it would not alter the characterization to the prejudice of the assessee. The percentage of ownership was the only a material factor. As the assessee was the only shareholder in it's 100% subsidiary company, it would not make any difference merely because part of the share application money was converted into equity shares and the balance were allotted in subsequent assessment years. It rejected Revenue's submission that Indian Companies Act mandates charging of interest if the company was unable to allot shares within specified time, held that relevant provisions of Indian Companies Act would not be applicable to this case and deferent countries had separate laws/regulations on such issue. Accordingly, it deleted the TP-adjustment on account of interest on share application money advanced towards subscription of shares in AE.

Sun Pharmaceuticals Industries ltd vs ACIT-TS-596-ITAT-2017(Ahd)-TP-ITA No.3297 & 3420/AHD/2014 dated 16.06.2017

Others

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

Global Payments Asia Pacific (India) vs. DCIT – TS-112-ITAT-2017 (Mum) – TP ITA NO. 5345/MUM/2012 dated 25.01.2017

878. The Tribunal, following co-ordinate bench's ruling in assessee's own case for AY 2009-10 wherein the bench had dismissed grounds relating to similar TP-adjustment as infructuous as DRP had subsequently issue a corrigendum (after passing order) deleting the adjustment, deleted the TP addition of Rs. 13.94 crores made on account of assessee's international license revenue transaction for AY 2010-11.

Nimbus Communications Ltd vs ACIT-TS-941-ITAT-2017(mum)-TP dated 03.11.2017

879. Where the assessee had purchased capital goods from AE at cost plus 10% mark-up which was accepted by the authorities in assessee's case for previous years, in the absence of change in facts and law and following the principle of consistency, the Tribunal deleted the TP adjustment regarding the purchase of capital goods and spares.

Samsonite South Asia Pvt Ltd vs. DCIT-TS-809-ITAT-2017(Mum)-TP dated 01.09.2017

880. The Tribunal upheld the CIT(A)'s deletion of TP-addition on account of depreciation on purchase of trademarks by assessee from its AEs during AY 2005-06 and rejected the Revenue's objection that CIT(A)'s admission of documentary evidence furnished by assessee was contrary to the procedure contemplated under Rule 46A of the Income Tax Rules. It noted that the CIT(A), after perusing the copies of agreements, had deleted the addition considering the fact that assessee had paid the same price for brands/registrations as was paid by the AEs for acquiring the same from unrelated third party owners, which itself sufficiently proved that the acquisition of the brands/registrations was within ALP and that the CIT(A) had called for remand report from AO and had considered the latter's objections as regards the admission as well as reliability of the documents furnished by assessee (that the report of the Chartered Accountant relied on by the assessee was not reliable on account of the disclaimers contained therein). Accordingly, it held that the CIT(A) was justified in deleting the addition and also that he had acted in the true letter and spirit of law while exercising his powers u/s 250(4). Further, it also agreed with CIT(A)'s observation that the disclaimer incorporated in the certificate of the Chartered Accountant was in the nature of a customary disclaimer, which is given in the reports/certificates to protect the interest of the individual professional issuing such certificate/s, and the same in no way can go to adversely hit the reliability of the same.

ACIT v Strides Acrolabs Ltd - TS-294-ITAT-2017(Mum)-TP - /I.T.A. No.6528/Mum/2010 dated 31/03/2017

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

Hyundai Motor India Limited Vs DCIT - TS-322-ITAT-2017(CHNY)-TP - I.T.A. No. 853/Chny/2014 and 563/Chny/2015 dated 27.04.2017

f. ***Miscellaneous***

Appeal

882. The Tribunal allowed the miscellaneous petition filed by assessee challenging its previous order dated 26.08.2016 for AY 2011-12 relating to selection of comparables for benchmarking technical and marketing support services rendered to AEs. It agreed that the assessee's ground for inclusion of 'Indus Technical and Financial Consultants' as comparable was not decided by the Tribunal and also that although it had decided assessee's ground for inclusion of 'United Vander Horst Ltd' and 'Yashmun engineers Ltd.' it had not considered the aspects of consistency. Further it accepted that the Tribunal had also not considered and decided on the issue regarding benefit of cost of living index adjustment to comparables for technical support services segment. Accordingly, it concluded that there was apparent mistake in the Tribunal order on these three grounds, and it recalled the order for the limited purpose of deciding these grounds.
EADS India Pvt. Ltd v ACIT – TS-27-ITAT-2017 (Bang) – TP - IT(TP)A No.95 (Bang)/2016 dated 06.01.2017
883. The Tribunal allowed the assessee's miscellaneous petition challenging its order for AY 2008-09 dated 30/8/2016, accepting that certain mistakes had crept in its ITAT decision. Accordingly, it recalled the appeal for fresh hearing.
Microchip Technology (India) Pvt. Ltd. Vs ACIT – TS-110-ITAT-2017 (Bang) – TP IT(TP)A No.1586/Bang/2012 dated 10.01.2017
884. The Tribunal dismissed assessee's miscellaneous petition against Tribunal order remitting comparability of Accurate Data Converters Pvt. Ltd back to AO/TPO for AY 2007-08. The assessee submitted that Tribunal had not taken into consideration the complete details of this comparable and had simply restored the matter back to AO/TPO to re-examine exclusion of this company after collecting relevant information. Noting that the Tribunal while adjudicating the issue of exclusion of this comparable, had considered Magma Design and AOL Online rulings and the TPO had in its order categorically observed that the annual report for the comparable was not available, the Tribunal held that there was no infirmity in the order and accordingly dismissed the application.
Global E-Business Operations Private Limited vs. DCIT-TS-830-ITAT-2017(bang)-TP [MP No. 78/B/2017 dated 13.10.2017
885. Where the assessee appealed against Tribunal's order contending that while Tribunal admitted the additional ground of appeal and required the TPO to undertake fresh comparability analysis for determining ALP, it did not consider it necessary to adjudicate any of the remaining grounds urged by the assessee, the Court dismissing assessee's appeal held that since the remaining grounds also pertained to comparability analysis, there was no infirmity in the order of Tribunal since the matter being remanded for a fresh determination of ALP was in accordance with law, there was no need to decide the remaining grounds at the current stage.
Validor Capital India pvt. Ltd vs ITO-TS-821-HC-2017(DEL)-TP ITA 491/2017 dated 12.10.2017
886. The Court, relying on the decision in the case of Post Master General v Living Media India Ltd wherein it was held that mere departmental administrative process involved in filing of appeal could not be a reason for condonation of delay, dismissed Revenue's appeal on account of 158 days delay in filing the appeal.
Pr. CIT vs. Oks Span Tech Pvt Ltd-TS-776-HC-2017(DEL)-TP ITA 789/2017 dated 09.10.2017
887. The Tribunal dismissed assessee's miscellaneous petition contending that the Tribunal had ruled upon only one ground regarding exclusion of 2 comparables, but had not decided other grounds raised in appeal. Noting Tribunal's categorical finding in its order that the assessee had not pressed remaining grounds of appeal, it rejected assessee's contention that since the Tribunal while deciding another appeal for AY 2011-12 which was heard on the same day, had restored other issues to the file of DRP for fresh consideration, similar action should have been taken for relevant year under consideration i.e. AY 2009-10. It noted that while specific ground was taken regarding comparability of 7 companies in AY 2011-12, assessee had not taken similar specific ground for AY 2009-10. Accordingly, it held that there was no mistake apparent from record in the Tribunal order in absence of specific ground on inclusion/exclusion of specific comparable.

Symbol Technologies India P Ltd v ITO-TS-786-ITAT-2017(Bang)-TP- M.P. Nos. 84 & 85/Bang/2017 (in IT(TP)A Nos.264 & 177/Bang/2014) dated 08.09.2017

888. The Tribunal, applying the provisions of section 254(2) which provided that miscellaneous petition is to be filed within 6 months from the end of the month in which order was passed, dismissed Revenue's miscellaneous petition on account of delay in filing the petition. Noting that the Tribunal order was passed on 21.10.2016 and therefore, 6 months period from filing of miscellaneous petition ended on 30.04.2017, it held that since there is no provision u/s 254(2) for condonation of delay, the appeal stood dismissed
DCIT vs Brocade Communications Systems P ltd -TS- 802-ITAT-2017(Bang)-TP dated 13.09.2017
889. Where the assessee had raised about 20 grounds (including TP grounds), but the Tribunal had extracted only about 9 grounds which did not emerge from the appeal filed by the assessee, but were part of some other case, the Tribunal allowed assessee's miscellaneous petition against the order and held that since the grounds of other appeal had been reproduced inadvertently, the grounds raised in this appeal should replace the grounds extracted in the order.
Magma Design Automation India Private Limited (now merged with and known as Synopsys (India) Private Limited) vs. DCIT-TS-793-ITAT-2017(Bang)-TP dated 13.09.2017
890. Where the DRP recorded objections raised by the assessee, but while confirming TPO's order, restricted its finding only on the selective points of objections raised by the assessee instead of deciding each aspect of functional similarity of comparables, the Tribunal remitted matter back to the file of DRP for fresh adjudication in respect of assessee's software development & ITeS segments.
Arctern Consulting Pvt Ltd [TS-813-ITAT-2017(Bang)-TP] I.T.(T.P) A. No.240/Bang/2014 dated 08.09.2017
891. The Tribunal dismissed assessee's additional grounds agitating that the AO's order dated January 16, 2015 u/s 144C r.w.s. 143(3) was time barred and thus bad in law. It noted that the DRP gave its directions on December 31, 2013 and in the meantime assessee filed a writ petition before the High Court which directed the AO not to pass the final assessment order till disposal of the petition. Since the High Court passed its order on November 18, 2014 setting aside DRP's directions and deleting TP-adjustment on issue of equity shares following the Vodafone India ruling, the Tribunal opined that the assessee's case clearly fell under the ambit of provision of section 153(6), which provides that orders pursuant to an order of any court in a proceeding otherwise than by way of appeal or reference under this Act should be passed before the expiry of 12 months from the end of the month in which such order is received or passed. It held that since the assessment order was passed on January 16, 2015, which was well within 12 months from November, 2014 in which month HC had passed the order, the Tribunal held that the order passed by the A.O. was well within the time limit mandated as per section 153(6). On the merits of the case (taxability of interest on loan given to employees, margin deposits), it followed its own order in the case of the assessee for prior years wherein the said interest income was held to be business income and not IFOS. Vis-à-vis the 14A disallowance, relying on the decision of the High Court in Cheminvest Ltd 281 CTR 447 (Del), it held that no disallowance could be made where no exempt income was earned.
Essar Power Limited vs ACIT-TS-824-ITAT-2017(MUM)-TP dated 17.10.2017
892. Where the Tribunal had not adjudicated the issue regarding treatment of miscellaneous income earned by comparables as part of operating margin and 2 other issues viz., correctness of assessee's margin computation by TPO on consolidated/combined transaction basis (AE and non-AE) and exclusion of special rebate given by assessee to AE from operating cost, the Tribunal held that there was an apparent mistake in the impugned order to the extent of non-adjudication of these issues and accordingly recalled the order for the limited purpose of adjudication of these issues. Thus, it allowed assessee's miscellaneous petition.

Logix Mircosystems Ltd-TS-820-ITAT-2017(BANG)-TP M.P. No.174/Bang/2017 dated 15.09.2017

893. Where the Tribunal remanded the matter in respect of determination of ALP for intra-group services to the file of AO even when all the details were available on record, the Court held that the Tribunal had erred in remitting the matter and set aside the order directing it to decide the issue on merits.

Voith Hydro Private Limited (Earlier known as Voith Siemens Hydro Private Ltd) vs. Pr. CIT-TS-771-HC-2017(DEL)-TP ITA 10/2017 dated 25.09.2017

894. The Tribunal, allowed assessee's appeal challenging CIT(A)'s direction to AO/TPO to re-compute/reconsider ALP determination without discussing merits of the case and held that it was incumbent upon the CIT(A) to adjudicate the issue and it was beyond his scope to set aside the matter to the file of AO for recalculation. Accordingly, the Tribunal remanded the matter back to the file of CIT(A) to adjudicate the issue after giving the assessee an opportunity of being heard.

Wipro GE Healthcare P Ltd vs ACIT-TS-801-ITAT-2017(Bang)-TP dated 31.08.2017

895. The Tribunal dismissed assessee's miscellaneous petition and rejected assessee's contention that Tribunal had not adjudicated Ground No 5 (that CIT(A) erred in ignoring margin computation under internal TNMM as not reliable without considering that AO/TPO himself in assessment order had computed margins earned by assessee from transactions with AEs and non-AEs) and held that the Tribunal had adjudicated ground 5 collectively with other grounds and in para No.7 had opined that comparison of internal TNMM was not possible as comparison was not of the same period in respect of AE and non-AE business. Accordingly, it held that though the Tribunal had not made a detailed discussion with respect to ground No.5, but the gist of ground No.5 was considered by the Tribunal and gave its findings which could not be reviewed under the garb of provision to section 254(2) of the Act.

e4e Business Solutions India Private Ltd vs. DCIT-TS-789-ITAT-2017(bang)-TP dated 13.09.2017

896. Where the tax effect was less than Rs. 10 lakhs, the Tribunal dismissed Revenue's appeal on account of CBDT Circular No. 21/2015 (providing monetary limits for filing of departmental appeals before Appellate Tribunal and High Courts and SLP before the Supreme Court).

ACIT v Glenmark Generics Ltd-TS-787-ITAT-2017(Mum)-TP- ITA No. 4973/MUM/2016 dated 06.09.2017

897. Where the assessee had not raised grounds for exclusion of Cosmic Global in the grounds of appeal and assessee had only made a submission in the form of a chart, the Tribunal held that it was necessary for the assessee to raise the specific ground for exclusion/inclusion of any comparable in the grounds of appeal and unless the grounds of appeal are specific, no adjudication can take place at the Tribunal level, based on the chart, filed or submissions filed by assessee. Accordingly, it dismissed the miscellaneous petition filed by the assessee against the Tribunal order with regard to non-adjudication of the issue of inclusion/exclusion of Cosmic Global as a comparable.

AOL Online India P. Ltd vs. DCIT-TS-916-ITAT-2017(bang)-TP- Miscellaneous Petition No.189/Bang/2017 dated 02.11.2017

AOL Online India P. Ltd vs. DCIT - TS-907-ITAT-2017(Bang)-TP dated 2.11.2017

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

it held that the order passed by the Tribunal making observation exceeding the direction given in the case of the assessee for the Assessment Year 2007-08 would no more operate and directed the TPO/AO to consider the matter in the same manner as was considered earlier viz. AY 2007-08.

Forsoc Chemicals India Pvt Ltd v DCIT – TS-158-HC-2017 (Kar) – TP – ITA No 15 / 2016 dated January 24, 2017

899. The Tribunal allowed the assessee's miscellaneous application against its order dated August 28, 2016 noting that it had wrongly stated the name of M/s Accentia Technologies Ltd for exclusion from the list of comparables as opposed to the correct name of M.s Acropetal Tech Ltd. Further, it noted that in Para 28 of its order it had incorrectly excluded M/s Accentia Technologies Ltd from the list of comparables wherein the correct name of the comparable was M/s Asian Busienss Exhibition and Conference Ltd and that in Para 6 of the order it had wrongly mentioned that the Revenue had filed an appeal for the inclusion of Infosys BPO and that the order was to be read after omitting the said name. Accordingly, it held that the Tribunal order dated August 28, 2016 was to be read with the aforesaid corrections without any change in the final conclusion.

Interwoven Software Services Ind. Pvt. Ltd. Vs ITO - TS-136-ITAT-2017(Bang)-TPJ -M.P No.119 (B)/2016 dated 06-01-2017

900. The Tribunal allowed assessee's miscellaneous petition seeking rectification of mistake in the order for AY 2010-11, accepting assessee's claim that the TP issues pertaining to the ALP determination of both 'service charges' and 'royalty' were adjudicated during appeal but final conclusions referred to only 'royalty' and not 'service charges'. It held that both issues were identical and were adjudicated along similar lines, observing that, similar to royalty, the ALP of service charges also could not be treated as NIL and accordingly rectified its order to set aside ALP determination of both royalty and service charges to TPO for fresh consideration.

Inteva Products India Automotive Pvt Ltd vs. DCITTS-78-ITAT-2017(Bang)-TP - M.P. No.125/Bang/2016 dated 20.01.2017.

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

AB Mauri India Pvt Ltd v DCIT – TS-1097-HC-2016 (Mad) – TP - W.P. No.43204 of 2016 dated 12.12.2016

902. Where the assessee had applied RPM in respect of international transaction of goods imported for distribution which was rejected by the TPO who applied TNMM as the MAM, the Tribunal upheld the TPOs order and rejected RPM considering the huge selling and distribution expenses incurred by assessee which was not the case for comparables and held that the precedent relied on by assessee was not applicable as no such expenditure was incurred therein. The Tribunal dismissed the assessee's miscellaneous petition seeking rectification of its order for AY 2007-08 on the ground of non-consideration of judicial precedent relied upon. It held that the that review of existing evidence was not permissible u/s 254(2) as the issue was decided on merit after consideration of facts and law and accordingly dismissed the petition.

Abott Medical Optics Private Limited vs. DCIT - TS-75-ITAT-2017(Bang)-TP - M.P. No.130/Bang/2016 dated 25.01.2017.

903. The Tribunal allowed the assessee's miscellaneous petition seeking rectification of Tribunal order for AY 2010-11 dated 24.6.2016, wherein it had rejected assessee's plea for exclusion of 'Infosys Ltd' from the list of comparables, observing that it was selected by assessee in its TP study and no separate ground was raised before Tribunal whereas the assessee pointed out that it had objected to inclusion of this company before TPO itself, and also submitted that it had selected this company in its TP study by adopting CUP method, whereas TPO had applied TNMM for benchmarking. Referring to the order passed by AO/TPO which recorded assessee's objection against inclusion of this company, the Tribunal concluded that since its observation was without considering the fact of objection raised by assessee before TPO, there was a mistake apparent on record of ITAT order. Accordingly, it directed the Registry to fix the appeal in normal course for hearing for adjudication of the issue of functional comparability of 'Infosys Limited'.

Mercedes-Benz Research & Development Pvt. Ltd. vs. ACIT - TS-77-ITAT-2017(Bang)-TP - M.P. No.133/Bang/2016 dated 23.01.2017

904. Where in the original order passed by the Tribunal, it had set aside comparability of one company viz. Jeevan Scientific Technology Ltd. for considering only segmental turnover of 'BPO operations' and the assessee vide a miscellaneous application sought to rectify the said order to the effect that earnings from 'BPO segment' should be considered as against 'BPO operations', the Tribunal dismissed the miscellaneous petition observing that it had in its previous order specifically mentioned that segmental revenue from BPO operations stated at Rs. 71.219 lacs required verification and therefore there was no apparent mistake rectifiable u/s 254(2).

Swiss Re Global Business Solutions India Pvt. Ltd. (Formerly M/s. Swiss Re Shared Services (India) Pvt. Ltd.) vs. ACIT - TS-186-ITAT-2017(Bang)-TP - M.P. No.7/Bang/2017

905. The Tribunal admitted additional evidence filed by the assessee with regard to TP-adjustment on management fees paid by assessee to its AE the ALP of which was determined at Nil by the TPO TPO who held that assessee had neither received services nor derived benefit from the said payment. Noting that the TPO had also held that the assessee had failed to produce supporting evidence and that the expenses were actually in the nature of stewardship, the Tribunal remitted the issue to TPO for fresh decision in light of additional evidence submitted by assessee after giving assessee an adequate opportunity of being heard. It also clarified that it had not expressed any opinion on the merits of the case.

Flowserve India Controls Pvt.Ltd vs DCIT - TS-195-ITAT-2017(Bang)-TP - IT(TP)A No.1366/Bang/2010 dated 23/02/2017

906. The Tribunal, concurring with the assessee's submission, held that since the CIT(A) order on the inclusion / exclusion comparables was very cryptic and not a speaking / reasoned order, restored the matter back to CIT(A) for fresh decision with a direction to pass speaking and reasoned order after affording adequate opportunity of being heard to both sides.

Syniverse Teledata Systems Pvt. Ltd (Formerly known as MACHTeledata systems Pvt. Ltd) vs. DCIT - TS-217-ITAT-2017(Bang)-TP - IT (TP) A No.1363 (Bang) 2014 dated 15.02.2017

907. Where the Tribunal had directed inclusion of 3 comparables and had remitted comparability of 8 comparables to TPO for reconsideration, the Court held that though remittance of the issue by the Tribunal was justified, however, the lack of reasoning by the authorities for inclusion of the comparables would mean that the matter would be open for the assessee and it had right to contend that the inclusion of comparables was not in accordance with law for whatever grounds it choose to urge. Accordingly, it remitted the matter back to TPO.

Agnity India Technologists P. Ltd. [TS-175-HC-2017(Del)-TP] [ITA 99/2017]

908. The Tribunal dismissed the assessee's miscellaneous petition seeking to recall ex-parte Tribunal order on the basis that notice for hearing of stay petition was not served on assessee for AY 2010-11. It held that even if the notice was not served on the assessee, the assessee should have been vigilant to find out the date of hearing because in normal cases, the stay petition is fixed for hearing on the second Friday after filing of the stay petition. Further, it held that in any case, once assessee's stay petition was dismissed, a fresh stay petition could always be filed

and therefore instead of recalling the ex-parte Tribunal order, the assessee may file a fresh stay petition which can be disposed of in regular course.

Logix Microsystem Ltd. Vs ACIT - TS-253-ITAT-2017(Bang)-TP - M.P No.134 (B)/2016 dated 21-03-2017

909. The Tribunal, in the case of the assessee, had directed the AO/TPO to apply the Court's decision in the case of Knorr Bremse on the issue of adoption of CUP method vs TNMM for determining ALP of assessee's international transaction of payment of management fees to AE. Assessee filed writ on the ground that AO had not applied the said decision in Knorr Bremse, therefore the order was not in accordance with the Tribunal's directions. The Court agreeing with Revenue's contention held that effect giving orders could be challenged before the next fact finding authority, namely the First Appellate Authority, and that it was not inclined to entertain the writ petition as there was an alternative remedy. Noting that the AO had sought to distinguish the facts and circumstances of assessee's case with the case of Knorr Bremse, the Court stated that whether such distinction of the facts as done by the first respondent was correct or not, was for the next fact finding authority to consider and decide, as such exercise involved appreciation of the facts and circumstances of both the cases. Accordingly, it dismissed the writ petition filed by assessee challenging order passed by AO giving effect to Tribunal's directions for AYs 2010-11 and 2011-12, holding that the assessee could avail of alternative remedy before the First Appellate Authority.

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

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

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

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

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

912. The Tribunal, relying on the decisions in the case of Nortel Networks India P. Ltd and Roche Products (India) Private Limited, allowed assessee's additional ground on admission of fresh evidence which was declined by CIT(A) for AY 2003-04. The assessee further submitted that Choksi Laboratories (engaged in engineering activities and chemical testing services) was functionally dissimilar to assessee providing contract testing and other services to AE. However,

considering the admission of additional evidence, the Tribunal remitted the matter to the file of CIT(A), without adjudicating on the issue of comparability.

UL India Pvt Ltd [TS-343-ITAT-2017(Bang)-TP IT (TP) A No .180/bang/2012 dated 22.03.2017

913. The Tribunal, relying on Apex Court's ruling in the case of NTPC Ltd admitted software developer assessee's additional grounds challenging CIT(A)'s modification of filters in respect of comparables selection for AY 2007-08 and held that since issues raised in the additional grounds were in respect of the filters applied by the CIT (A), it did not require any investigation and examination of new facts.

PMC Sierra India Pvt Ltd vs DCIT [TS-371-ITAT-2017(Bang)-TP-IT(TP)ANo.1308/BANG/2012 dated 13.04.2017

914. The Tribunal, referring to the provisions of section 144C, allowed Revenue's appeal challenging DRP's direction to remit working capital adjustment back to AO. It held that the DRP had no power to remit a matter back to the AO and had to determine the adjustment on its own. Accordingly it remitted the matter back to DRP to work out the correct amount of working capital adjustment and then issue necessary directions to AO/TPO. In respect of assessee's plea against inclusion of Dynamic Technologies Ltd as a comparable, following the ruling in assessee's own case, it remitted the matter to the file of AO/TPO for selection of comparables with similar functional profile.

Myunghwa Automotive India Pvt Ltd [TS-401-ITAT-2017(CHNY)-TP ITA No. 1186/Mds/2016 & CO no.179/Mds/2016 dated 12.04.2017

915. The Court, refusing to condone extraordinary delay of 505 days in refiling appeal, dismissed Revenue's appeal challenging Tribunal's decision on transfer pricing issues on the ground that change in counsel could not explain a delay of 505 days in curing defects and refiling the appeal. Noting Revenue's explanation that appeal was initially filed on 9.10.2014, but was placed under objections by registry owing to drastic increase in Court fees, digitization (e-filing), it held that the Court registry had conducted orientation sessions to enable lawyers to familiarize themselves with e-filing process and that the increase in court fees had come into force much before filing of present appeal. Accordingly, it dismissed the appeal of the Revenue.

Pr. CIT vs Iqor India Services (P) Ltd [TS-419-HC-2017(DEL)-TP- ITA 314/2017 & CM No. 14730/2017 dated 19.04.2017

916. Tribunal remitted TP-issue of exclusion of comparables for AY 2010-11 to the DRP for fresh consideration considering the correctness of margins of various comparables chosen by TPO and decide on their inclusion/exclusion as a change in profit level margins of comparables would have a considerable effect on the TP study. It directed the AO to pass a fresh order based on the directions of DRP.

Extreme Networks India Pvt Ltd [TS-367-ITAT-2017(CHNY)-TP ITA No 449/Mds/2015 dated 26.04.2017

917. The Court, dismissed Revenue's appeal for AY 2006-07 challenging Tribunal's order on exclusion of comparables without proper discussion. It held that previous precedents had been relied by the Tribunal and it was incorrect to say that it had not taken into account the factors that weighed with it for excluding the said comparables.

Pr. CIT vs Mentor Graphics (India) P Ltd-TS-420-HC-2017(DEL)-TP-ITA 318/2017 dated 02.05.2017.

918. The Court, admitted assessee's appeal and framed 2 questions for determination (i) pertaining to exclusion of 'Advanced Micronic Devices Ltd' as a comparable and (ii) restricting the ALP-adjustment to the value of international transactions instead of the assessee's entire turnover. Further, it also permitted the parties to file additional documents/papers which were part of assessment record filed before Tribunal within 8 weeks.

Becton Dickinson India Pvt. Ltd vs Pr. CIT - TS-416-HC-2017(DEL)-TP-ITA 289/2017 dated 16.05.2017

919. The Tribunal reprimanded the assessee for contesting inclusion of 2 comparables initially selected in TP study in the second round of proceedings before Tribunal in 2017 i.e. 11 years after filing return of income for AY 2006-07. It admitted the additional grounds while clarifying that Special Bench in the case of Quark Systems had not laid down a law that anytime and every time assessee could resile from a comparable selected by it. It further observed that the assessee in the present had not pointed out any specific functional dissimilarity vis-à-vis the comparable.

Further, it adjudicated the dispute on functional profile of the assessee in the backdrop of the decision in the assessee's own case for subsequent AY 2007-08 classifying assessee as low end ITES provider as against decision for earlier AY 2005-06 wherein it was held that the assessee was a high end ITES provider on the basis of TP study report. It observed that the coordinate bench, while deciding the case for AY 2007-08, had not considered the AY 2005-06 findings which held assessee to be a high end ITES services provider (based on TP study report) as it was conducting research activity and knowledge management services and noted that the for the relevant year the TPO had neither classified assessee as high end or low end ITES provider. Accordingly, it remitted the entire issue of TP-Adjustment to AO/TPO for correct ascertainment of assessee's functional profile, carrying out comparability analysis and then determining ALP. In sum and substance, the Tribunal admitted additional ground only on the premise that the assessment year involved in Quark Systems was very near to the assessment year involved in the present case i.e AY 2006-07 being initial years of transfer pricing.

Evalueserve.com Pvt Ltd TS-390-ITAT-2017(DEL)-TP- ITA 4001/DEL/2013 dated 11.05.2017

920. The Court held that the Tribunal was not justified in remanding the issues relating to inclusion/exclusion of comparables, determination of working capital and risk adjustments while benchmarking the assessee's Contract Software Development (CSD) services and Technical Support Services (TSS) segments for AY 2011-12 without giving any finding, and that the Tribunal **could** remand the matter to TPO only when it was absolutely necessary, i.e. due to lack of clarity on factual aspects or for consideration of facts which have emerged since the TPO's order which would have a bearing on outcome.. Noting that the Tribunal had remanded, it further held that the scope of remand should be clearly spelled out. Accordingly, it held that where all relevant facts **were** already before the Tribunal and the parties had no new material to provide, simply remanding the issue to the TPO without rendering a finding would be an abdication of the functions of the appellate body. Thus, it directed the Tribunal to decide the 4 issues arising out of appeal viz, (i) exclusion of WAPCOS and Mahindra and Mahindra and inclusion of Kirloskar in TSS segment. (ii) Exclusion of Sasken in CSD segment, (iii) denial of working capital adjustment and risk capital adjustment and (iv) proportionate adjustment in TSS segment.

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

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

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

922. The Court, dismissed Revenue's appeal challenging Tribunal's decision wherein it had deleted the TP adjustment as the value of international transactions undertaken by the assessee was within +/- 5% range of ALP. The Revenue contended that section 92C(2) had not been properly considered by CIT(A) and Tribunal. It was argued that by mere mathematical calculation, the

purchase ALP computed by TPO fell beyond the +/- 5% range. Noting that these grounds were not agitated before lower authorities it held that it could not be agitated in the present appeal. Accordingly, the appeal was dismissed.

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

923. The Tribunal allowed assessee's miscellaneous petition, modified Tribunal order for AY 2007-08. Noting that the Tribunal had set aside comparability of various companies back to the AO/TPO in the ITeS segment but had , however, omitted to deal with 2 comparables viz., Accurate Data Converters Private Ltd and iServices India Private Ltd specifically, it remanded the matter back to the AO/TPO directing it to consider these two companies and thereafter make an analysis of pricing of international transaction of the assessee in the ITeS segment.

Hewlett Packard (India) Global Soft P Ltd vs DCIT-TS-552-ITAT-2017(Bang)-TP-IT(TP)A no. 1031/bang/2011 dated 28.03.2017

924. The Tribunal dismissed assessee's miscellaneous petition for AY 2005-06 refusing to interfere with its earlier direction to the AO/TPO for verification of additional evidence filed by assessee and decide whether administrative and business support services for which assessee had made payment were actually rendered by the AE. Assessee had contended that the evidence to prove the service rendition was earlier filed before CIT(A) who had granted relief in this respect and thus, remand to the AO / TPO for verification was unwarranted. Noting that nothing was discernable from the CIT(A) order and that the evidence on record did not conclusively prove that services were actually rendered by AE it upheld the remand of the Tribunal. Since there was no finding by lower authorities as evidence was not filed before it by the assessee, it also observed that the jurisdiction of the CIT(A) on issue involving facts could be exercised only if there was a finding by lower authorities. The CIT(A) could only give a finding on the correctness or otherwise of finding of lower authorities. Accordingly, it held that there was no mistake apparent from the record in the Tribunal order requiring modification. It held that in the proceedings u/s 254, the final conclusion reached by the Tribunal in the earlier order was not to be disturbed.

3M India Ltd vs ACIT-TS-532-ITAT-2017(Bang)-TP-MP No. 42/bang/2017 dated 31.03.2017

925. The Tribunal allowed assessee's miscellaneous petition seeking rectification of Tribunal's order on the ground of non-consideration of 4 out of 5 additional grounds raised by assessee. Noting that only 1 additional ground pertaining to inclusion of 2 comparables viz., Guindy Machine Tools Ltd and United Drilling Tools Ltd had been considered by Tribunal, it restored the matter back to the file of AO/TPO for fresh consideration in respect of adjustment made by AO/TPO to the same class of international transaction twice, not providing an adjustment to the operating cost mark-up for difference in working capital of assessee vis-à-vis the comparables, considered non-comparable companies, Electronics Machine Tools Ltd. and Kulkami Power Tools Ltd. as comparable while determining the arm's length price as the aforementioned companies failed functional and other criteria.

Molex India Tooling Pvt. Ltd vs. ACIT-[TS-538-ITAT-2017(Bang)-TP]-IT(TP)A No. 1494 (bang)/2010 dated 28.04.2017

926. The Tribunal admitted additional grounds pertaining to benchmarking of international transactions in the Trading Segment adopting RPM as the most appropriate method as opposed to TNMM adopted by the CIT(A) on the ground that it was legal in nature. Accordingly, it remitted the issue to the file of AO/TPO for considering the benchmarking of international transaction of trading activity and directed the AO/TPO to grant a reasonable opportunity of being heard in accordance with the principles of natural justice.

Fresenius Kabi India Private Limited vs DCIT-TS-625-ITAT-2017(PUN)-TP-ITA No.235/pun/2013 dated 16.06.2017

927. The Tribunal, noting that since the coordinate bench of the Tribunal in a series of rulings in the cases of AMD India, GT Nexus Software & Quark Systems had examined functional comparability of E-Infochips, Acropetal Technologies, ICRA Techno Analytics and E-Zest Solutions even though the assessee did not raise a specific issue of functional dissimilarity before the authorities, as the assessee had made out prima facie case for raising this issue of functional comparability of these four companies, in the instant case, the Tribunal admitted the

additional ground and remanded the comparability of **the aforesaid companies** to the file of AO/TPO for examination/ verification of functional comparability.

Fortinet Innovation Centre India Pvt. Ltd (formerly known as Meru Networks India Pvt. Ltd) vs. ITO-TS-617-ITAT-2017(BANG)-TP dated 28.07.2017

928. Noting that since the assessee was taken over by Canara Power Projects Group and entire managing team had quit the office while a new team was yet to be in place, required documents could not be filed before DRP/TPO, the Tribunal admitted additional evidence filed by assessee even though application for admission of such evidence was made for the first time before Tribunal. Although no records were maintained by the assessee and TP study was not filed before TPO/DRP, the Tribunal held that the assessee had vide letter dated November 11, 2013 explained that the entire management team along with the Company Secretary had left the office and new management had taken over the assessee and in view of the that necessary documents had not been furnished before the TPO. Accordingly, the Tribunal held that the it was justified to accept the additional evidence and remanded the matter back to the file of TPO for examination after granting the assessee a personal hearing.

Conergy Energy Systems Private Limited (formerly known as Sun Technics Energy Systems Pvt Ltd) vs ACIT-TS-604-ITAT-2017(BANG)-TP-IT(TP)A no.584/bang/2015 dated 22.03.2017

929. Relying on the decision in the case of Desa Singh vs Ajit Singh where it was held that normally when appellant was not represented, the Court would dismiss it for default and not go into merit in detail, the Tribunal dismissed assessee's appeal for non-prosecution/dismiss in default as no one appeared on behalf of assessee to argue the case.

MModal Global Services Private Limited vs ITO-TS-615-ITAT-2017(Bang)-TP-ITA No. 1351/bang/2011 dated 17.05.2017

930. Noting that the substantial question of law framed in the said order wrongly pertained to quantum appeal instead of the appeal against penalty, it deleted the earlier 4 questions framed relating to TP-addition of Rs. 5.86 crores, validity of reference to TPO in respect of mere reimbursement and secondment of employees and framed the following questions-(a) Whether on the facts and in the circumstances of the case and in law the Tribunal was right in confirming the levy of penalty of Rs.2,05,26,780/under section 271(1)(c) of the Act. (b) whether the Tribunal was right in holding that the revised return filed was invalid. (c) whether the Tribunal was right in holding that the Appellant had not offered any explanation towards claim of Rs. 5.86 crores as expenditure or deduction u/s 10A of the Act. (d) whether on facts and in circumstances of the case and in law the order of Tribunal was perverse and liable to be quashed.

Deloitte Consulting India Pvt Ltd vs ACIT-TS-605-HC-2017(BOM)-TP-ITA NO 107 of 2015 dated 27.07.2017

931. The Tribunal allowed the assessee's miscellaneous application (relating to deductibility of license fee) for AY 2003-04 as it had restored the matter to the file of AO following assessee's own case for AY 2002-03, ignoring the fact that the exact same issue had been decided in favour of the assessee **by the High Court** for AY 2001-02. It held non-consideration of the jurisdictional HC judgment by Tribunal in case of assessee constituted a mistake apparent from record and accordingly, directed the rectification of the Tribunal order and refiled the matter before Regular bench to hear the case afresh.

Star India Pvt. Ltd vs ACIT-TS-639-ITAT-2017(Mum)-TP-MA no. 329/mum/2016 dated 21.07.2017

932. Where the assessee had produced before the Court a detailed chart explaining the approach of the TPO, DRP and the Tribunal in respect of determination of ALP for each of the segments which proved that all facts were available on record before the Tribunal, the Court noting that the Tribunal had failed to render a finding, directed the Tribunal to decide TP-issues without remanding matter for de-novo adjudication.

Bechtel India Private Limited vs DCIT-TS-606-HC-2017-ITA No 97/2017 dated 25.07.2017

933. Where the CIT(A) had elaborately considered both the internal as well as external benchmarking analysis and come to a definitive conclusion that TP adjustment was unwarranted, the Court rejected Revenue submission that the AO ought to have made reference to TPO and that the CIT(A) had no power in exercise of its appellate jurisdiction, to undertake a TP analysis. Accordingly, the Court, upheld Tribunal's order refusing to adopt earlier year's comparables without undertaking proper analysis. Noting that the Revenue had not contended before the Tribunal that the CIT(A) ought to have remanded the matter to the file of the TPO rather than adjudicating it himself, the Court held that the Revenue could not be permitted to raise such ground at this stage.
Pr. CIT vs. Interra Infotech (India) Pvt. Ltd.-TS-669-HC-2017(DEL)-TP-ITA no. 250/2017 dated 25.08.2017
934. The Tribunal, noting that during the course of the proceedings no one appeared on behalf of the assessee nor any application to seek adjournment was filed even though notice was duly served on the assessee, dismissed assessee's appeal for non-prosecution for AY 2012-13.
Advice America Software Development Center Pvt Ltd vs DCIT-TS-763-ITAT-2017(Bang)-TP dated 06.09.2017
935. The Tribunal, allowed Revenue's miscellaneous petition against its earlier order. Noting that the Revenue had contended for inclusion of 2 companies (RS Software India Limited and Mindtree Limited) on the ground of functional comparability but the Tribunal had not adjudicated on the issue, and no objection was raised by the assessee vis a vis the inclusion of the two comparables, the Tribunal, directed the AO/TPO to include the aforesaid comparables for determining the arm's length price (ALP).
ITO vs Arcot R&S Software Pvt Ltd-TS-692-ITAT-2017(Bang)-TP-M.P.No. 92/bang/2017 [IT(TP)A no. 393/bang/2015 dated 24.08.2017
936. The Tribunal, noting that no one appeared on behalf of the assessee even though notice was duly served on it fixing appeal hearing for August 21, 2017, dismissed assessee's appeal for non-prosecution under rule 19(2) of Income Tax Appellate Tribunal Rules.
Indeca Sporting Goods Pvt. Ltd vs. DCIT-TS-713-ITAT-2017(Bang)-TP-IT(TP)A no. 445/bang/2017 dated 21.08.2017
937. The Tribunal allowed assessee's miscellaneous petition seeking recall of ex-parte Tribunal order. Noting assessee's submission that it was unable to appear before the Tribunal on the hearing date as the notice was misplaced since it was delivered on a weekend & collected by the security person, the Tribunal held that there was reasonable cause for non-appearance of the assessee on the appointed date and accordingly recalled the ex-parte order and fixed appeal hearing on December 5, 2017.
Salesforce.com India Private Limited vs DCIT-TS-761-ITAT-2017(Bang)-TP-MP no.160/bang/2017 dated 08.09.2017
938. The Tribunal partly allowed assessee's miscellaneous petition and recalled Tribunal's order for the limited purpose of adjudicating working capital adjustment not adjudicated earlier. Further, it dismissed assessee's contention that the comparability of Evoke was not to be remanded to the lower authorities as neither did the DRP nor the TPO object to the inclusion of this comparable and held that there was no mistake apparent from records as the Tribunal held that all comparables were to be reexamined.
Obopay Mobile Technology India P. Ltd vs DCIT-TS-710-ITAT-2017(Bang)-TP- Misc Petition No.145/Bang/2017 dated 11.08.2017
939. The Tribunal, dismissed second miscellaneous petition filed by Revenue against Tribunal order for AY 2005-06 as it was time barred. It held that as per the amended provisions of section 254(2), assessee/Revenue could file a miscellaneous petition within 6 months from the end of the month in which order was passed by the Tribunal and since the Tribunal order against which the petition was filed was passed on August 11, 2016, the miscellaneous petition filed on May 29, 2017 was time barred.

DCIT vs Swiss' Re Shared Services (India) Pvt Ltd-TS-721-ITAT-2017(Bang)-TP- M§ No. 159/Bang/2017 (in IT(TP)A No. 172/Bang/2012) dated 18.08.2017

940. The Court dismissed the appeal filed by the assessee owing to extraordinary delay of 439 days and rejected the assessee's justification that the delay occurred since it was pursuing an alternate remedy by way of filing a miscellaneous application before the Tribunal for the exclusion of Bodhtree as comparable. It held that an application under Section 254(2) of the Act is for rectifying mistakes apparent from record which is much narrower in scope than an appeal before the Court under Section 260A. Therefore, it held that the time period for filing an appeal under Section 260A would not get suspended on account of pendency of miscellaneous application filed before the Tribunal.

Agnity Technologies Pvt Ltd vs CIT-TS-729-HC-2017(DEL)-TP- ITA 939/2016 dated 19.09.2017

941. The Tribunal dismissed assessee's miscellaneous petition against Tribunal's order for AY 2007-08. Noting that the Tribunal (vide order dated February 10, 2011) had decided the issue considering the explanation to section 92C(2) which provided that the second proviso to section 92C(2) was applicable to all proceedings pending before the AO on 1.10.2009, it held that since the proceedings for subject AY were pending as on 1.10.2009 and accordingly, there was no apparent mistake in the order of Tribunal.

Insilica Semiconductors India Pvt Ltd-TS-709-ITAT-2017(Bang)-TP- "rvr.P.No. 1211Bang/2017 (in IT(TP)A No. 117/Bang/2013) dated 18.08.2017

942. Where the CIT(A) had not examined and decided the issue of functional dissimilarity in respect of 9 companies against which the assessee had raised objections, the Tribunal remitted the matter to the file of CIT(A) for fresh adjudication. Further, in respect of 0% RPT filter, it held that the CIT(A) was not justified in applying 0% RPT filter suo-moto as no comparables were available. It held that a reasonable tolerance range of 5% to 25% depending on facts and circumstances of the case should be applied.

ITO vs iPass India Pvt Ltd-TS-751-ITAT-2017(Bang)-TP- I.T.(T.P)A. No.526/Bang/2012 dated 31.08.2017

943. The Tribunal dismissed assessee's miscellaneous petition (MP) seeking to modify Tribunal's order for contending that the Tribunal in the impugned order had discussed the comparability of several companies but failed to render finding thereon. Noting that the assessee had filed a single application for rectification of the order even though the original appeal was filed by both assessee and Revenue as cross appeals, it held that the minimum requirement of law is that separate applications are required to be filed in respect of each appeal. Since the fact of the defect was intimated but the assessee had chosen not to rectify the same, it dismissed the Miscellaneous application filed by assessee as defective.

IDS Software Solutions India Pvt Ltd vs DCIT-TS-759-ITAT-2017(Bang)-TP- Misc. Petn.No.138/Bang/2017 dated 15.09.2017

944. The Apex Court admitted Revenue's SLP against High Court order confirming Tribunal's quashing of assessments made by AO/TPO u/s 153A pursuant to search and seizure operations. The Tribunal noting that no new or incriminating material was found during search and seizure proceedings which took place in assessee's premises after completion of scrutiny assessment u/s 143(3), but that the AO, based upon existing material, had referred the matter to TPO, who then proposed TP adjustment on interest-free loans granted to AE, deleted this TP addition in absence of any incriminating material which was upheld by the High Court.

Pr.CIT vs Baba Global Ltd-TS-956-SC-2017-TP dated 01.12.2017

945. Where the assessee's filed TP documentation before the CIT(A) for the first time who thereafter called for a remand report from the AO, the Tribunal held that the approach of the CIT(A) was incorrect and he should have referred the matter back to the file of TPO for determination of ALP.

Further, noting that there were mistakes in the margin computation, the Tribunal remanded the matter back to the file of AO/TPO for fresh determination of ALP in accordance with law.

ACIT vs. Mindspeed Technologies Ltd-TS-1012-ITAT-2017(DEL)-TP- ITA No.1600/Hyd/2014 dated 08.12.2017

946. The Tribunal considering assessee's submission that Revenue only had time till July 31, 2017 (being the end of 6 months from expiry of January 2017 being the month in which the Tribunal order was passed) and since miscellaneous petition (MP) was filed on September 20, 2017 it was time barred, dismissed Revenue's MP against Tribunal order as time barred.

Infineon Technologies India Ltd vs. DCIT-TS-1010-ITAT-2017(Bang)-TP- M.P. No. 222/Bang/2017 dated 10.11.2017

947. The Tribunal noting that the TPO had mentioned that the information furnished by assessee was incomplete and consequently no conclusion could be drawn, but the assessee had asked for time to comply with the directions which had not been granted by TPO, restored the TP issues back to the AO/TPO for re-adjudication.

POSCO India Chennai Steel Processing Centre Pvt. Ltd vs. ACIT-TS-1011-ITAT-2017(CHNY)-TP dated 01.12.2017

948. Where the AO/TPO had made no adjustment with respect to guarantee commission while determining the ALP and the Tribunal had in Para NO. 17, by holding that guarantee commission should form part of the ALP, enhanced the income though the Tribunal had no power of enhancement and thereby committed mistake apparent on record, the Tribunal allowed assessee's miscellaneous application against Tribunal order for AY 2008-09 and expunged the guarantee commission from the order.

Uttam Galva Steel Ltd vs. ITO-TS-1044-ITAT-2017(mum)-TP MA No.292/MUM/2016 dated 27.11.2017

949. Where the Tribunal had not adjudicated ground no. 7 of its appeal (regarding exclusion of E-Infochips Ltd from the list of comparables for software developer assessee), the Tribunal allowing Revenue's appeal recalled the Tribunal order for the limited purpose of adjudicating ground no 7 of Revenue's appeal.

DCIT vs. Applied Material India P. Ltd-TS-1063-ITAT-2017(Bang)-TP Miscellaneous Petition No.269/Bang/2017 dated 26.12.2017

950. The Tribunal accepted assessee's miscellaneous petition against Tribunal order for AY 2008-09. Noting that Tribunal, in its order, had incorrectly stated that assessee sought exclusion of Saksoft Ltd whereas in reality, the assessee had successfully appealed before CIT(A) for its inclusion and the CIT(A) had accepted assessee's contentions and held that Saksoft Ltd was functionally similar and therefore could not be excluded, the Tribunal held that there was an apparent error in the order and accordingly directed the inclusion of Saksoft Ltd.

Radisys India P. Ltd (Formerly Continuous Computing India P. Ltd) vs ITO-TS-1004-ITAT-2017(Bang)-TP dated 08.12.2017

951. Where the Tribunal had not adjudicated Revenue's ground against DRP's exclusion of Acropetal Technologies Pvt. Ltd by applying onsite revenue filter, the Tribunal allowed Revenue's miscellaneous petition and directed the AO/TPO to apply onsite revenue filter to all the comparables and include only those companies which satisfy the filter.

Addl. CIT vs Dell International Services India Pvt. Ltd (formerly known as Perot Systems TSI (India) Pvt. Ltd-TS-991-ITAT-2017(Bang)-TP dated 29.11.2017

952. The Tribunal allowed the miscellaneous petition filed by the assessee as the Tribunal had not decided the assessee's ground regarding treatment of foreign exchange gain / loss as operating in nature for the purpose of computation of PLI of the assessee and the comparables. Observing that there were no details vis-à-vis the issue, it restored the matter back to the AO / TPO for fresh examination.

Further, it dismissed assessee's contention that the AO / TPO erred in selecting certain comparables which were functionally dissimilar and held that there was no mistake apparent from record vis-à-vis this contention as during the original hearing the appeal was heard based

on a chart filed by the assessee wherein the only contentions raised were margin computation errors and turnover filter.

ISG Novasoft Technologies Ltd vs. ACIT-TS-1016-ITAT-2017(Bang)-TP- M.P. No. 250/Bang/2017 dated 15.12.2017

953. The Tribunal, considering assessee's submission that delay in filing objections before DRP in respect of technical & management costs for AY 2012-13 arose as it was in the process of shifting its office to a new location and also due to ongoing assessment proceedings for subsequent AY 2013-14 and CIT(A) for AY 2011-12, held that delay was neither with malafide intention/ wilful and that the assessee had sufficient and reasonable cause. Accordingly, it set aside the DRP directions which rejected condonation of 22 days delay by assessee in filing of objections. Accordingly, it condoned the delay of 22 days and restored the matter back to the file of DRP for fresh adjudication.

Conergy Energy Sytems Pvt. Ltd vs. ACIT-TS-967-ITAT-2017(Bang)-TP I.T. (T.P) A. No.88/Bang/2017 dated 29.11.2017

954. The Tribunal refused to condone assessee's 117 days delay in filing appeal (including TP-issues) for AY 2009-10 for failure to establish sufficient cause to condone delay. Noting that no one appeared on behalf of assessee for hearing on many occasions despite several notices, the Tribunal opined that from the conduct of the appellant/ assessee it seemed that the assessee was no longer interested in pursuing its appeal. Further, referring to Sec 253(5) (which provided that Tribunal may admit appeal or permit filing of memorandum of cross-objection after expiry of relevant period of limitation if it was satisfied that there was sufficient cause for not presenting it within that period), the Tribunal held that as per the settled law when mandatory provision is not complied with and the delay is not properly explained, the court cannot condone the delay on sympathetic grounds alone. Accordingly, it concluded that since, the application for condonation of delay was dismissed, the appeal of the assessee was not maintainable being barred by law of limitation.

TCL India Holdings Pvt Ltd vs DCIT-TS-972-ITAT-2017(Mum)-TP dated 30.10.2017

955. The Tribunal dismissed the miscellaneous petition filed by the assessee wherein it contended that Tribunal's dismissal of grounds for inclusion/exclusion of various comparables for the reason that the same was not urged before lower authorities was "contrary to facts". It held that the ruling of the Tribunal was based on a chart filed by assessee during the course of hearing wherein it clearly showed that contentions for inclusion/ exclusion of comparables were not put forth before lower authorities. Therefore, considering that assessee had not brought the Tribunals attention to the pleadings made before lower authorities, it dismissed the miscellaneous petition.

Curam Software International Pvt. Ltd. vs. ITO-TS-978-ITAT-2017(Bang)-TP Misc. Petn. No.181/Bang/2017 (In IT(TP)A No.192/Bang/2017) dated 25.10.2017

956. Where the assessee's appeal was decided based on chart filed during hearing which contained arguments regarding exclusion of certain comparables and adjustment for capacity under-utilization but grounds for adjustment regarding rent, depreciation, provision for doubtful advance, employee cost and working capital etc were not argued at all, the Tribunal held that there was no mistake apparent from record which could be rectified and accordingly dismissed assessee's miscellaneous petition alleging that certain grounds raised by assessee were not decided by Tribunal.

Biesse Manufacturing Co. Pvt. Ltd v DCIT-TS-1041-ITAT-2017(Bang)-TP M.P. No. 252/Bang/2017 · · in IT(TP)A No. 755/Bang/2017 dated 15.12.2017

957. Where the assessee claimed that notice for hearing of appeal was received by front desk security guard who misplaced it without informing or handing over the same to appropriate person, the Tribunal held that there was reasonable cause for failure of assessee to appear before the Tribunal for hearing on August 21, 2017 and accordingly, allowed miscellaneous petition filed by assessee, recalled Tribunal order for AY 2012-13 whereby appeal was dismissed in limine for non-prosecution.

Indeca Sporting Goods Pvt. Ltd. v ACIT-TS-1040-ITAT-2017(bang)-TP M.P No.246/Bang/2017 dated 17.11.2017

958. Where the assessee had raised grounds regarding adjustment on royalty paid to AE, viz., i) DRP's action of disregarding the basis of royalty payment i.e. as a percentage of sales, ii) comparison with Toyota Motors without establishing comparability, iii) absence of tax base erosion, etc, however the representative of assessee had not pressed these grounds of appeal, the Tribunal, relying on the decision in the case of Earnest Exports wherein it was held that miscellaneous petition was maintainable only on the issues which are argued and specific attention of the bench was drawn, dismissed assessee's miscellaneous petition alleging non-adjudication of certain grounds for AY 2010-11.

Kaypee Electronics & Associates Pvt. Ltd v ACIT-TS-1043-ITAT-2017(bang)-TP Misc. Petn. Nos.162, 163 & 164/Bang/2017 dated 31.10.2017

959. The Tribunal rejected assessee's miscellaneous petition for AY 2006-07 and 2007-08 raising a contention that Tribunal failed to consider additional evidence filed by the assessee to prove the receipt of administrative services provided by AE. Noting that the Tribunal while passing the original order had rendered a specific finding that evidence on record only describes nature of technical know-how and administrative services, but did not conclusively prove the actual rendition of services held that the Tribunal had considered all material on record and accordingly dismissed assessee's petition as there was no mistake apparent from record.

Herbalife International India Pvt. Ltd v ACIT-TS-1042-ITAT-2017(Bang)-TP Misc.Petn.Nos.131 & 132/Bang/2017 dated 25.10.2017

960. The Tribunal dismissed assessee's miscellaneous petition against Tribunal order for AY 2008-09. Noting assessee's submission that Tribunal had considered the margin of transactions with AEs excluding idle costs, but transactions for non-Associated Enterprises were not considered and therefore, the ground relating to operating costs of both Associated and non-Associated Enterprises should be considered in order to determine the ALP adjustment for non-Associated Enterprises also, the Tribunal held that the issue of idle costs incurred by the assessee on account of excess capacity as operating cost for arriving at the ALP was considered by Tribunal in detail in para 8 and had restored the matter to the file of AO for fresh adjudication and therefore there was no error apparent in the order of the Tribunal.

Trianz Holdings Pvt. Ltd (formerly Trianz Consulting P. Ltd.,) vs. DCIT-TS-1037-ITAT-2017(bang)-TP M.P. No.234/Bang/2017 dated 17.11.2017

961. Where the CIT(A) did not adjudicate assessee's contentions regarding inclusion/exclusion of comparables by passing a reasoned order on all disputed comparables and thereafter to determine ALP, the Tribunal set aside the order of the CIT(Appeals) and restored the matter to his file with a direction to adjudicate the issues raised after affording opportunity of being heard to the assessee.

GE Intelligent Platforms Pvt. Ltd (formerly GE Fanuc Systems Pvt. Ltd) vs. ACIT-TS-1035-ITAT-2017(Bang)-TP dated 15.12.2017

Assessment/Reassessment

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

India Trimmings Pvt Ltd – TS-62-ITAT-2017 (Chny) – TP

963. Where the DRP summarily rejected assessee's contentions in a cryptic manner and failed to pass a reasoned order, the Tribunal held that the DRP had not applied his mind to assessee's

submission and the TPO's conclusions and accordingly restored the matter back to the file of DRP for fresh adjudication on inclusion/exclusion of comparables for assessee's international transactions relating to software development services and ITes. Further, noting that the assessee had raised additional grounds before tribunal, it also directed the DRP to consider the said grounds while adjudicating the matter.

TE Connectivity Global Shared services India Pvt Ltd (formerly known as ADC (India) communications & infotech ltd) vs ITO-TS-807-ITAT-2017(BANG)-TP IT(TP)A No.1230/Bang/2011 dated 27.09.2017

964. The Tribunal restored the entire issue to the file of the DRP since the order of the DRP was not speaking and reasoned and directed the DRP to pass a fresh speaking and reasoned order.

Thomson Reuters International Services Pvt Ltd vs DCIT- TS-836-ITAT-2017(Bang)-TP dated 28.09.2017

Thomson Reuters International Services Pvt Ltd vs. DCIT-TS-810-ITAT-2017(Bang)-TP dated 28.09.2017

965. Where the Pr.CIT issued a show cause notice u/s 263 considering the order of AO as erroneous and prejudicial to the interest of Revenue without making proper inquiries/verifications/investigations on various issues, the Tribunal relying on the High Court ruling in the case of Delhi Airport Metro Express and DG Housing Projects (wherein it was held that it was incumbent for the PrCIT to make some minimum independent enquiry to reach the conclusion that AO's order was erroneous and prejudicial to the Revenue's interest), quashed the revision u/s 263 by PrCIT.

Amira Pure Foods Pvt. Ltd vs Pr.CIT-TS-1053-ITAT-2017(DEL)-TP SA No. 451/DEL/2017 & ITA No. 3205/DEL/2017 dated 29.11.2017

966. The Tribunal remitted ALP determination in respect of assessee's import transactions for AY 2003-04. Noting that CIT(A) had held that the assessee's operating profit margin during the subject AY from the combined activities as compared by the AO was 4.4% while comparables margin was 2.61%, thus even by adopting TPO's comparables, the transaction would be at ALP under TNMM. Further, observed that CIT(A) allowed adjustment on account of excise duty and working capital and restricted TP adjustment to Rs. 16.99 crore as against TPO's Rs. 36.28 crores. Since the CIT(A)'s order was not elaborate and very cryptic, the Tribunal remanded the matter back to the file of TPO/AO for fresh consideration.

Whirlpool Of India Ltd vs DCIT-TS-1003-ITAT-2017(DEL)-TP dated 03.11.2017

967. Relying on the decision in the case of Maruti Suzuki India (wherein under similar facts, assessment made in the name of non-existent entity post amalgamation was quashed), the Tribunal rejected Revenue's contention that since in the assessment order, along with the name of the merged company (Aztecsoft Ltd), the name of the successor company (Mindtree Ltd) was also mentioned, it could not be said that the assessment was completed in the name of the merged company, and quashed the assessment order & revisionary order passed in the name of non-existent merged entity (Aztecsoft Ltd).

Mindtree Ltd (Previously known as Aztecsoft Ltd, now merged with Mindtree Ltd.) vs. DCIT-TS-1014-ITAT-2017(Bang)-TP- IT(TP)A No. 277/Bang/2014 dated 08.12.2017

JCB India Limited (formerly known as JCB Manufacturing Pvt. Ltd) vs. DCIT-TS-1034-ITAT-2017(DEL)-TP dated 12.12.2017

968. Where the assessee [Heartland Delhi Transcription and Services Pvt. Ltd. (HDTs)] amalgamated with Heartland Information and Consultancy Services Pvt. Ltd (HICS) pursuant to Delhi HC-order dated July 25, 2008 and this fact was brought to AO & CIT's notice vide separate letters dated October 19, 2008, however, the AO referred the matter u/s 92CA of amalgamating company to TPO who passed the order on the amalgamating entity and thereafter, AO also passed assessment order on amalgamated entity, the Tribunal, relying on the decision in the case of Maruti Suzuki India Ltd [TS-520-ITAT-2016(DEL)-TP] quashed the assessment order framed on non-existent amalgamating company for AY 2007-08 as the assessment was void ab initio since

the assessee entity M/s (HDTS) was not in existence when the TPO as well as the AO passed their respective orders.

DCIT vs Transcend MT Services Pvt. Ltd-TS-992-ITAT-2017(DEL)-TP dated 30.11.2017

969. Where the Revenue was unable produce any letter to prove that AO had made a reference of international transactions to TPO and what was produced was only an approval granted by DIT on December 27, 2011 to make such reference, the Tribunal quashed assessment orders for AYs 2009-10 & 2010-11 as being barred by limitation u/s 153(1) absent valid reference by AO to TPO u/s 92CA(1). It held that the grant of approval did not meet the requirements of section 92CA(1) of the Act, which specifically requires reference by the Assessing Officer to the Transfer Pricing Officer for the computation of ALP in relation to international transactions. Accordingly, it concluded that the assessment orders were barred by limitation u/s 153(1).

Dongfang Electric Corporation (Kolkata Project Office) vs. DCIT-TS-847-ITAT-2017(kol)-TP dated 25.10.2017

970. In the original order, the Tribunal, had accepted assessee's contention that CIT(A)'s order was cryptic in respect of inclusion/exclusion of comparables for IT enabled services had restored the matter back to the CIT(A) for a fresh decision. However, regarding CIT(A)'s decision of not considering interest received on delayed payments from AE as operating income for computation of PLI, it had held that it was based on the High Court decision in the case of Sharavathy Steel Products [347 ITR 371]. The assessee filed a miscellaneous petition contending that there was an apparent mistake in the order of the Tribunal as the Tribunal ought to have remanded this issue back to the file of the CIT(A) as well. The Tribunal dismissed the Miscellaneous Petition filed by assessee noting that it was apparent that the order of CIT(A) on this issue was not cryptic and accordingly held that there was no apparent mistake in the Tribunal order.

Syniverse Teledata Systems Pvt Ltd (Formerly known as MACHTeledata Systems Pvt Ltd) vs. DCIT-TS-845-ITAT-2017(Bang)-TP dated 26.09.2017

971. Where the DRP had not recorded any specific finding on assessee's objections regarding various comparables such as high turnover, big size, brand and high profitability, the Tribunal restored the DRP's cryptic order on comparables selection for fresh decision directing it to decide the exclusion of 7 comparable companies contested by assessee by way of a speaking and reasoned order

Akamai Technologies India Private Limited vs. DCIT-TS-757-ITAT-2017(Bang)-TP IT(TP)A No. 1122/Bang/2011 dated 08.09.2017

972. Where the DRP's findings were very cryptic and in view of the settled position of law that any order of a quasi-judicial authority should be a speaking and reasoned order, the Tribunal restored the entire TP-issue in respect of inclusion/exclusion of comparables back to the DRP for fresh decision by way of a speaking and reasoned order for AY 2007-08.

Moody's Analytics Knowledge Services (India) Pvt Ltd [TS-838-ITAT-2017(bang)-TP r IT(TP)A No.1238/Bang/2011 dated 22.09.2017

973. The Court dismissed assessee's writ challenging the order of enhancement by DRP wherein the DRP directed the AO not to restrict TP adjustment to the proportion of international transactions to the total operating costs and held that the DRP order was binding on the AO, and the assessment order was an order giving effect to the direction issued by DRP and against such an order the assessee could file an appeal before Tribunal. Rejecting assessee's reliance of various judicial precedents viz., Mobis India Ltd [TS-235-ITAT-2013(CHNY)-TP], IL Jin Electronics [TS-11-ITAT-2009(DEL)], it held that none of the decisions arose out of a challenge in Writ petition to the order passed by the DRP. Accordingly, it directed the AO to pass a final assessment order after giving effect to DRP directions and clarified that the assessee was free to challenge such assessment order before Tribunal.

Hyundai Motor India Limited vs The Secretary (Income Tax Department) and Ors.-TS-823-HC-2017(MAD)-TP dated 20.10.2017

974. The Tribunal dismissing assessee's additional ground for AY 2012-13 held that mere issue of demand notice and penalty notice along with the draft assessment order did not tantamount to passing final assessment order. It held that the AO had passed a draft assessment and the issue of demand notice and penalty notice were procedural mistakes. Accordingly, it dismissed the appeal.
Bartronics India Ltd vs DCIT-TS-814-ITAT-2017(HYD)-TP ITA No. 259 /Hyd/2017 dated 27.09.2017
975. Where the DRP had rejected assessee's ground that functional comparability was not considered and merely stated that the TPO had discussed functional comparability of comparables, the Tribunal held that any quasi-judicial authority had to pass a reasoned order and accordingly, restored the matter to the file of DRP for fresh adjudication after providing adequate opportunity of being heard to both sides.
Mann and Hummel Filter Pvt Ltd vs ACIT-TS-800-ITAT-2017(Bang)-TP dated 08.09.2017
976. Where the assessee had amalgamated with another entity (Telelogic India P Ltd) w.e.f May 27, 2010 and despite intimation, the TPO passed order in the name of the non-existent entity and the assessee had not filed appeal memo etc in the name of the merged entity, the Tribunal held that both the assessee and Revenue had not followed the procedure established by law and remanded the matter to the file of DRP directing it to pass order in the name of Telelogic India P Ltd.
Corio India Infotech Services P. Ltd, (Since merged with Telelogic India P. Ltd) v DCIT-TS-788-ITAT-2017(Bang)-TP dated 23.08.2017
977. Relying on the decision in the case of Turner International India Pvt Ltd [TS-400-HC-2017(DEL)-TP], the Court held that even where the Tribunal had remanded the matter, the AO ought to have passed the draft assessment order under section 144C prior to the final order. Further, it held that section 292B of the Act could not save an order not passed in accordance with the provisions of the Act since it was an incurable illegality. Accordingly, it held that the final assessment order passed by the AO was without any jurisdiction.
JCB India Ltd vs DCIT-TS-706-HC-2017(DEL)-TP dated 07.09.2017
978. The Tribunal relying on co-ordinate bench ruling in BA Continuum India Private Limited (formerly CFC India Services Pvt. Ltd set aside CIT(A)'s order wherein he had quashed the assessment order on the ground that assessment was done in the name of a non-existing company. The Tribunal noted that the assessee, Merrill Lynch India Technology Services Private Limited merged with B. A. Continuum India Private Limited w.e.f. April 1, 2009, and that the order passed by the TPO was in the name of Merrill Lynch, but the draft as well as final assessment orders were passed by AO having jurisdiction over amalgamated company in the name of BA Continuum. Accordingly, it disagreed with the CIT(A) that assessment was made on non-existent company and remanded the matter to the CIT(A) directing it to decide the issue on merits.
DCIT vs. B. A. Continuum India Private Limited-TS-773-ITAT-2017(HYD)-TP dated 22.09.2017
979. Noting that the AO made TP-adjustment without making a reference to TPO but following TPO's order for AY 2007-08 as basis for making TP-addition, the Tribunal set aside the order of the CIT(A) on TP -adjustment of Rs. 13.28 crores and admitted assessee's additional grounds challenging the framing of assessment without making reference to TPO for determination of ALP and without following procedure u/s 144C. Accordingly, it remitted the matter to the file of AO for de-novo determination of the issue on merits.
Bericap India Pvt. Ltd. vs. ACIT-TS- TS-935-ITAT-2017(Mum)-TP- I.T.A. No. 4703/Mum/2013 dated 27.11.2017
Bechtel India Pvt Ltd vs ACIT-TS-925-ITAT-2017(DEL)-TP dated 11.11.2017

980. The Tribunal upheld the final assessment order and dismissed the assessee's contention that the same was void ab initio as the DRP had not passed any directions. It noted that since there was a delay of 13 days in filing objections before the DRP and the DRP rejected the assessee's application for condonation the AO passed the final assessment order as if no objections were filed. Accordingly, it held that the order passed by the AO was within the time limits and dismissed the assessee's appeal.
Gameloft Software Private Limited vs. DCIT-TS-912-ITAT-2017(HYD)-TP I.T.A. No. 443/HYD/2017 dated 10.11.2017
981. The Tribunal upheld CIT's revisionary order u/s 263 and held that the order of the AO was prejudicial to the interest of the revenue as the AO failed to verify the specified domestic transactions [deduction u/s 80IB and payment to specified persons u/s 40A(2)] for AY 2013-14 entered into by the assessee. It rejected the assessee's submission that the transactions had been examined by the AO who denied deduction u/s 80IB/80IE on the ground that assessee was not carrying on manufacturing activity and held that the denial of deduction was on a technical ground and the quantum of deduction claimed was not examined. It held that the mere submission of necessary details in form of 3CEB would not prove that the AO had verified the details regarding the deduction claimed by the assessee u/s 80IB/80IE of the Act. Accordingly, it upheld the initiation of proceedings under Section 263 of the Act.
Amrit Feeds Ltd vs. DCIT- TS-875-ITAT-2017(Kol)-TP- ITA No.753/Kol/2017 dated 31.10.2017
982. Where the assessee had adopted TNMM to determine ALP of export of vaccine, but TPO proposed adjustment by comparing margins of export sales with margins of sale in domestic market to related entities and the CIT(A) had dismissed assessee's appeal even though assessee made detailed submission and filed additional evidence in support of its claim, the Tribunal noting that right from AY 2002-03 onwards, Tribunal had remitted the matter to the AO/TPO for fresh determination of ALP as neither the assessee nor the TPO carried out ALP determination exercise as per law, remitted the matter to the AO/TPO directing it to consider the assessee's evidence and submission and re-adjudicate the issue after giving opportunity of hearing to the assessee.
Chiron Behring Vaccine Pvt Ltd vs ACIT-TS-929-ITAT-2017(mum)-TP dated 03.11.2017
983. Where the assessee made a submission that it was not clear from TPO/DRP's order as to which comparables were finally adopted, how ALP was determined and how TP adjustment was quantified, the Tribunal set aside the assessment order on TP issue and restored the entire TP issue to the file of DRP for fresh decision by way of speaking and reasoned order after providing adequate opportunity of being heard to both sides.
Aptean Software India Pvt. Ltd (formerly CDC Software India Pvt. Ltd.) vs. ITO-TS-870-ITAT-2017(Bang)-TP dated 26.10.2017
984. Where the TPO in remand proceedings for the subsequent year, had accepted the ALP of SAP implementation / IT / SAP service charges on identical facts but had determined the ALP of such payment at Nil in the relevant year, the Tribunal set aside the assessment order for the relevant year directing the AO / TPO to conduct a fresh exercise for determining ALP in light of the remand report of the succeeding year.
Kennametal India Ltd – TS-30-ITAT-2017 (Bang) – TP
985. The Tribunal allowed the assessee's miscellaneous application for restoration of the assessee's appeal which was dismissed ex-parte as none appeared on behalf of the assessee. It noted that there was a delay in engaging counsel before the Tribunal and that the non-appearance was neither deliberate nor intentional, which amounted to reasonable cause. Accordingly, it recalled the ex-parte order and re-fixed the hearing.
Merck Life Science Pvt Ltd – TS-46-ITAT-2017 (Bang) - TP
986. The Tribunal quashed the reassessment proceedings initiated against the assessee and the consequent orders for AYs 1998-99, 1999-00, 2000-01 and 2001-02 which were initiated on the

assumption that the assessee had suppressed its profits from its transactions with Indian companies as a result of which the provisions of Section 92 were applicable. With respect to AYs 1998-99 and 1999-00, for which reopening was initiated beyond 4 years, it upheld the contention of the assessee that there was no allegation regarding failure to disclose material facts and therefore reopening was invalid. Further, in respect of all years, it noted that during the original assessment proceedings, the AO realizing the non-applicability of section 92 had accepted the justifications provided by the assessee and dropped the ground which formed the basis of reopening.

Coca Cola India Inv v DCIT – TS-59-ITAT-2017 (Del) – TP

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

Soktas India (P.) Ltd - [2017] 77 taxmann.com 19 (Pune - Trib.)

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

Sanvik Information Technology AB - TS-1055-ITAT-2016 (PUN)-TP

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

DSP Merrill Lynch Ltd - TS-21-HC-2017-(Bom)-TP

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

Baba Global Limited - TS-1070-ITAT-2016(DEL)-TP

991. Where the AO disallowed section 10AA benefit while passing the final assessment order which was not proposed in the draft assessment order, the Court held that while passing the final assessment order, the AO cannot go beyond what is proposed in the draft assessment order as it will lead to breach of principle of natural justice as no opportunity would be given to the assessee to file its objection before DRP and accordingly, it confirmed Tribunal's order of deletion of disallowance of section 10AA benefit.

Woco Motherson Advanced Rubber Technologies Limited [TS-173-HC-2017(GUJ)-TP] (Tax Appeal No. 129 of 2017)

992. The Court admitted Revenue's appeal against the order passed by the Tribunal quashing the assessment framed on the amalgamating company after incorporating the TP addition for excess royalty paid by it by virtue of the provisions of section 170(2) as per which assessment should be framed on the amalgamated company and not amalgamating company.

Maruti Suzuki India Ltd. [TS-172-HC-2017(DEL)-TP] [ITA 65/2017]

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

Harland Clarke Holdings Software India Private Limited - TS-1062-ITAT-2016-(CHNY)-TP

994. The Tribunal dismissed revenue's appeal for AY 2009-10 on transfer pricing issues and deductions under section 10A on the ground that the appeal filed by revenue was in violation of CBDT Circular No 21/2015, prescribing pecuniary limit for preferring appeal by Revenue before ITAT as beyond Rs 10 Lakhs.

Curam Software International Pvt Ltd - TS-1037-ITAT-2016(Bang)-TP

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

GE Energy Parts Inc v ADIT – TS-22-ITAT-2017 (Del) – TP

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

MagnetiMarelliPowertain India Pvt Ltd v DCIT – TS-68-HC-2017 (Del) – TP - W.P. (C) 8760/2014 dated 06.02.2017

997. The Tribunal remitted TP-issues to DRP for passing fresh direction in case of assessee rendering software development services to its AEs during AY 2007-08, noting that the DRP had upheld TPO's application of filters while selecting appropriate comparables for benchmarking, and had rejected assessee's objections with respect to 'secret data' u/s 133(6) used by TPO. It held that the order passed by TPO was cryptic and non-speaking and that no proper reasoning was given by DRP while dismissing assessee's objections. Accordingly, it remanded the matter stating that DRP had not given proper reasons while issuing directions which it ought to have done.

ABB Global Industries & Services Ltd. Vs DCIT - TS-137-ITAT-2017(Bang)-TP - IT(TP)A No.1142/Bang/2011 dated 07.02.2017

998. Where the assessee contended that the transactions entered into it were at ALP in light of the fact that it had entered into advance pricing agreement (APA) under section 92CC of the Act with CBDT on 24th November 2015, wherein, the arm's length price of international transaction relating to investment advisory services provided to AE had been accepted at operating profit margin of not less than 20% and the DRP and TPO had in AY 2006-07 and AY 2007-08, accepted the margin of the assessee at cost plus 17% and 17.5%, respectively, the Tribunal held that though no conclusive finding on the binding nature of APAs was required in light of its decision on comparables (assessee succeeded in excluding and including certain comparables post which it was at ALP), it held that the the APA entered into by the assessee was of persuasive value while determining ALP of the relevant year.
Warburg Pincus India Pvt. Ltd. vs. ACIT - TS-44-ITAT-2017(Mum)-TP -ITA no. 6981/Mum./2012 dated 13.01.2017
999. Where the AO failed to issue a notice under section 143(2) of the Act within the time limit prescribed as a result of which the regular assessment came to an end and the matter had reached its finality, and then subsequently he made a reference to the TPO wherein the TPO made an upward addition of Rs.85.63 lakh, the Tribunal held that the AO erred in issuing a notice under section 148 of the Act on the basis of the order of the TPO contending that income of the assessee had escaped assessment as the reference made by the AO to the TPO was bad in law in the first place as at the time of reference no proceedings were pending. Accordingly, it held that the order of the TPO based on such incorrect reference was void-ab-initio and therefore could not be a valid material to entertain a belief on part of the AO that income chargeable to tax has escaped assessment.
ITO vs. Magic Software Enterprises India Pvt. Ltd - TS-53-ITAT-2017(PUN)-TP- ITA No.1801/PUN/2013 dated 31.01.2017
1000. Noting that the assessee placed a copy of MAP order before the Tribunal, it dismissed assessee's transfer pricing grounds as withdrawn in view of MAP order under Article 27 of the relevant DTAA for AY 2009-10.
DCIT v Hewlett Packard (India) Software Operation Pvt Ltd – TS-1039-ITAT-2016 (Bang) – TP - IT(TP)A No.213IBang/2014 IT(TP)A No.2881Bang/2014 dated 04.11.2016
1001. The Tribunal dismissed the assessee's appeal for AY 2009-10 as well as transfer pricing grounds raised in Revenue's appeal as TP-issues raised therein were resolved as per MAP order under Article 25 of the Indo-US DTAA and the MAP order had also passed by AO/TPO.
Northern Operating Services Pvt. Ltd. vs. DCIT – TS-1086-ITAT-2016 (Bang) – TP - I.T. (TP)A. No.261/Bang/2014 dated 13.12.2016
1002. Relying on the decision of the coordinate bench in the assessee's own case for the prior AY, the Tribunal remitted the TP grounds raised by assessee (contract manufacturer / distributor of medical equipment) to the file of DRP for re-adjudication, noting that identical TP issues involving additions with respect to royalty, distribution / trading, trademark and interest had been remitted back by ITAT for AYs 2006-07 to 2010-11 since both TPO and DRP had failed to consider detailed submissions made by assessee, which was so in the instant case as well.
Wipro GE Health Care Pvt Ltd v ACIT – TS-109-ITAT-2017 (Bang) – TP - ITA No. 406IBang/2016 dated 09.01.2017
1003. The Tribunal adjudicated on 2 grounds not considered in original order which was recalled pursuant to miscellaneous petition filed by assessee for AY 2008-09 and held that since assessee's claim [(i) TP-adjustment exceeded the AE's share of revenue (approximately Rs. 7.7 crores as against TP adjustment of Rs. 16 crores) and that reverse analysis could have been done by making the AE as the tested party and(ii) TPO failed to recognize that the compensation ratio between AE and assessee was commensurate with the FAR analysis of both parties] were not raised before DRP and the TPO and the issues involved were not properly addressed by authorities in earlier proceedings the same ought to have been remitted to the TPO to re-consider the issue after the assessee furnished requisite details.

Synechron Technologies Pvt Ltd v ACIT – TS-50-ITAT-2017 (Pun) – TP - ITA No. 2518/PUN/2012 dated 01.12.2017

1004. The Tribunal allowed the miscellaneous petition filed by assessee seeking correction of its previous order wherein the Tribunal set aside the order of the CIT(A) and directed for the selection of 2 comparables viz. Exensis Software Solutions and Thirdwave software Solutions on ground that they could not be excluded merely because of their high profit margin, noting that the assessee sought their exclusion on the ground of functional dissimilarity. Accordingly, it recalled the earlier order to consider assessee's claim for comparable exclusion on ground of functional dissimilarity and scheduled hearing on 23.02.2017.

Maxim India Integrated Circuit Design Pvt. Ltd vs ITO - TS-108-ITAT-2017(Bang)-TP - M.P. No.10S/Bang/2016 dated 13.01.2017

1005. The Tribunal set aside the order of the CIT(A) wherein he had directed the AO to exclude 3 functionally dissimilar companies viz. Exensys Software Solutions Ltd, Four Soft Ltd and Geometric Software Solutions Co Ltd from the list of comparables. The Tribunal held that as per the provisions of Section 251 of the Act the CIT(A) has the power to confirm / reduce / enhance or annul the assessee but does not have the power to remand the matter for fresh consideration. It held that the CIT(A) should not have remanded the matter to the AO and instead ought to have exercised his power under the Act to complete the assessment by excluding companies which were functionally dissimilar. Accordingly, it directed the AO to examine the comparability of the 3 companies on the basis of the submission made by the assessee and to find out whether these companies were functionally dissimilar to that of the assessee or not while making the ALP adjustment.

ITO Vs Crimsonlogic India Pvt. Ltd.- TS-143-ITAT-2017 (Bang) – TP - IT(TP)A No.1666/Bang/2013 dated 31.01.2017

1006. The Tribunal accepted the Revenue's contention that CIT(A)'s direction to exclude certain functionally dissimilar companies in light of guidelines laid down by Delhi Tribunal in Actis Advisers Pvt. Ltd. Vs DCIT, was beyond the mandate of Sec 251(1)(a) and held that the CIT(A) should not have restored the matter to the file of the AO with certain directions and that he ought to have decided the issue himself. Accordingly, it remitted the TP-issues raised vide both the assessee's and Revenue's appeals for AYs 2004-05 and 2005-06 to the file of CIT(A) for fresh adjudication.

DCIT vs. AOL Online India Pvt Ltd - TS-134-ITAT-2017(Bang)-TP - IT (TP)A Nos.1669 & 1670(Bang) 2013 dated 25-01-2017

DCIT vs. E4E Business Solutions Pvt. Ltd - TS-221-ITAT-2017(Bang)-TP - 1763/Bang/2013 (2004-05), 1781/Bang/2013 (2004-05) 1764/Bang/2013 (2005-06) 1782/Bang/2013 (Asst. Year 2005-06) dated 17-3-2017

1007. The Tribunal upheld the jurisdiction of the TPO in determining ALP of the alleged international transactions relating to AMP expenses which were not reported as an international transaction by the assessee (re-seller of Louis Vuitton Group products in India) in its Form 3CEB. Relying on the decision of the co-ordinate bench in Nikon India Pvt Ltd – TS-469-ITAT-2016(Del)- TP, it rejected the assessee's contention that as per CBDT Instruction No 3/ 2016, the AO ought to have first provided the assessee an opportunity of being heard before recording satisfaction in respect of AMP transaction and that the TPO could not have proceeded to undertake ALP determination without providing such opportunity and held that since in the instant case, it was not the AO who formulated his view on AMP expenses as an international transaction, the said Instruction was not applicable. As regards the contention of the assessee that as per Para 4.1 of the impugned Instruction, the TPO could proceed to determine the ALP of only those transactions which were referred to him, the Tribunal held that though the original jurisdiction of the TPO was confined to the international transactions referred to him by the AO for determination of ALP, such jurisdiction was extendable to other international transactions which came to his notice during the course of proceedings before him and that it was nowhere mentioned that the power of the TPO to determine the ALP of international transactions was

restricted to only those transactions referred by the AO alone. Accordingly, it held that there was no lack of jurisdiction in the instant case.

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

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

1008. The Court, relying on the decision in CIT vs. Kabul Chawla [[TS-494-HC-2015\(DEL\)](#)], dismissed the Revenue's appeal against the decision of the Tribunal wherein it had quashed assessments made by AO/TPO u/s 153A for AY 2008-09 pursuant to search and seizure operations, despite the fact that no new or incriminating material had been found during search and seizure proceedings [which took place in assessee's premises after completion of scrutiny assessment u/s 143(3)] and that the AO based upon existing material, referred the matter to TPO, who proposed TP adjustment on interest-free loans granted to AE. The Court observed that the scrutiny assessments concluded earlier were based upon queries, and assessee had disclosed all the materials which came to be reviewed subsequently in Sec 153A proceedings. Accordingly, it upheld the order of the Tribunal quashing the assessments.

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

1009. Where pursuant to the order passed by the TPO, the AO passed draft assessment order dated 07-02-2014 making TP-addition of Rs. 24.37 Cr and along with the impugned assessment order, the AO also issued notice of demand u/s 156 and show cause notice for levy of penalty u/s 271(1)(c), after recording satisfaction for initiating penalty proceedings u/s. 271(1)(c) r.w.s Explanation 7, the DRP refused to exercise its jurisdiction, holding that the draft assessment order was final order for all intent and purposes as it was issued along with demand and penalty notices. The Tribunal held that as per the provisions of Sec 144C, it was incumbent upon the AO to forward a draft assessment order to the assessee in the first instance, so as to enable the assessee to file objections before the DRP and that it was only after receipt of directions from the DRP, that the AO could pass the final assessment order and record satisfaction for initiating penalty proceedings. Noting that the AO issued demand notice u/s 156 and show cause notice for levy of penalty u/s. 271(1)(c) while passing the draft assessment order itself, the Tribunal held that in spirit the draft assessment order was the final assessment order and therefore quashed the assessment order dated 07.02.2014, and held that the subsequent proceedings arising there from were vitiated and null and void.

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

1010. The Tribunal set aside the order of the DRP for AY 2008-09 on TP-issues viz. regarding non-exclusion of certain comparables, non-inclusion of comparables, risk adjustment, ALP of Management fees, RPT Filter, Employee cost filter etc by holding the same to be cryptic, non-speaking and non-reasoned and thus remitted the issues to TPO for fresh decision after affording assessee adequate opportunity of being heard.

UL India Private Ltd vs DCIT - TS-207-ITAT-2017(Bang)-TP- IT(TP)A No. 1564(Bang) 2012 dated 03.03.2017

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

1011. Where the AO passed the final assessment order without issuing a draft assessment order as provided in section 144(C)(1), the Tribunal accepted the assessee's contention that, in view of the provisions u/s 144C(1), he ought to have been given an opportunity to present its objections before DRP on the basis of a draft assessment order, failing which the final order issued by AO was void-ab-initio. Relying on the decision of Zuari Cement Ltd. [TS-271-HC-2013(AP)-TP] wherein it was held that AO is mandated to first pass a draft assessment order,

communicate it to the assessee, hear his objection and then complete assessment, it held that the final order of the assessment was clearly contrary to section 144C of the Act.

Molex Mafatlal Micron Pvt Ltd (now merged with Molex India Ltd) vs DCIT - TS-191-ITAT-2017(Bang)-TP – 1170/ Ahd/2010, 1197/Ahd/2010 etc dated 10.01.2017

1012. The Tribunal held that where the due date for issuing the final assessment order as provided in section 144(C)(4) was February 28, 2011 (within one month from the end of the month in which either (a) the acceptance of the assessee is received or (b) the period of filing of objections under sub-section (2) expires and the assessee does not file such objections) but the order was actually issued on March 25, 2011, the order passed by AO was contrary to law and void –ab-initio.

Molex Mafatlal Micron Pvt Ltd (now merged with Molex India Ltd) vs DCIT - TS-191-ITAT-2017(Bang)-TP – 1170/ Ahd/2010, 1197/Ahd/2010 etc dated 10.01.2017

1013. The Court allowed assessee's writ and quashed the show cause notice issued to Li & Fung India (assessee) for AY 2007-08 pursuant to remand by Tribunal, proposing to reject comparables selected by the assessee in its TP-study noting that the Tribunal, relying on HC decision in assessee's own case for AY 2006-07, had directed TPO to determine ALP afresh by considering 'total cost' as cost base and not FOB value of goods sourced through assessee. The Court observed that when there was a remand on the basis of a specific finding (in this case, the untenability of shifting of the OP/TC to FOB) the TPO could not have travelled beyond it, given that there was no controversy ever about the inclusion of any comparable.

Li & Fung India Pvt. Ltd. Vs ACIT - TS-228-HC-2017(DEL)-TP - W.P. (C) 11596/2016, CM APPL.45660-61/2016 dated 08.03.2017

1014. Where the assessee had filed a letter on 3/3/2015 intimating change in address in respect of appeal for AY 2005-06 but had not filed a separate letter intimating address change in respect of appeal for subject AY 2009-10, the Tribunal allowed the assessee's miscellaneous petition, and recalled its ex-parte order dated 7/10/2016 for AY 2009-10, opining that not filing of separate letter about the change of address in respect of present appeal being in IT(TP)A No.2871Bang/20 14 for assessment year 2009-10 was an inadvertent mistake and hence, there was a reasonable cause for non-appearance of assessee on the date of hearing. Accordingly, as per Rule 24 of Income-tax Appellate Tribunal Rules 1963, it recalled its earlier order and fixed the appeal for hearing on May 24, 2017.

Maxim India Integrated Circuit Design Pvt. Ltd. vs. DCIT - TS-262-ITAT-2017(Bang)-TP - M.P No.351Bang/2017 dated 10-3-2017

1015. The Court dismissed Revenue's appeal against Tribunal's order remitting the inclusion of 6 comparables to TPO as the TPO failed to conduct the FAR analysis which was a prerequisite for selection of comparables. It considered the Revenue's submission that both the DRP and TPO had given reasons and sent notices as to why the six comparables had to be included for purposes of ALP determination and held that the Revenue was not prejudiced in the present matter as it was at liberty to argue all the submissions not foreclosed by the Tribunal. Thus, in absence of substantial question of law, it dismissed the appeals of the Revenue

Copal Research India Pvt Ltd [TS-229-HC-2017(DEL)-TP]

1016. The Division bench of the Court stayed the order of the Single judge dismissed the writ petition filed by the assessee on the issue of jurisdiction of TPO to examine the existence of international transaction without the AO making a particular finding that there was an international transaction within the meaning of Section 92B before referring the matter to the TPO. The Single bench had upheld the AO's reference to the TPO, holding that Section 92CA(1) did not require the AO to first come to a definite finding that there was an 'international transaction' within the meaning of Sec 92B before referring the matter to TPO. On further appeal, the Division bench was prima facie satisfied with the contention of the assessee viz. the AO should have determined as to whether the transactions involved came within the ambit of the international transactions or not before making reference to the TPO. Accordingly, it proposed to hear the entire appeal and stayed the operation of the judgment of the single bench.

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

1017. The Tribunal set aside the CIT(A)'s cryptic order with respect to the issue of selection of comparables and restored the matter to the CIT(A) for fresh decision by way of a speaking and reasoned order. It considered assessee's plea that various objections were raised before CIT(A) for exclusion of Bodhtree Consulting Ltd and Kals Information Systems Ltd but the CIT(A) had decided the matter only on the basis of assessee's objection that Bodhtree Consulting Ltd had abnormal profit margin. However, it rejected the assessee's contention that issue regarding exclusion of these two comparables on the ground that the issue was now covered by various Tribunal orders and held that it would do not like to promote a culture of not bringing on record all materials before the lower authorities.

VeriFone India Technology Pvt. Ltd. vs. ITO - TS-293-ITAT-2017(Bang)-TP - IT (TP) A No.300 (Bang) 2014 dated 17-03-2017

1018. Where the DRP upheld CUP method as Most Appropriate Method (MAM) instead of TNMM adopted by TPO, but, the AO/TPO passed final order without giving effect to DRP directions, the Tribunal deleted the TP addition in case of the assessee for AY 2010-11 and held that the AO/TPO acted in clear defiance and disregard to the binding directions of the DRP. It held that when the directions of DRP were binding then the TPO/A.O. were bound to give the effect to the directions of DRP irrespective of the fact whether the same are acceptable or not to the department. It held that the remedy to file appeal against the DRP's directions was available to the department when a final order is passed in pursuant to the directions of the DRP.

DCIT Vs Lenovo India Pvt. Ltd - TS-259-ITAT-2017(Bang)-TP - I.T. (T.P) A. No.511 /Bang/2015 dated 31.03.2017.

1019. The Tribunal set aside the order of the CIT(A) in the case of the assessee engaged in providing software service and directed the CIT(A) to re-adjudicate issues relating to functional comparability and application of filters in light of various tribunal rulings, noting that the CIT(A) had simply remanded the issues in light of Delhi Tribunal ruling in Actis Advisers P. Ltd. Vs. DCIT 20 ITR (Trib) 138. It observed that the findings reproduced by the CIT (Appeals) were only a broad guideline but not the factual finding on the comparability of the comparables selected by the TPO and contested by the assessee. Further, it held that the CIT(A) had no jurisdiction to remand the issue to AO/TPO and held that he was to decide it himself and that if he needed further verification of fact, a remand report could have been sought from the TPO.

Athena Semiconductors Pvt. Ltd. (merged with Broadcom India Pvt. Ltd.) Vs DCIT - TS-383-ITAT-2017(Bang)-TP - IT(TP)A No.1630/Bang/2013 dated 05.05.2017

1020. Tribunal rejected assessee's ground seeking to treat assessment order for AY 2008-09 passed in the name of amalgamated company as invalid for the reason that PAN mentioned in the order was that of the amalgamating company. The assessee submitted that on merger, the identity of Transferor company was lost and it ceased to exist in the eyes of law, rendering the assessment made in the name of non-existent company invalid. It observed that on bringing the fact of amalgamation to AO's notice, the case was transferred to the jurisdiction of AO under whom the amalgamated company's registered office was located. Further, it observed that mention of PAN was only to differentiate between amalgamated and amalgamation company.

BA Continuum India Private Limited vs Addl CIT [TS-396-ITAT-2017(HYD)-TP] ITA-1144/HYD/2014 dated 28.04.2017

1021. The Court allowed assessee's writ for AY 2007-08 and 2008-09 and set aside final assessment order passed by AO without first issuing draft assessment order as mandated by section 144C(1). It observed that the Tribunal had remanded TP issues in respect of assessee to the file of the AO who without passing a draft assessment order, issued a final assessment order under section 143(3) and issued demand and penalty notices. The Court relying on the decision in the

case of Vijay Television Pvt Ltd [TS-172-HC-2014(MAD)-TP] and ESPN Star Sports Mauritius S.N.C.ET Compagnie [TS-130-HC-2016(DEL)-TP], held that the failure by the AO to adhere to the mandatory requirement of section 144C(1) and first pass a draft assessment order would result in invalidation of final assessment order and the consequent demand notices and penalty proceedings. It rejected Revenue's contention that the failure to adhere to section 144C(1) requirement was a curable defect and that the matter should be remanded for passing draft assessment order. Accordingly the Tribunal set aside the demand notices issued by AO and penalty proceedings initiated by the AO.

Turner International India Pvt Ltd vs DCIT [TS-400-HC-2017(DEL)- 4269/2015-TP dated 17.05.2017

1022. The Tribunal relying on the decision in the case of Maximize Learning (P) Ltd [TS-43-ITAT-2015(PUN)-TP] held that the initiation of reassessment proceedings by the AO u/s 147/148 on the basis of adjustments made in TPO's order without initiation of scrutiny assessment u/s 143(2) was invalid as the AO was precluded from making a reference to the TPO u/s 92CA(1) of the Act for the purpose of computing arm's length price in relation to the international transaction where no assessment proceedings were pending in relation to the relevant assessment year.

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

1023. The Assessing Officer (AO) based on TPO order dated 29.10.2010 proposing TP adjustments of Rs.1.46 crores, issued notice u/s 148, which was served upon assessee on 24.11.2011. CIT(A) applying the second proviso to section 153(2), held that in respect of a notice served after 1.4.2011, the AO was required to complete assessment within 9 months from end of FY in which notice was served i.e. before 31.12.2011 order u/s 144c r.w.s 147 of the Act was passed on on 29.02.2012. The CIT(A) thus concluded that re-assessment order passed by AO was time barred. Tribunal upheld the order of CIT(A) wherein the CIT(A).

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

1024. The Tribunal rejected assessee's contention that AO's draft assessment order was a final assessment order (as it had computed tax liability in the said order and initiated penalty proceedings) and therefore bad in law. It held that assessee's reliance on the case of Vijay Television [107 DTR (Mad) 111] was not valid as in that case a corrigendum was passed by the AO in which it was stated that the order passed earlier as final assessment order had to be read and treated as draft assessment order. Accordingly, working out of tax liability did not make a draft order final and it was not a case of the assessee that demand notice was issued along with the draft assessment order

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

1025. The Tribunal quashed the assessment framed in the name of non-existent amalgamating company (Sapient Corporation Ltd) for AY 2011-12. It noted that pursuant to order of the Delhi High Court for merger (dated October 12, 2011 and January 6, 2012) the assessee stood dissolved without the process of winding up w.e.f April 1, 2011. Therefore it held that the notice issued by the AO under section 143(2) of the Act on M/s Sapient Corporation Ltd dated 17.09.2012. to initiate assessment proceedings for the assessment year 2011-12 was invalid as M/s Sapient Corporation Ltd had ceased to exist in the eyes of law and was non-existent on the date of initiation of assessment proceedings. Accordingly, relying on the decision of the Court in SPICE ENTERTAINMENT LTD [TS-830-HC-2011(DEL)-TP] it held that framing of assessment against a non-existing entity/person was a jurisdictional defect as there could not be any assessment against a 'dead person' and therefore held that the impugned assessment was bad in law and liable to be quashed being void ab initio. Since the assessment order was quashed being without valid jurisdiction, it held that other TP-issues raised by assessee were academic & infructuous. Accordingly, the issues were dismissed without deliberations on merits.

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

1026. The Tribunal held that a reference made by AO to TPO in cases where international transaction as per Form 3CEB was less than Rs 15 cr could not be held to be bad in law as there was no provision in the Act to that effect. Noting that in the instant case of the assessee (whose international transactions were less than 15 crore), the TPO had returned back the reference made by the AO on the ground that the value of transactions was less than 15 crore, it held that the assessee was correct in challenging the validity of the order of the AO who had proceeded to make his own addition. Accordingly, the Tribunal restored the matter to the TPO, directing him to pass a requisite order as per law, after providing adequate opportunity of being heard to the assessee

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

1027. The Court dismissed the assessee's writ petition challenging i) the DRP directions refusing to condone assessee's delay in filing objections before it and ii) the consequent final assessment order by AO making the TP-adjustment for AY 2012-13. The AO issued a draft assessment order dated 29.03.2016 confirming the TP addition on account of excess interest paid on CCDs, which was served on the assessee on the same day. The assessee filed objections before DRP on April 29, 2016, representing to the DRP that it had received the order only on 31.03.2016. The Court also observed that the assessee had deliberately submitted to the AO that it had filed the appeal/objection before DRP on 27.04.2016 (i.e. within time limit prescribed of 30 days from the day of service of Draft AO order), consequently preventing AO from passing the final assessment order u/s 144C(3). The DRP after receiving information from the AO rejected the objections on the basis that the assessee had filed the same beyond the specified period of 30 days (delay of 1 day) vide order dated 10.11.2016. Thereafter, AO passed a final assessment order on November 18, 2016 after incorporating the adjustment proposed by TPO. The Court rejected the assessee's contention that the final order of the AO was not in accordance with the provisions of Section 144C(13), since the DRP had not given any specific directions but had rejected assessee's objections on ground of delay and held that the dismissal or rejection of the objection and communication of the same was to be treated as a direction given by the DRP to the Assessing Officer to complete the assessment as per draft order. It also held that the that assessee was entitled to file an appeal before the Appellate Authorities as the AO's final order was well within the period of limitation.

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

1028. The assessee had entered into an international transaction for import of raw material and semi finished products from its AE. While computing its operating margin, the assessee had made adjustments with regard to the excise duty, power related adjustment, long period credit, adjustment for depreciation and Forex loss treating the same as non-operating, which was rejected by the TPO as a result of which the margin of the assessee was less than the comparables. Accordingly, the TPO made an adjustment to the proportionate operating cost of the assessee pertaining to its international transactions. The DRP had issued directions to the AO to work out the ALP cost for total cost base of the assessee instead of restricting it to proportionate AE cost. The Tribunal held that as per Section 144C(8) of the Act, the DRP was empowered to confirm or reduce or enhance the variations proposed in the draft Order but was not vested with the power to set-aside or issue direction under Sub-section 5 for further enquiry. Accordingly, the Tribunal remitted the issue to the file of the DRP directing it to conduct the enquiries and determine the amount of ALP on its own and to issue necessary directions to the AO/TPO to make the adjustments.

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

1029. The Tribunal set aside the TP- issues for AYs 2005-06 and 2008-09 and remitted the matter back to DRP for fresh adjudication. The TPO had proposed adjustment at entity level both vis-à-vis the marketing and distribution activities carried out by the assessee as well as item-wise adjustments towards AMP, product & brand development. In appeal, DRP confirmed AMP, product & brand development adjustment and directed TPO to exclude entity level adjustment.

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

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

1030. The Tribunal allowed Revenue's appeal against CIT(A)'s order for AY 2005-06 and remitted the entire TP-issue back to CIT(A) for fresh decision. Noting that CIT(A) had restored the comparability of certain functionally dissimilar companies back to the file of AO/TPO. It held that the entire matter had to go back to the file of CIT(A) for a fresh decision **as the CIT(A) should have decided the matter himself instead of restoring it to the file of AO.** Further, it rejected Rs. 1-200 cr turnover filter applied by CIT(A) on the ground that the Tribunal had been consistently adopting a filter of 1/10th to 10 times the assessee's turnover.

ITO vs Intellinet Technologies India Pvt Ltd-TS-527-ITAT-2017(Bang)-TP-ITA No. 1613/bang/2013 dated 09.06.2017

1031. The Tribunal, noting that the assessee had raised TP-grounds/additional grounds relating to comparability analysis, risk adjustment, application of various filters, restored TP-issues back to the AO/TPO for fresh adjudication for AY 2007-08 and 2008-09 **as** DRP's order was not speaking and reasoned.

Target Corporation Ltd vs. DCIT-TS-546-ITAT-2017(Bang)-TP- IT(TP)A Nos.1561 & 1562(B)/2012 dated 09.06.2017

1032. Noting that the AO had not given effect to DRP directions while passing the final assessment order to exclude ICC International Agencies Ltd from the list of comparables, the Tribunal dismissed Revenue's appeal for AY 2011-12 and held that an appeal before the Tribunal was maintainable only when the final assessment order was passed in pursuance of and conformity with the directions issued by DRP. Referring to the provisions of section 144C it held that AO/TPO was bound to give effect to DRP's directions irrespective of the fact whether the same are acceptable to the Revenue or not and thus dismissed the appeal.

DCIT vs Coriant Communication India Pvt Ltd-TS-543-ITAT-2017(BANG)-TP-IT(TP)A No.652/Bang/2016 dated 02.06.2017

1033. The Tribunal, noting that the DRP had not considered assessee's ground regarding TPO wrongly invoking provisions of section 92CA as the reference under the section was void ab initio being invoked without satisfying the conditions therein, directed TPO to decide that aspect first, remitted the TP-issue back to the file of AO/TPO for fresh decision. Further, it held that since the main issue relating to TPO's decision to invoke the provisions of section 92CA was yet to be decided, the other grounds relating to TP adjustment of Rs. 2.34crores should also be decided afresh by the AO/TPO after deciding the technical aspect of the matter regarding validity to invoke the provisions of sec.92C(3)(c) of the Act, 1961 and accordingly, remitted the same.

Maxim India Integrated Circuit Design Private Ltd v DCIT-TS-519-ITAT-2017(BANG)-TP-IT(TP)A No. 1660(B)2016 dated 04.04.2017

1034. The Tribunal, relying on the decision in the case of International Air Transport Association [TS-62-HC-2016(BOM)-TP] and Zuari Cement Ltd vs ACIT[TS-271-HC-2013(AP)-TP] dismissed Revenue's appeal against CIT(A) order quashing final assessment order passed by AO without

passing draft order on the ground that a final assessment order, not preceded by draft order was without jurisdiction, null, void and unenforceable. Noting that the TPO had made an adjustment after which AO passed the final assessment order u/s 143(3) without the draft order mandated u/s 144C(1), it held that the final assessment order was in violation of provisions of section 144C and therefore liable to be quashed.

DCIT vs Fiat India Automobiles Limited-TS-560-ITAT-2017(PUN)-TP-ITA No. 853/PUN/2015 dated 13.04.2017

1035. The Apex Court dismissed the Revenue's appeal against the order of the High Court wherein the High Court set aside the order of the TPO passed without giving the assessee an opportunity to cross-examine the authorized personnel of companies whose segmental data had been relied on for arriving at ALP.

DCIT v Cashedge India Pvt Ltd – TS-593-SC-2017-TP-IA no. 53300/2017 dated 21.07.2017

1036. The directions from DRP were received by AO on 29.12.2015 who was required to pass final assessment order on or before 31/01/2016, however the final assessment order was passed by AO on 18/02/2016 which was beyond the period to period prescribed u/s 144C(13) (i.e one month from the end of the month in which directions from DRP were received by AO). The Tribunal applying the provisions of section 144C, dismissed assessee's preliminary ground for quashing final assessment order passed beyond the time limit prescribed u/s 144C (13) pursuant to DRP directions for AY 2011-12 and held that AO did not have any discretion while passing the assessment order except to follow the directions of DRP and therefore it was not a jurisdictional issue. It held that since the fate of the proceedings initiated u/s 143(2) r.w.s. 144C was well known to the assessee as DRP had already passed the directions along with a copy to assessee, no prejudice was caused to assessee. Further relying on the decision in the case of Rain Cements, it distinguished the language of section 153 which expressly prohibited passing order beyond the prescribed therein, and held that section 144C did not provide for such issue and therefore the proceedings could not be declared null and void.

The Himalayan Drug Co vs DCIT-TS-566-ITAT-2017(Bang)-TP-ITA No. 807/bang/2016 dated 21.06.2017

1037. The Tribunal, noting that the DRP had not discussed the functional profile of each company sought to be excluded or included by assessee individually, remitted the matter to the file of DRP for fresh adjudication after providing an adequate opportunity of being heard to the assessee. Further, in respect of assessee's ground on rejection of TP documentation and use of incorrect data/ information in ALP computation, it held that since assessee had filed a rectification application which was pending before the DRP, it should not have raised the ground before Tribunal, **accordingly** it directed the DRP to adjudicate these grounds on merits.

Symphony Marketing Solutions India P Ltd vs ITO-TS-582-ITAT-2017(BANG)-TP-I.T.(TP)A no.336/bang/2015 dated 16.06.2017

1038. The Tribunal relying on the decision in assessee's own case for AY 2011-12, held that where the amalgamating company was not in existence when the assessment order was passed, the assessment was void ab initio. It held that amalgamating company i.e. M/s. Suzuki Powertrain India Ltd. was not in existence on the date of passing Assessment Order. Hence, the Assessment proceedings as well as the Assessment order itself were not valid. Accordingly, it quashed the assessment framed in the name of erstwhile entity (i.e. Suzuki Powertrain India Ltd.) which amalgamated with the assessee (Maruti Suzuki India Ltd) for AY 2012-13.

Maruti Suzuki India Ltd. (As Successor in interest of erstwhile M/s. Suzuki Powertrain India Ltd- Since Amalgamated) vs. DCIT-TS-600-ITAT-2017(DEL)-TP-ITA No. 902/del/2017 dated 06.04.2017

1039. Where the TPO/DRP proposed an adjustment in the assessee's manufacturing segment on the basis that segmental/sub-segmental accounts were required to be statutorily audited and allocation of interlaced expenses was not properly done, the Tribunal remitted the matter to the file of AO/TPO observing that rulings relied on by assessee regarding non-requirement of

furnishing audited segmental/sub-segmental accounts were ignored by TPO/DRP and opined that DRP should have given reasons as to how the TP study demanded auditing of assessee's accounts.

Fresenius Kabi India Private Limited vs DCIT-TS-625-ITAT-2017(PUN)-TP-ITA No.235/pun/2013 dated 16.06.2017

1040. The Tribunal restored **the** determination of ALP in respect of assessee's international transactions of marketing and support services for the purpose of external commercial borrowings (ECB) issued by assessee's head office to the TPO as the TPO proposed an adjustment without issuing show-cause notice to assessee. It held that the TPO's action was in violation of principles of natural justice and that the CIT(A) should have adjudicated the issue after calling for the remand report from TPO which was not done in the instant case. Accordingly, it restored the matter to the file of TPO.

DDIT vs The Bank of Tokyo Mitsubishi UFJ Ltd-TS-634-ITAT-2017(DEL)-TP-ITA No. 3754/del/2014 dated 03.08.2017

1041. The Court allowing assessee's writ petition, set aside the final assessment order passed by AO without first issuing draft assessment order as mandated by section 144C. Noting that in the first round of proceedings, Tribunal had remanded TP issues in respect of assessee to the file of TPO and directed to pass a speaking order after considering the additional details filed by assessee. The TPO then undertook a fresh benchmarking analysis and passed an order dated 31st March, 2017 proposing an adjustment of Rs. 1,19,49,680/- to the Arm's Length Price ('ALP') determined by the assessee. The AO passed a final assessment order on 11th May, 2011 instead of passing a draft assessment order. Applying the provisions of section 92CA(3) of the Act, the Court held that it was incumbent upon the AO to pass a draft assessment order under section 144C of the act which was overlooked by the AO depriving the assessee of an opportunity of questioning the draft assessment order under section 144C of the act before the DRP.

Control Risks India Pvt Ltd vs DCIT-TS-603-HC-2017(DEL)-TP-W.P.(C) 5722/2017 & C.M.NO.23860/2017 (stay) dated 27.07.2017

1042. The Tribunal, noting that the AO passed a draft assessment order u/s 143(3) r.w.s 144C but also issued a demand notice and initiated penalty proceedings held that the assessment order passed was invalid in law. The procedure laid down in section 144C had not been followed. It held that the draft AO order issued was as good as a final AO order as it was accompanied with a notice of demand which was in contravention to the provisions of Section 144C which provides that the AO was obliged to first pass a draft order and then a final order after the assessee selected its preferred remedy i.e DRP or CIT(A). Therefore, it quashed the draft assessment order.

DCIT vs Reha Polymers Pvt. Ltd-TS-642-ITAT-2017(PUN)-TP-ITA no. 566/PUN/2015 dated 14.06.2017

1043. The Court, upheld Tribunal's order quashing of assessment order for AY 2009-10 making transfer pricing adjustment without following DRP procedure laid down u/s 144C. It rejected revenue's contention that it was a mere procedure and thus a curable defect. Referring to the provisions of section 144C which provide that the AO shall forward a draft of the proposed order of assessment to the assessee if any variation was proposed in income or loss which may be prejudicial to the assessee, it held that the statutory provisions made it abundantly clear that the procedure was of great importance and mandatory. Such an opportunity could not be taken away by treating it as purely procedural in nature.

CIT vs C-Sam (India) Pvt Ltd-TS-626-HC-2017(GUJ)-TP dated-ITA No. 542 of 2017 31.07.2017

1044. The Tribunal upheld the DRP's power to propose TP adjustment (in respect of intra-group services) despite AO/TPO not proposing such adjustment in the draft order and rejected the assessee's contention that DRP overstepped its jurisdiction. Referring to section 144C(8) read with the explanation (inserted retrospectively FROM April 1 2000), it held that the DRP's power

was co-terminus with that of the AO/TPO and opined that if the language of the provision was read as disabling the DRP to exercise the power of enhancement, it would amount to diluting the power, which the statute had expressly granted. The Tribunal rejected assessee's contention that the only remedy for mistakes in draft order was by revision u/s 263.

Bausch & Lomb India Pvt. Ltd vs ACIT-TS-667-ITAT-2017(DEL)-TP-ITA NO. 1399/DEL/2017 dated 25.08.2017

1045. The Court confirmed Tribunal's order for AY 2009-10, holding that AO exceeded the jurisdiction by making new disallowance while passing order u/s 144C(13) giving effect to DRP directions when such disallowance had not emanated from the draft assessment order or from the directions of DRP.

CIT vs Sanmina SCI India Pvt. Ltd. -TS-643-HC-2017(MAD)-TP-567 of 2016 dated 08.08.2017

1046. Where the AO made a reference to the TPO without providing an opportunity of being heard to the assessee or passing a reasoned order, the Court held that though the CBDT instruction No. 2/2016 dated March 10, 2016 was issued subsequent to AO's decision to refer the matter to TPO, the applicability of principles of natural justice and requirement of AO to decide on a jurisdictional fact could not be circumvented. Accordingly, it set aside the reference made by AO to TPO.

PCM Strescon Overseas Ventures Ltd vs DCIT-TS-666-HC-2017(CAL)-TP-WP no. 214 of 2016 dated 11.08.2017

1047. Where the grounds of appeal filed by the Revenue did not emanate from the DRP order, as no directions were issued therein by the DRP as alleged by Revenue in its grounds, the Tribunal dismissed the appeal of the Revenue.

DCIT vs Subex Ltd-TS-569-ITAT-2017(Bang)-TP-IT(TP)A No.239/Bang/2014 dated 31.05.2017

1048. Relying on the decision in the case of Turner International India Pvt Ltd [TS-400-HC-2017(DEL)-TP], wherein it was held that it was mandatory for the AO to pass the draft assessment order u/s 144C prior to issuing final assessment order, the Court held that even where the Tribunal had remanded the matter, the AO ought to have passed the draft assessment order under section 144C. Further, it held that section 292B of the Act cannot save an order not passed in accordance with the provisions of the Act since it was an incurable illegality. Accordingly, it held that the final assessment order passed by the AO was without any jurisdiction.

JCB India Ltd vs DCIT-TS-706-HC-2017(DEL)-TP W.P. (C) No. 3399/2016 - dated 07.09.2017

1049. The Tribunal set aside the CIT's order u/s 263 wherein the CIT held that since assessee had not entered into international transaction, the last date for filing of return of income was September 30 as opposed to November 30 and directed the AO to pass a consequential order. It observed that the assessee had disclosed transaction of 'reimbursement paid/payable by AE' in the annexure to Form No. 3CEB and similar transaction was also considered as an international transaction by the TPO for subsequent AY. Further, it also noted that the CIT confused the disclosure of the reimbursement with another note to return referring to issue of shares at a premium. Accordingly, it concluded that the assessee's return filed on November 28, 2011 was well within the due date.

Bangla Entertainment Private Limited vs Pr. CIT-TS-674-ITAT-2017(KOL)-TP dated 23.08.2017

1050. The Tribunal, allowed Revenue's appeal challenging CIT(A)'s direction to AO/TPO to re-compute/reconsider ALP determination without discussing merits of the case. It held that it was incumbent upon the CIT(A) to adjudicate the issue and it was beyond its scope to set aside the matter to the file of AO for recalculation. Accordingly, the Tribunal remanded the matter back to the file of CIT(A) to adjudicate the issue after giving the assessee an opportunity of being heard.

DCIT vs. Wipro GE HealthCare Ltd-TS-712-ITAT-2017(Bang)-TP-IT(TP)A no. 1392/bang/2013 dated 18.08.2017

1051. The Court, dismissed Revenue's appeal against Tribunal's order wherein the assessment made by the AO was quashed being void, as it was made in the name of the erstwhile non-existing entity which was amalgamated with Maruti Suzuki India Ltd w.e.f april 1 2012.

Pr CIT vs. Maruti Suzuki Ltd (Successor of Suzuki Powertrain India Ltd)-TS-690-HC-2017(DEL)-TP- ITA No. 65/2017 dated 04.09.2017

1052. The Tribunal set aside DRP's cryptic & non-speaking order on TP-issues for assessee providing data management services to AEs, since the order of DRP was cryptic and not a speaking / reasoned order.

Symphony Marketing Solutions India P Ltd -TS-734-ITAT-2017(Bang)-TP-I.T(TP).A No.336/Bang/2015) dated 16.06.2017

1053. Since there was a discrepancy in the turnover reflected in the assessee's Transfer Pricing study (Rs.3.97 crore) and value of international transaction in the additional ground of appeal filed by the assessee (Rs. 6.13 crore), the Tribunal remitted the matter to the AO / TPO for re-consideration noting the assessee's submission that a fresh Transfer Pricing study had to be conducted due to the aforesaid error.

Gameloft Software Private Limited vs ACIT-TS-660-ITAT-2017(HYD)-TP-ITA No.25 of 2012 dated 08.09.2017

MAP

1054. The assessee had entered into international transactions with its AE in four countries i.e USA, Canada, UK and Australia. During the pendency of the cross appeals before CIT(A), the competent authorities of India and USA arrived at a resolution under MAP resolving the TP adjustment issue arising in the appeal. Assessee withdrew its appeal before the Tribunal insofar as it related to software development services provided by assessee to its AE in USA and Canada as the said issue was covered under MAP. The assessee contended that the markup of 17.5% for USA and Canada should also be applied in case of UK and Australia also. The Tribunal noted that the TPO had determined the ALP of transactions undertaken by the assessee with all AEs together and not considered ALP of different transactions for AEs of different countries. The Tribunal relying on the ruling in the case of JP Morgan Services (P.) Ltd [TS-578-ITAT-2015(Mum)-TP held that whatever margin had been applied through MAP with respect to major transactions, should also be applied for the remaining similar transactions not covered under MAP and therefore, applied the markup of 17.5% approved in MAP with USA and Canada on assessee's IT services transactions with AEs in UK and Australia.

CGI Information System and Management Consultants Pvt Ltd vs DCIT TS-333-ITAT-2017(Bang)-TP- IT(TP)A No.439/Bang/2011 dated 21.04.2017

1055. Where the TP-issue under dispute was resolved under MAP proceedings as per which Indian Government agreed to withdraw TP-adjustment to the extent of Rs. 34.6 lakhs (out of adjustment of Rs. 1.04 Cr) while UK agreed to relieve the remaining adjustment considering assessee's under-utilization of capacity of 65% as against comparable's average of 40%, the Tribunal held that the order passed by the authorities below were not required to be adjudicated as the MAP resolution shall prevail over directions/order passed by the authorities below. Accordingly, it dismissed appeals filed by assessee and Revenue as withdrawn.

DCIT v British Engines (India) P. Ltd-TS-785-ITAT-2017(Bang)-TP dated 23.08.2017

1056. Where the TP issue under consideration was already covered by MAP resolution reached between India and USA competent authorities wherein 15.75% was accepted as appropriate ALP (by directing re-computation of the operating revenue and operating cost on the basis of the audited financials) as against TPO's margin of 36.37% of the comparables and the coordinate bench in assessee's own case for AY 2006-07 to 2009-10 had held that arm's length mark-up agreed under MAP for transactions with US entities should also be applied for transactions with

non-US entities as the transactions were considered together, the Tribunal remitted the TP adjustment in assessee's ITeS segment for adjudicating the issue afresh in terms of resolution reached under MAP agreement for AY 2010-11 to the file of TPO.

DCIT vs J.P Morgan Services Pvt. Ltd-TS-795-ITAT-2017(Mum)-TP dated 11.04.2017

1057. The Tribunal, noting that application for resolution of TP issues was filed under Mutual Agreement Procedure (MAP) consequent to which order dated 28.10.2015 was passed, dismissed TP grounds as infructuous.

Affiliated Computer Services of India Pvt. Ltd-TS-889-ITAT-2017(Bang)-TP I.T. (T.P.) A. No.98/Bang/2015 dated 24.10.2017

1058. The Tribunal considering assessee's submission that TP issues were resolved under MAP and therefore grounds of TP issues were being withdrawn, dismissed assessee's appeal as withdrawn for AY 2010-11.

Quintiles Research (India) Pvt. Ltd vs DCIT-TS-950-ITAT-2017(bang)-TP IT(TP)A No 417/bang/2015 dated 29.11.2017

1059. The Tribunal dismissed cross appeals of assessee (engaged in providing software development/research and development services to foreign AEs) and Revenue for AYs 2007-08 to 2010-11 as the TP issues were resolved under India-USA MAP.

Symantec Software India Private Limited - TS-1054-ITAT-2016(PUN)-TP

1060. The Tribunal dismissed assessee's appeal for AY 2008-09 as the TP issue relating to royalty paid by assessee to AE was resolved under India-Japan MAP, wherein royalty payment was agreed to be allowable at 1.15% and since the appeal had become infructuous as on date, they were dismissed as not pressed.

Anchor Electricals Pvt Ltd [TS-325-ITAT-2017(Mum)-TP I.T.A.No.6930/mum/2012 and I.T.A.No. 326/mum/2012 dated 26.04.2017

1061. The Tribunal dismissed assessee's and Revenue's cross appeals for AY 2008-09 as the TP issues were already resolved under MAP proceedings as per which relief of Rs 48.20 lakhs was allowed from TP adjustment.

Agile Software Enterprises Private Limited vs ITO [TS-395-ITAT-2017(Bang)-TP-IT(TP)ANo.1342/B/2013 dated 11.04.2017

1062. The Tribunal dismissed assessee's appeal for AY 2004-05 as the TP-issue pertaining to payment of engineering fees was AE resolved under MAP. Noting the assessee's submission that the TP-issue was resolved as per MAP order dated July 16, 2015 under Indo-Japan DTAA and since the assessee did not press the TP grounds and requested for it to be dismissed in view of MAP resolution, it held that the grounds were infructuous and therefore were dismissed.

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

1063. The Tribunal dismissed assessee's appeal as the TP issues were already resolved under MAP proceedings as per which relief of Rs 49.39 crores was allowed from TP adjustment.

Texas Instruments (India) Pvt Ltd vs DCIT-TS-524-ITAT-2017(Bang)-TP-IT(TP)A nos. 1478/bang/2010 and 1603/bang/2014 dated 19.05.2017

1064. The Tribunal dismissed assessee's appeal as the TP issue relating to technical assistance fee was already resolved under MAP proceedings as per which relief of Rs 9.89 crores was allowed from TP adjustment.

Toyota Kirloskar Auto Parts Pvt. Ltd vs Dy.CIT-TS-563-ITAT-2017-TP-ITA No. 118/bang/2014 Dated 03.05.2017

1065. Where the assessee had accepted a margin of 24% under MAP resolution for USA transactions (2/3rd of the total transactions) and contended that the margin was 10.1% for the remaining 1/3rd non-US transactions was at ALP, the Tribunal held the onus to bring out the distinction between the USA Transactions and the non-USA Transactions and to make out a case for adopting different margins as ALP for the USA and Non-USA Transactions was on the assessee. Further, it desisted from applying the ratio of CGI Information Systems and Management Consultants Pvt wherein the Tribunal had applied the margin for USA transactions to non-USA transactions, highlighting that the percentage of non-USA transactions in that case was only 4% as against 33.33% in the present case. Accordingly, it remanded matter back to CIT(A) to decide whether the profit margin under USA MAP needs to be applied to non-USA transactions in case of ITeS provider.
Global e-Business Operations Pvt. Ltd. vs. DCIT-TS-654-ITAT-2017(Bang)-TP dated 26.07.2017
1066. The Tribunal, noting that application for resolution of TP issues was filed under Mutual Agreement Procedure (MAP), allowed assessee's appeal for statistical purposes for AY 2007-08 and held that nothing was required to be adjudicated in respect of the TP issues.
Flowserve India Controls P. Ltd vs DCIT-TS-665-ITAT-2017(Bang)-TP-IT(TP)A no. 1623/bang/2012 dated 23.08.2017
1067. The Tribunal admitted assessee's additional ground on exclusion of Wirpo BPO and Maple eSolution for AY 2005-06. Further, relying on the decision in assessee's own case for AY 2004-05, it directed the CIT(A) to determine whether the profit margin adopted under USA MAP could be applied to non-USA transactions since the assessee as well as TPO had benchmarked both set of transactions together. In respect of comparables, it remitted Vishal Information Technologies Ltd and Wipro BPO Ltd to the file of CIT(A) for verifying the functional comparability vis a vis the assessee.
DCIT v Global e-Business Operations Pvt. Ltd.-TS-726-ITAT-2017(Bang)-TP-JT(TP)A No.298/Bang/2014 dated 16.08.2017
1068. The Tribunal, considering assessee's submission that its entity level PLI was 6.43% as against PLI of 4.5% agreed in Advance Pricing Agreement (APA), remitted the TP issue to the file of AO to verify the claim of the assessee. It noted that assessee had entered into an APA with CBDT on February 2, 2017 under which appropriate PLI was agreed to be operating profit margin to sales and arm's length margin was agreed at 4.5% and that APA contained provisions for rollback from AY 2010-11 to AY 2013-14, thus covering the subject AY 2012-13.
DIC Fine Chemicals Pvt. Ltd vs. DCIT-TS-683-ITAT-2017(Kol)-TP-ITA no. 446/kol/2017 dated 25.08.2017
1069. The Tribunal, noting that Competent authorities of India and USA had agreed upon a framework to resolve pending TP cases relating to AY 2008-09 pursuant to which relief of Rs. 65.58 crores had been computed w.r.t adjustment made by TPO in respect of international transactions of IT enabled customer care and employee care support services segment, it set aside TP-issue to the file of AO to be adjudicated in accordance with MAP.
ACIT vs Convergys India Services Pvt. Ltd-TS-695-ITAT-2017(DEL)-TP-ITA No. 2194/del/2014 dated 31.08.2017
1070. The Tribunal, noting that application for resolution of TP issues was filed under Mutual Agreement Procedure (MAP), allowed assessee's appeal for statistical purposes for AY 2008-09 and held that nothing was required to be adjudicated in respect of the TP issues.
Flowserve India Controls P. Ltd vs. DCIT-TS-714-ITAT-2017(Bang)-TP-IT(TP)A no. 1623/bang/2012 dated 23.08.2017
1071. The Tribunal, noting that assessee withdrew TP grounds because of the settlement of dispute under Mutual Agreement Procedure (MAP), dismissed cross appeals filed by Revenue and Assessee as withdrawn.

GKN Driveline (India) Ltd vs DCIT-TS-739-ITAT-2017(DEL)-TP-ITA No. 1416/del/2015, 1616/del/2015 and 843/del/2016 dated 12.09.2017

1072. The Tribunal, noting assessee's submission that underlying issues were resolved bilaterally through India-USA MAP proceedings which was given effect to by AO & and that the Revenue had no objection against assessee's withdrawal of grounds, allowed the assessee to withdraw appeal for AY 2007-08.

Quintiles Research (India) P Ltd vs DCIT-TS-732-ITAT-2017(bang)-TP- I.T(TP).A No.1162/Bang/2011 dated 22.09.2017

1073. Where the underlying transfer pricing issues were resolved bilaterally through India-USA MAP proceedings which was given effect to by the AO, the Tribunal, noting and that the Revenue had no objection against assessee's withdrawal of grounds, allowed the assessee to withdraw appeal for AY 2006-07

Quintiles Research (India) P Ltd vs DCIT-TS-755-ITAT-2017(bang)-TP- I.T(TP).A No.2/Bang/2011 dated 22.09.2017

1074. The Tribunal considering assessee's submission that TP issues were resolved under MAP and therefore grounds of TP issues were being withdrawn, dismissed assessee's appeal as withdrawn for AY 2009-10.

DCIT v Flowserve India Controls Pvt. Ltd-TS-1045-ITAT-2017(bang)-TP-IT(TP)A No. 136/bang/2014 dated 03.11.2017

1075. Since the assessee had entered into a unilateral APA with CBDT and the settlement was executed for 5 years from AYs 2015-16 to 2019-20 and the assessee submitted to withdraw the appeal for the impugned assessment year 2011-12, the Tribunal dismissed the assessee's appeal.

First Advantage Global Operating Center Pvt. Ltd (Formerly known as First Advantage Offshore Services Pvt. Ltd) vs. ACIT-TS-1050-ITAT-2017(Bang)-TP IT(TP)A No.198/Bang/2016 dated 10.11.2017

1076. Since the assessee contended that international transactions for the subject AYs were identical to those in AYs 2010-11 to 2018-19 which were part of APA proceedings (including rollback years) and the assessee contended that the TP-adjustment ought to have been made as per the same terms as agreed in APA proceedings, the Tribunal relying on the decision in assessee's own case for AY 2009-10 wherein the issue was remitted back to the file of TPO to decide the issue afresh in accordance with terms and conditions of APA, remitted the issue of computation of ALP of to the AO for fresh consideration.

Abicor Binzel Production (India) Pvt. Ltd vs. DCIT-TS-1036-ITAT-2017(PUN)-TP dated 15.12.2017

1077. Since the grounds raised regarding TP adjustment of Rs. 12.48 crores were resolved under Indo-Japan MAP resolution between competent authorities of India and Japan, the Tribunal allowed assessee to withdraw the TP grounds and also dismissed Revenue's TP related appeal as not pressed.

Toyota Kirloskar Auto Parts Private Ltd vs DCIT-TS-1073-ITAT-2017(Bang)-TP- IT(TP)A No. 1024 & 1029 / bang / 2014 dated 22.12.2017

Penalty

1078. The Tribunal remitted the issue of imposition of penalty under section 271AA of the Act (for non-maintenance of documentation required under TP regulations) to the file of the AO, noting that the subject matter of appeal was already adjudicated in the quantum appeal by the Tribunal wherein the matter was remitted to the file of the TPO for fresh consideration of comparables by considering comparables who sold garments outside India as opposed to the comparables

selected by the assessee i.e. companies who sold garments within India. Accordingly, since the Tribunal had remitted the matter in the quantum appeal, it remitted the issue to the file of the AO directing him to determine the penalty issue after determining the quantum appeal.

Greenland Exports Pvt Ltd v ACIT – TS-25-ITAT-2017 (Chny) – TP - I.T.A.No.2633/Mds./2016 dated 25.01.2017

1079. Where the TPO insisted for segment wise P&L account even though the assessee had explained the practical difficulty in furnishing the same and instead of determining ALP, TPO went ahead and levied penalty u/s 271G, the Tribunal upholding CIT(A)'s deletion of penalty u/s 271G imposed on the assessee (diamond manufacturer and traders) for not complying with the statutory obligation cast upon it to furnish requisite details for correctly benchmarking the international transactions. Noting that it was extremely difficult to identify which rough diamond got converted into which polished diamond (unless the single piece rough diamond happened to be of exceptionally high carat value, therein making the tracing out and identification of the polished diamond physically possible and convenient), held that though assessee may not have effected absolute compliance to the directions of the TPO and furnished all the requisite details as were called for by him on account of practical difficulties, failure to the said extent can safely be held to be backed by a reasonable cause, which would bring the case of the assessee within the sweep of Sec. 273B. Accordingly, it dismissed Revenue's appeal.

ACIT vs. D. Navinchandra Exports Pvt Ltd-TS-862-ITAT-2017(Mum)-TP dated 25.10.2017

1080. Noting that Expl. 7 to Sec. 271(1)(c) refers to term 'good faith' along with 'due diligence', the Tribunal held that as long as no dishonesty is found in the conduct of the assessee, and the ALP was determined in accordance with the scheme of section 92C, deeming fiction under Explanation 7 to section 271(1)(c) could not be invoked, and deleted the concealment penalty levied with respect to TP adjustments in respect of disallowance of Rs 3.31 cr for intra-group services for AY 2010-11. Noting that grounds on which ALP-determination was rejected are debatable and assessee had obtained TP study from outside expert, objectivity of which was not called in question, Tribunal held that lack of due diligence in determining the ALP is neither indicated nor can be inferred.

Halcrow Consulting India Pvt Ltd vs DCIT-TS-848-ITAT-2017(DEL)-TP

1081. Where the AO had accepted income declared by assessee and neither AO/TPO had issued notice u/s 92D(3) to assessee, the Tribunal relying on the decision in the case of Netsoft India Ltd [TS-376-ITAT-2013(Mum)-TP] and Leroy Somer & Controls (India) Pvt. Ltd. [TS-249-HC-2013(DEL)-TP], where in it was held that penalty u/s 271G, for failure to furnish information u/s 92D, could not be imposed unless notice was issued specifying the information to be produced by person entering into an international transaction and post which no information is provided by the said person, deleted the penalty of Rs. 48.70 lacs levied on assessee u/s 271G for failure to furnish information/documents before TPO u/s 92D for AY 2008-09.

Cadbury Schweppes Overseas Ltd vs. ADIT-TS-865-ITAT-2017(mum)-TP ITA No. 5318/MUM/2014 dated 31.10.2017

1082. Where the assessee had failed to properly benchmark payment of management fees and had not contested its disallowance before the CIT(A) and the Assessing Officer had imposed penalty u/s 271(1)(c) in respect of disallowance of cost allocation of management expenses, the Tribunal relying on the Apex Court ruling in the case of Reliance Petroproducts wherein it was observed that merely because an assessee had claimed an expenditure, which claim was not accepted or was not acceptable to the revenue, that by itself would not attract penalty u/s 271(1)(c), held that it was obligatory for the AO to justify the imposition of penalty. Accordingly, it quashed the penalty imposed on the assessee.

Fuchs Lubricants (India) P Ltd vs DCIT-TS-913-ITAT-2017(mum)-TP / I.T.A. No. 5111/Mum/2015 dated 25.10.2017

1083. The Tribunal, reversing CIT(A)'s order, deleted penalty u/s 271G for failure of assessee to furnish details/documentation of international transactions (IT and ITES services) within the time provided in the notice u/s 92D for AY 200809. It noted that (a) despite a genuine request made by the assessee before the departmental authorities for transfer of jurisdiction (on account of merger with another group entity and transfer of principal place of business) and regular follow

up, no action was taken nor any intimation was given to the assessee that such a transfer was not possible and (b) the assessee had requested the TPO to keep the matter in abeyance for the reason that it had been following the transfer of its file from Delhi to Bangalore (c) penalty was imposed by the TPO on the assessee of Rs. 12.71 crores even though all international transactions were found to be at arm's length. Accordingly, the Tribunal held that assessee had a reasonable cause for not filing details before given date and therefore, penalty was not sustainable u/s 271G r.w.s 273B

NTT Data Global Delivery Services Ltd (formerly known as Keane India Ltd vs. ACIT-TS-872-ITAT-2017(DEL)-TP ITA No.:-6905/Del/2014 dated 07.11.2017

1084. The Tribunal deleted penalty imposed u/s 271G for non-filing of documents and held that penalty proceedings were invalid absent issue of notice to assessee u/s 92D(3) requiring the assessee to furnish such information or documents. Reliance was placed on the Tribunal ruling in Cargill India Pvt Ltd wherein it was held that the AO had to issue a notice u/s 92D(3), requiring assessee to furnish any information or documents and only on the failure of assessee to furnish the same, proceedings u/s 271G could be initiated.

Transport Corporation of India Ltd v ACIT – TS-41-ITAT-2017 (Hyd) – TP -ITA No.188/Hyd/2016 dated 11.01.2017

1085. Where the assessee engaged in the business of trading, carried on manufacturing for the first time in consequence of entering into business agreement with its AE and adopted TNMM as the most appropriate method and the TPO adopting CUP method determined the ALP as Nil, which resulted in reduction of losses of the assessee consequent to which, penalty u/s 271(1)(c) was levied, the Court confirmed the Tribunal's order deleting penalty levied u/s 271(1)(c) in relation to TP addition made since the assessee had satisfied conditions of good faith & due diligence as stipulated in Explanation 7 to sec 271(1)(c).

Mitsui Prime Advanced Composites India Pvt. Ltd [TS-135-HC-2017(DEL)-TP] (ITA 913/2016)

1086. The AO levied penalty under section 271G of the Act, vis-à-vis the TP adjustment on management consultancy fees, which was deleted by the CIT(A). The Tribunal noted that CIT(A) had deleted the penalty since the primary reason on which the penalty had been levied i.e. TP adjustment on management consultancy fees had also been deleted by the CIT(A). Since the Tribunal had remitted the matter relating to management consultancy fees for ascertaining exact nature of services, it directed the AO to also decide afresh the issue relating to levy of penalty after bringing on record the failure of assessee to provide the exact information and documents.

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

1087. The Court confirmed the Tribunal's deletion of concealment penalty levied under section 271(1)(c) of the Act for AY 2007-08. It noted that in the quantum appeal, assessee had conceded to the mark-up of 32% on operational costs for the purpose of making TP-adjustment and upheld the order of the Tribunal wherein it held that penalty could not be imposed merely because the addition was accepted by assessee. It held that there was no deliberate attempt by the assessee to conceal any income or to underpay tax and accordingly, it dismissed the Revenue's appeal.

Pr. CIT Vs Gap International Sourcing India Ltd - TS-323-HC-2017(DEL)-TP - ITA 185/2017 dated 24.04.2017

1088. The Tribunal upheld levy of penalty under section 271BA of the Act in AY 2011-12 for assessee's failure in filing Form 3CEB in respect of its transaction of receipt of share capital / premium from its NRI director-shareholder. Relying on the decision of the co-ordinate bench in IL&FS Maritime Infrastructure Company Ltd. [TS-204-ITAT-2013(Mum)-TP], it held that share investment transactions fell within the purview of Sec 92B and the assessee was required to file audit report in Form 3CEB for such transactions, failure of which would attract Sec 271BA penalty. It distinguished the Bombay High Court ruling in Vodafone India on facts, stating that the present case was entirely different as AO had neither attempted to nor made any adjustment

to the ALP for issue of equity shares at a premium to its NRI Director and the issue was simply whether penalty u/s 271BA was attracted since assessee had not filed the Audit Report in Form 3CEB within the period warranted u/s 92E. Thus, concluding that since assessee had entered into an international transaction, failure on the part of the assessee to furnish the Audit Report in Form 3CEB from an Accountant in the prescribed proforma within the prescribed period, without reasonable cause, was a clear violation of the provisions of section 92E of the Act and therefore the levy of penalty under section 271BA of the Act was clearly warranted.

BNT Global Pvt. Ltd. vs. ITO - TS-319-ITAT-2017(Mum)-TP - ITA No. 4111/Mum/2016 dated 26.04.2017

1089. The Tribunal for AY 2011-12 upheld levy of penalty under section 271BA for assessee's failure in filing Form 3CEB in respect of transaction of receipt from its NRI director shareholder towards share capital premium. It relied on the co-ordinate bench ruling in the case of IL&FS Maritime Infrastructure Company Ltd [TS-2014-ITAT-2013(Mum)-TP] and held that share investment transactions fell within the purview of section 92B and the assessee was required to file audit report in Form 3CEB for such transactions. Further, it distinguished Bombay HC ruling in the case of Vodafone India on facts, noting that the present case was entirely different as the AO had neither attempted to nor made any adjustments to the ALP for issue of equity shares at a premium to its NRI Director and the issue was simply whether penalty u/s 271BA was attracted since the assessee had not filed the audit report in form 3CEB within the period warranted u/s 92E.

BNT Global Pvt Ltd vs ITO - TS-319-ITAT-2017(Mum)-TP-ITA No 4111/Mum/2016 dated 26.04.2017

1090. Assessee, incorporated in India, was a wholly owned subsidiary of GAP International Sourcing Inc, USA and operated as a procurement support service company whereby it facilitated sourcing of apparel merchandise from India for its AE, for which it was remunerated at total operating costs plus a 15% mark-up thereon. The TPO accepted TNMM as the most appropriate method, however, re-characterized the assessee as a 'significant risk bearing' entity having intangibles as opposed to a low risk service provider. In quantum proceedings, the Tribunal noting that the assessee was entitled to a cost plus mark-up on total operating cost of Gap International Sourcing India Ltd. (and not the value of goods sourced by GAP US), rejected the TPO's recharacterization of the assessee as a significant risk bearing service provider but did not accept assessee's mark-up of 15% and instead relying on the Delhi Tribunal's decision in the case of Li & Fung's [TS-583-ITAT-2011(DEL)-TP] substituted the mark-up of 32% (i.e. the maximum operating margin adopted in Li & Fung decision), which the assessee accepted. As there was no deliberate attempt by the assessee to conceal any income, the Court upheld the Tribunal's order wherein penalty under section 271(1)(c) of the Act was deleted on the ground that the assessee had accepted the TP adjustment merely to buy peace of mind.

Gap International Sourcing India Ltd -TS -323-HC-2017(DEL)-TP-ITA 185/207 dated 02.05.2017

Pr. CIT vs Gap International Sourcing India Ltd-TS-425-HC-2017(DEL)-TP- ITA 185/2017 dated 24.04.2017

1091. The Court, quashed CIT(A)'s enhancement of concealment penalty under section 271(1)(c) on TP addition on import of raw material which was proposed by TPO but not made by AO in final assessment and held that once the addition had been made/confirmed in the quantum proceedings, then subject matter of penalty proceedings under section 271(1)(c) was strictly circumscribed to such addition only. The TPO had proposed additions on import of capital goods and raw materials, of which only the addition in respect of capital goods import was incorporated in final order, however, the CIT(A) while confirming concealment penalty levied by AO, also enhanced penalty on account of TP-addition on raw material import. The Tribunal held that the CIT(A) was unjustified in law and on facts to levy or enhance a penalty on an addition which was not arising out of assessment order or any appellate order in the quantum proceedings or from the penalty order passed by the AO. It also deleted penalty levied on TP addition on import of capital goods, disagreeing with the TPO's approach of benchmarking the transaction by considering foreign AE as tested party and then selecting local comparables on Indian Data System, which operated under different geographical, economical and market environment, to benchmark AE's margin.

JRK Auto Parts Pvt. Ltd [TS-434-ITAT-2017(DEL)-TP- ITA No.3458/del.2014 dated 31.05.2017

1092. The Court, considering the admission of quantum appeal, admitted the appeal filed by assessee challenging penalty u/s 271(1)(c) on disallowance of reimbursement of marketing cost and denial of Sec. 10A benefit on such disallowance. In the quantum proceedings, noting that the assessee's role was mere provision of software services to its AE, the Tribunal held that there was no justification for reimbursement of marketing expenses when the assessee was not involved in marketing and was only involved in delivering software development services to its AE.

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

1093. The Tribunal upheld CIT(A)'s order deleting penalty levied u/s 271AA by TPO for failure to maintain the prescribed TP documentation for AY 2005-06. The Revenue had contended that the assessee had not maintained transfer pricing documentation as required under rule 10B of the Act to which the assessee argued that the TPO had not made any adjustment relating to the international transaction and therefore levy of penalty was unjustified. Relying on the coordinate bench's ruling in assessee's own case it held that since no adjustment was made with respect to international transaction, levy of penalty u/s 271AA was not justified. Accordingly, it deleted the penalty levied u/s 271AA of the Act.

DCIT vs Indian Additives Express High Way-TS-525-ITAT-2017(CHNY)-TP-I.T.A No.649/mds/2017 dated 06.06.2017

1094. The Apex Court dismissed Revenue's SLP against Delhi High Court order confirming deletion of concealment penalty on TP adjustment made vis-à-vis assessee's intra-group services. The TPO had made an adjustment in respect of three international transactions of availing specified business and consultancy services, engineering support services and management services by determining the ALP at 'NIL' under CUP method contending that the assessee did not avail any services from its AEs as no benefit was shown to have been received. The AO imposed a penalty of Rs. 1.20 crores u/s 271(1)(c) on the ground of concealment of income or furnishing of inaccurate particulars. The Tribunal, noting that the assessee had satisfied the requisite conditions of good faith and due diligence as stipulated in explanation 7 of sec 271(1)(c) held that non-filing of quantum appeal could not be a reason for levy of concealment penalty. Rejecting Revenue's contention that failure to substantiate benefit derived from services resulted not only in rejection of TNMM but also in reduction of losses and thus application of explanation 7 to section 271(1)(c) was warranted, the Court held that the provision should be applied on case to case basis and could not be generalized. Accordingly, it concluded that the Tribunal had not committed any error of law.

Pr. CIT vs Mitsui Prime Advanced Composites India Pvt Ltd-TS-599-SC-2017-(TP)- ITA No. 913/2016 dated 21.07.2017

1095. Where the assessee failed to furnish document/information u/s 92A(1) based on a bonafide belief that since both conditions u/s 92A(1) and (2) were not fulfilled, no international transaction had been undertaken, the Tribunal held that penalty u/s 271BA could not be imposed as the view of the assessee was a possible one and amount to reasonable cause as provided in section 273B.

Palm Grove Beach Hotels Pvt. Ltd vs DCIT-TS-631-ITAT-2017(Mum)-TP-ITA No. 5217/mum/2015 dated 09.08.2017

1096. Where the assessee had provided relevant information during the assessment proceedings based on which AO completed the assessment, the Tribunal deleted the penalty u/s 271G (imposed on failure to furnish information or document u/s 92D) and held that penalty was attracted only when the AO had issued a notice u/s 92D(3) and the assessee failed to furnish information for completing the assessment. Since in the present case the assessee had already filed the relevant information as soon as it was brought to its notice and assessment was completed without any adjustment, the levy of penalty was unwarranted.

Karvy Computershare Pvt. Ltd vs ACIT-TS-670-ITAT-2017(HYD)-TP-ITA No. 737, 738, 739 and 740/HYD/2016 dated 07.07.2017

1097. The Tribunal upheld the levy of penalty under Section 271BA (for non filing of Form 3CEB as per Section 92E) and held that mere ignorance of the finance manager was not reasonable cause for not filing Form 3CEB.

Karvy Computershare Pvt. Ltd vs ACIT-TS-670-ITAT-2017(HYD)-TP-ITA No. 737, 738, 739 and 740/HYD/2016 dated 07.07.2017

1098. Relying on the decision in assessee's own case for AY 2007-08 wherein the Court had dismissed the Revenue's appeal against the Tribunal order deleting penalty levied u/s 271(1)(c), the Court upheld Tribunal's order deleting penalty in respect of the impugned year as well and held that penalty u/s 271(1)(c) was not to be levied merely because the assessee accepted the addition under quantum proceedings.

Pr.CIT vs Gap International Sourcing (India) Pvt. Ltd-TS-677-HC-2017(DEL)-TP- ITA No. 692/2017 dated 31.07.2017

1099. Where the TPO had made a transfer pricing adjustment on account of the wrong deduction of export incentive and rebate from cost of goods sold while computing PLI, which was subsequently deleted by the Tribunal, the Tribunal deleted the penalty imposed under Section 271(1)(c) of the Act as the transfer pricing adjustment based on which it was imposed was deleted.

Goodyear India Ltd v DCIT-TS-1039-ITAT-2017(DEL)-TP I.T.A. No. 328/DEL/2015 dated 04.12.2017

1100. The Tribunal, considering assessee's submission that the demand pertained to TP adjustment and the assessee had a strong prima facie case as Revenue had wrongly rejected CUP method and considered comparables with substantial related party transactions and that a refund of Rs. 18.50 lakhs and Rs. 26.22 lakhs was due to the assessee, granted stay to the extent of 50% of outstanding demand while directing payment/adjustment of refunds for balance.

Atlas Healthcare Software (India) Ltd v ACIT-TS-1060-ITAT-2017(KOL)-TP dated 22.12.2017

Stay

1101. The Tribunal granted extension of stay of outstanding demand for AY 2011-12 for a further period of 3 months from the date of order subject to the condition that assessee does not seek adjournment on the date of hearing. It agreed with the assessee that the delay in disposal of the appeal was not attributable to the assessee, and there was no change of circumstances from the day of earlier stay i.e. 11 March, 2016.

NovoNordisk India Pvt. Ltd v DCIT [TS-1046-ITAT-2016(Bang)-TP] - S.P.No.188(BNG.)2016 dated 02.12.2016

1102. The Tribunal granted stay of outstanding demand of Rs. 58.92 lakhs arising out of TP issues for AY 2012-12, subject to further payment of RS. 10 lakhs by assessee observing that out of total demand of Rs.69.31 lakhs, assessee had already paid 15% i.e. Rs. 10.39 lakhs. It also noted that some of the companies included in the set of comparables may be excluded on functional dissimilarity, and held that the assessee had made out good case for grant of stay. It directed the assessee to deposit further sum of Rs. 10 lakhs on or before 15 February, 2017 and granted stay of balance demand for 180 days or till disposal of appeal whichever is earlier and fixed an out of turn hearing on 7 March, 2017.

UEI Electronics Pvt Ltd v DCIT – TS-111-ITAT-2017 (Bang) – TP - S.P.No.3/Bang/2017 dated 20.01.2017

1103. The Tribunal granted stay of outstanding demand of Rs. 81.24 Cr for AY 2012-13 arising out of TP adjustment on account of AMP expenditure and royalty payment, subject to payment of Rs. 15 Cr on or before 15.07.2017. Further, for AY 2009-10; noting that that the assessment order had been challenged on serious grounds, namely, limitation u/s 143(2) and approval u/s 151, it granted absolute stay of outstanding demand of Rs. 56.32 Cr.

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

1104. The Tribunal extended stay granted to the assessee for AYs 2009-10 to 2011-12 by 3 months, noting that the issues involved in all 3 years were identical to issues in appeal for AY 2008-09 which was already heard by the Tribunal and for which the order was awaited. Further, it noted that the delay in disposal of appeal was not attributable to the assessee and that there was no change in circumstances from the earlier stay order and therefore granted extension on the condition that assessee would not seek adjournment without just and reasonable cause.
Google India Private Limited Vs DCIT – TS-1045-ITAT-2016 (Bang) – TP - Stay Petition Nos.194 to 1961Bang/2016 dated 02.12.2017
1105. The Tribunal granted partial stay of demand to the assessee till the disposal of appeal or 30.04.2017 whichever is earlier subject to the payment of Rs. 20 lakhs as against outstanding tax liability of Rs. 1.83 Cr (which was agreed upon by the assessee). It clarified that stay would stand automatically withdrawn if assessee sought adjournment.
Mindteck (India) Limited Vs DCIT – TS-1088-ITAT-2016 (Bang) – TP - SP No. 176/Bang/2016 dated 23.12.2016
1106. The Tribunal granted stay of outstanding demand of Rs 45 lakhs to the assessee for AY 2009-10 till disposal of appeal observing that 50% of the disputed demand was already paid by assessee in the past and that the demand arose on account of TP adjustment which mainly revolved around the issue of comparable selection and in respect of which most of the issues of comparables were covered in favour of the assessee. It listed the appeal for hearing on 19.01.2017 clarifying that assessee was not entitled to seek further adjournment.
Arrow Electronics India Pvt Ltd v DCIT – TS-1042-ITAT-2016 (Bang) – TP - Stay Petition No.186/Bang/2016 dated 02.12.2016
1107. The Tribunal granted the assessee stay of balance outstanding demand of Rs. 1.16 Cr for AY 2012-13 for a period of 180 days or till disposal of appeal whichever is earlier, subject to payment of Rs. 25 lacs by assessee on or before 28 February 2017, stating that assessee had a good prima facie case. It directed the assessee not to seek adjournment without justifiable reasons, failing which, stay granted would be vacated automatically and fixed the appeal for hearing on 23 March 2017.
Kaypee Electronics Associates Pvt. Ltd. Vs ACIT - S-138-ITAT-2017(Bang)-TP - S.P. No 6/Bang/2017 dated 03.12.2017
1108. The Tribunal granted stay of outstanding demand of Rs. 6 Cr for AY 2012-13 to the assessee viz. ISG Novasoft Tech Ltd till 17.03.2017 or till disposal of appeal whichever was earlier, noting the argument of the assessee that it had a prima facie good case. It held that no injustice would be caused to the revenue if the appeal was fixed for hearing on 06-03-2017 and the stay was granted till 17-03-2017 or till the disposal of the appeal whichever was earlier. However, it clarified that if the assessee sought adjournment without justifiable reasons, stay granted would be vacated automatically.
ISG Novasoft Tech.Ltd. Vs. ACIT - TS-189-ITAT-2017(Bang)-TP - S.P. No.24 / Bang / 17 dated 03-03-2017.
1109. The Tribunal granted stay on collection of outstanding demand of Rs. 17.3 Cr for AY 2012-13 subject to further payment of Rs. 2 Cr by assessee on or before 28.2.2017 for a period of 6 months or disposal of appeal whichever is earlier. It fixed the appeal for hearing on 3.4.2017 and clarified that if the assessee sought adjournment without justifiable reasons, stay granted would be vacated automatically.
Cisco Systems capital (India) Pvt. Ltd. Vs ACIT TS-193-ITAT-2017(Bang)-TP - S.P. No. 16/Bang/2017

1110. The Tribunal noted that the demand of Rs.11.85 crore in the hands of the assessee arose on account of TP adjustment of Rs. 21.64 Cr in respect of software development and marketing support services transactions out of which an amount of Rs. 4 Cr was already paid while a refund of Rs. 33 lakhs for AY 2004-05 was to be adjusted, which in total amounted to 37% of original demand and granted the assessee stay of outstanding demand of Rs. 7.85 Cr for AY 2011-12 subject to payment of Rs. 1 Cr on or before 15.3.2017 and directed the assessee not to seek adjournment without just and reasonable cause.

Misys Software Solutions (India) Pvt. Ltd. Vs ACIT TS-197-ITAT-2017(Bang)-TP - SP No.35/Bang/2017 dated 27/02/2017

1111. Where the assessee's appeal for AY 2009-10 had already heard by the Tribunal and the order was awaited, the Tribunal rejected the assessee's application seeking stay till the order was served. However, it directed the Revenue not to put any pressure on the assessee for collection of demand till Tribunal order was served. For AY 2010-11, noting that assessee had made a payment of more than 90% of tax demand excluding interest, the Tribunal granted stay without any further payment; and scheduled hearing of appeal on 8.03.2017 clarifying that if assessee sought adjournment, stay granted would be vacated automatically.

Misys Software Solutions (India) Pvt. Ltd vs. DCIT - TS-215-ITAT-2017(Bang)-TP - S.P. No 33 & 34 / Bang / 2017 dated 03.03.2017.

1112. The Tribunal granted the assessee partial stay of outstanding demand of Rs. 2.47 crores for AY 2012-13 noting the submission of the assessee viz. that out of total demand of Rs. 2.91 Cr arising from TP adjustment, it had already deposited Rs. 44 lakhs and that if its contention of excluding only one comparable 'Persistent Systems Limited' was accepted, no TP-adjustment would survive. It directed the assessee to pay further amount of Rs.25 lakhs on or before 28.2.2017 and fixes the appeal for out of turn hearing on 5.4.2017, clarifying that the assessee should not seek adjournment without reasonable cause.

Curam Software International Pvt. Ltd vs. ITO - TS-187-ITAT-2017(Bang)-TP - S.P. No.19/Bang/2017 dated 17.02.2017.

1113. The Tribunal granted the assessee stay of outstanding demand of Rs. 1.8 Cr for AY 2012-13 for 6 months or till disposal of appeal whichever was earlier, subject to further payment of Rs. 18 lakhs after appreciating the assessee's submission that out of total demand of Rs. 2.12 Cr arising from TP adjustment, it had already deposited an amount of Rs. 32 lakhs and that out of the two comparables the assessee sought to exclude viz. Infosys BPO Ltd. and TCS E-Service Limited in the appeal, even if TCS e-Service was excluded, no TP-adjustment would survive. It fixed the appeal for out of turn hearing on 4.4.2017 and directed the assessee not to seek adjournment without reasonable cause.

State Street Services India Pvt. Ltd Vs DCIT - TS-201-ITAT-2017(Bang)-TP - S.P. No.204/Bang/2016 dated 17.02.2017.

1114. The Tribunal granted the stay of outstanding demand of Rs. 4.24 Cr arising out of TP adjustment for AY 2012-13, subject to payment of Rs. 1 Cr by assessee by 31.3.2017. Considering rival submissions made by parties (assessee contended that it had a prima facie good case as its case was fully covered by the order of the Tribunal in its own case for a prior year and the Department contended that arguments on merit could not be considered during a stay application and since the assessee did not have any financial constraints no stay was to be granted), it held that adjudication of the issues on merit could only be done while disposing the appeal. Further, noting that nothing had been placed on record regarding financial constraint of the assessee, it opined that stay could only be granted subject to payment of certain outstanding demands and accordingly directed the Revenue not to enforce recovery of outstanding demand for 6 months or till disposal of appeal whichever is earlier.

Fosroc Chemicals India Pvt. Ltd. Vs. ITO - TS-196-ITAT-2017(Bang)-TP - [SP No. 23/ B/2017 dated 03.03.2017

1115. The Tribunal extended the stay granted to the assessee viz. Outsource Partners.Ltd, noting the assessee's submission that the subject appeal hearing could not take place on two earlier occasions due to non-functioning of the bench on one occasion, and adjournment sought by

assessee due to counsel's non-availability on the other. Noting assessee's submission that it would not seek adjournment on the next date of hearing viz. 27.02.2017, it extended the stay till 28.02.2017.

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

1116. The Tribunal, noting the settled position that stay would be extended when delay was not attributable to the assessee as per the rulings of Peps Foods (P) Ltd 376 ITR 87 (Del), Narang Overseas Private Limited 295 ITR 22 (Bom.) and SAP Labs India Pvt. Ltd (67 taxmann.com 78), extended the stay granted to the assessee viz. GE Intelligent Platform Pvt. Ltd for a further period of 6 months or till disposal of appeal whichever is earlier, noting that the appeal was already heard on 18.01.2017 and delay in disposal was not on assessee's account.

GE Intelligent Platform Pvt. Ltd. Vs DCIT - TS-208-ITAT-2017(Bang)-TP - Stay Petn.No.7/Bang/2017 dated 03.03.2017

1117. The Tribunal extended the stay granted to the assessee viz. Manipal Global Education Services Pvt. Ltd. for a further period of 2 months for AY 2010-11, noting that the appeal in question had already been posted for hearing on 25.10.2017 and there was no change of circumstances from the date of the stay granted earlier on 22.08.2016 and 21.11.2016. Further, it noted that the delay in disposal of appeal was not attributable to the assessee except on one occasion. It also directed the assessee not to seek any adjournment without just and reasonable cause.

Manipal Global Education Services Pvt. Ltd. Vs DCITTS-198-ITAT-2017(Bang)-TP - SP NO.8/B/2017 dated 25/01/2017

1118. The Tribunal granted the assessee stay of demand arising from TP-addition on account of AMP expenditure for AY 2012-13, noting that a large portion of the demand in question was attributable to addition on account of AMP expenditure which was covered in favour of assessee vide Tribunal order for the earlier years. However, for the balance demand of Rs. 1.6 crores which was attributable to other additions i.e. disallowance u/s 14A and marked-to-market losses, the Tribunal stayed the same subject to payment of Rs.80 lakhs (50% of balance demand) on or before 22/03/2017. It granted the assessee an early hearing on 12/04/2017 and added that the assessee could not seek adjournment without reasonable cause.

Essilor India Pvt. Ltd vs. DCIT TS-203-ITAT-2017(Bang)-TP - SP No.39/Bang/2017 dated 03.03.2017

1119. The Tribunal rejected assessee's request to restrict partial payment to 15% for grant of stay of outstanding demand of Rs. 486 Cr for AY 2012-13 and directed it to deposit 50% demand (20% within 7 days and balance in 6 monthly instalments. Relying on the decision of the High Court in Flipkart India [TS-97-HC-2017(KAR)], the Tribunal held that if the CBDT Instruction dated February 29, 2016 (providing guidelines for stay of demand at first appeal stage) was made applicable to pending Tribunal proceedings, then the Tribunal would be considered equivalent to CIT(A) which would lead to absurd result as administrative Pr. CIT/CIT would be redressing grievances against Tribunal orders. Further, noting that the assessee had sound financial position to pay the demand and that it failed to establish prima-facie case for demand non-recovery or to show that demand was not payable, and that it had not filed a paper-book, it held that the prima facie case of assessee could not be examined. It dismissed the assessee's contention that since the AO made a disallowance of royalty u/s 40(a)(i) as well as an ALP adjustment it would lead to double addition and held that disallowance u/s 40(a)(i) and computation of income from international transaction regarding to ALP under Chapter X of the Income-tax Act operates in two different fields and the computation of income under Chapter X had no co-relation with disallowances under sec 40(a)(i). It further stated that assessee would not suffer any irreparable loss / injury if stay was not granted as it could get full refund with interest if assessee's appeal was allowed on merits.

Google India Private Limited vs. ACIT - TS-251-ITAT-2017(Bang)-TP - SP No. 45/Bang/2017 dated 22.03.2017

1120. The Tribunal granted extension of stay of demand to Business Process Outsourcing (India) for AY 2009-10, observing that after granting stay of demand on November 4, 2016, appeal was listed for hearing but unfortunately the Bench did not function on that date. Accordingly, since the assessee could not be held responsible for the delay in disposal of the appeal and the facts and circumstances under which the stay was granted, remained the same, it extended the stay upto 30.04.2017 as the appeal was listed for hearing on 10.04.2017.
Business Process Outsourcing (India) Pvt. Ltd vs. DCIT - TS-266-ITAT-2017(Bang)-TP - [SP No. 20/B/2017 dated 03/03/2017
1121. The Tribunal granted stay of outstanding demand of Rs 2.58cr to the assessee for AY 2012-13, subject to payment of Rs 25 lakhs on or before March 20, 2017. It considered the assessee's submissions that it had made part payment of demand of Rs 64.52 lakhs on February 27, 2017 and was willing to make further payment of Rs 25 lakhs by March 20, 2017 and accordingly granted conditional stay till June 30, 2017 or till disposal of appeal, whichever was earlier, observing that it was a fit case for granting of stay. It fixed the appeal hearing for April 10, 2017 and clarified that if assessee sought adjournment without justifiable reasons, stay granted would get vacated automatically.
Alten Calsoft Labs (India) Pvt. Ltd. Vs ACIT - TS-264-ITAT-2017(Bang)-TP - SP No 48/Bang/2017 dated :10.03. 2017.
1122. The Tribunal granted stay of outstanding demand of Rs 1.30cr (arising out of TP adjustment on account of disputed comparables) for a period of 6 months to the assessee Marvel India for AY 2010-11, subject to payment of Rs 10 lakhs on or before March 31, 2017, considering the fact that assessee had already paid Rs 1cr out of the original demand of Rs 2.3cr and refund of Rs 5 lakhs was due to assessee for AY 2011-12. However, it rejected the assessee's contention that there was a prima-facie case in assessee's favour, and stated that the TP adjustment was made on facts of the case and that it is trite law that in the stay proceedings, appellate authorities cannot embark upon detailed inquiry into the facts / merits of the case. It fixed the appeal hearing for May 9, 2017 and clarified that the stay order would cease to operate if assessee sought adjournment without just and reasonable cause.
Marvell India Pvt. Ltd Vs ACIT -TS-263-ITAT-2017(Bang)-TP - SP No.75/Bang/2017 dated 22/03/2017
1123. The Tribunal granted stay of outstanding demand of Rs 22.17cr for AY 2012-13 for a period of 90 days or till disposal of appeal, whichever is earlier, subject to payment of Rs 2 crores on or before March 20, 2017. It noted that the demand arose due to TP-adjustment on account of AMP expenditure, and held that the issue was a highly debatable issue in view of various decisions on this point. Accordingly, it held that the assessee made out a prima facie good case for grant of stay subject to part payment. It clarified that if assessee sought adjournment without reasonable cause, stay granted would stand vacated.
Epson India Private Limited Vs ACITTS-258-ITAT-2017(Bang)-TP - P.No.31/Bang/2017 dated 10.03.2017.
1124. The Tribunal granted stay of outstanding demand of Rs 5.23cr for a period of 180 days or till appeal disposal, whichever was earlier, subject to payment of Rs 1cr. It noted that that after making additional payment of Rs 1cr, the total demand deposited would be Rs 4.5cr (out of total demand of Rs 8.73cr) resulting in more than 50% demand deposited. It fixed an early appeal hearing and clarified that if assessee sought adjournment for unjustified reasons, stay order would get automatically vacated.
Misys Software Solutions (India) Pvt. Ltd. vs. DCIT - TS-273-ITAT-2017(Bang)-TP - S.P No.361Bang/2017 dated 3-3-2017
1125. The Tribunal granted stay of outstanding demand of Rs 470 lakhs for AY 2011-12 up to June 30, 2017 or till disposal of appeal, whichever was earlier, considering the assessee's submission that it had a prima facie good case and out of the total disputed demand of Rs 932.03 lakhs (including interest of Rs 328.76 lakhs), assessee had already paid Rs 462.03 lakhs (including refund adjustment of Rs 162.03 lakhs). It held that it was a fit case for granting of stay and accordingly, it granted stay of the balance outstanding demand. Noting that appeal hearing was

already fixed. It clarified that in the course of appeal hearing if the assessee sought adjournment without justifiable reasons, stay granted would get automatically vacated.

LG Soft India Pvt. Ltd. vs. DCIT - TS-275-ITAT-2017(Bang)-TP - S.P. No 49/ Bang/2017

1126. The Tribunal granted stay of outstanding demand of Rs 9.39cr (including 3.45cr interest) for AY 2012-13 for a period of 3 months or till disposal of appeal, whichever was earlier, subject to payment of Rs 2cr. It noted the assessee's submission that it had filed a rectification petition u/s 154 which, if passed, would reduce the demand to Rs 2.40cr and held that the effect of the rectification petition could not be considered at the present stage because it was not clear as to whether the claims in this rectification petition were eligible to be considered u/s 154 or not. Considering assessee's willingness to make further payment of Rs 2cr, it granted conditional stay and fixed the appeal for early hearing, clarifying that if assessee sought adjournment without justifiable reasons, stay granted would get automatically vacated.

Outsource Partners International (P) Ltd. vs. ACIT - TS-292-ITAT-2017(Bang)-TP - S.P. No. 65/Bang/2017 dated 24.03.2017.

1127. The Tribunal, following the co-ordinate bench ruling in SAP Labs India (wherein view was taken that Tribunal can grant the stay beyond 365 days if the delay in disposing of the appeal is not attributable to assessee) granted extension of stay of demand to the assessee beyond 365 days, considering the assessee's submission that appeal was heard on December 27, 2016 but subsequently the matter was released for fresh hearing. It noted that the original stay was granted vide order dated March 11, 2016 and thereafter extended for a period of 3 months vide order dated December 2, 2016. Accordingly, it held that the delay in disposing of the appeal was not attributable to the assessee and therefore in view of the decision of Hon'ble Delhi High Court in case of Pepsi Foods (P.) Ltd. Vs ACIT (supra), the assessee had made out a prima facie good case for extension of stay even beyond 365 days.

Novo Nordisk India Pvt. Ltd. vs. DCIT - TS-296-ITAT-2017(Bang)-TP - SP No. 61/Bang/2017 dated 24.03.2017

1128. The Tribunal granted further extension of stay of demand to the assessee till May 31, 2017, noting the assessee's submission that delay in appeal disposal was not attributable to assessee as issue involved in appeal was referred to Special Bench of Tribunal and Special Bench had not yet started hearing the issue. Accordingly, it held that the stay granted earlier should be extended if the delay in disposal of the appeal is not attributable to the assessee-company. It clarified that the assessee shall not seek adjournment from appeal hearing without just and reasonable cause.

Manipal Global Education Services Pvt. Ltd vs. DCIT - TS-297-ITAT-2017(Bang)-TP - SPNo.67 / Bang / 2017 dated 24.03.2017

1129. The Tribunal granted the assessee extension of stay of outstanding demand for a period of 3 months or till disposal of appeal, whichever is earlier. It noted that after stay was granted on July 29, 2016, the appeal hearing was fixed for December 15, 2016 which was adjourned as AR of the assessee was travelling on that date due to prior commitments. It observed that the date of hearing fixed on 15.12.2016 was not fixed in course of hearing of stay or the appeal after ascertaining the availability of the AR of the assessee and accordingly held that under these facts, the request for adjournment was due to cogent reasons and therefore, it could not be said that the delay was attributable to the assessee. It clarified that the assessee should not seek adjournment during the course of appeal hearing without justifiable reasons and if assessee did so, the stay granted would get automatically vacated.

Outsourcepartners International Pvt. Ltd. vs. DCIT - TS-276-ITAT-2017(Bang)-TP - S.P. No 521/Bang/2017 dated 17.03.2017

1130. The Tribunal granted stay of outstanding demand of Rs 38.64cr for AY 2012-13 for a period of 3 months or till appeal disposal, whichever was earlier, subject to payment of Rs 2cr.

Considering assessee's submission that a fresh payment of Rs 5.8cr recently had brought down the demand to Rs 32.84cr and it was willing to make a further payment of Rs 2cr as its financial position was not bad, it opined that it was a fit case for granting of stay subject to further payment of Rs. 2 Crores. It fixed early hearing for the appeal hearing and clarified that in the course of appeal hearing if the assessee sought adjournment without justifiable reasons, stay granted would be automatically vacated.

Cisco Systems (India) (P) Ltd vs. ACITTS-270-ITAT-2017(Bang)-TP - S.P. No 63/Bang/2017 dated 24.03.2017.

1131. The Tribunal granted stay of outstanding demand of Rs 26.48cr to the assessee for a period of 3 months or till appeal disposal, whichever was earlier, subject to payment of Rs 4cr. It noted that out of the total disputed demand (as per rectification order) of Rs 64.68cr, assessee had already paid Rs 28.20cr resulting in 44% of demand being discharged and that the assessee was willing to make further payment of Rs 4cr as a result of which it held that it was a fit case for granting of stay, subject to further payment of Rs. 4 Crores. It fixed the early hearing for the appeal and clarified that if the assessee sought adjournment without justifiable reasons, stay granted would be automatically vacated.

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

1132. The Tribunal, relying on the decision of the High Court in Verizon India (ITA No 460 / 2016) , granted the assessee full stay on recovery of Rs 1.14cr being penalty u/s 271(1)(c) on TP-additions made for AY 2010-11, for a period of 6 months or till disposal of appeal, whichever is earlier as in the absence of any overt act, which disclose conscience and material separation, invocation of Explanation 7 in a blanket manner could not only be injurious to the assessee but ultimately would be contrary to the purpose for which it was engrafted in the statute. It held that the mere fact that the assessing authority did not agree with the claim of the applicant would not lead to the conclusion beyond doubt that there was concealment of particulars of income or furnishing inaccurate particulars to attract penal provisions under section 271(1)(c) of the Act. Accordingly, it held that there was a prima facie case to justify assessee's request for stay of the disputed demand of penalty and restrained the Department to take coercive measures to recover disputed demand of penalty and fixed early hearing for the appeal.

Halcrow Consulting India Pvt. Ltd. vs. DCIT - TS-288-ITAT-2017(DEL)-TP – SP No 558 / Del / 2016 dated 30.03.2017

1133. The Tribunal extended stay of outstanding demand of Rs.1029.21 crores to Infosys Limited for AY 2012-13 on the ground that the assessee had agreed to make a further payment of 300 crores and had a good prima facie case on some issues and thus granted stay for a period of 6 months till disposal or appeal whichever is earlier.

Infosys Limited vs ACIT-TS-389-ITAT-2017(Bang)-TP-IT(TP)ANo.718/BANG/2017 dated 15.05.2017

1134. The Tribunal granted stay of outstanding demand of Rs 1.53cr to the assessee for AY 2012-13 for a period of 3 months subject to payment of Rs 10 lakhs on or before 30th April 2017. It **observed** that the first stay order was vacated by **the** Tribunal as **the assessee had sought adjournment at the time of** appeal hearing considering that it was compelled to seek adjournment as its counsel was to appear in another stay granted matter before Tribunal in Cochin.

Transitions Optical Distribution Pvt Ltd TS-381-ITAT-2017(Bang)-TP IT(TP)A No.2208/bang/2016 dated 21.04.2017

1135. The Tribunal granted stay of outstanding demand of Rs. 3.18 crore to E4e Business Solutions India for AY 2012-13 for a period of 180 days or till disposal of appeal, whichever was earlier subject to payment of Rs 75 lakhs in 2 installments noting that the assessee had already paid Rs 36 Lakhs. Further, it considered the fact that the assessee was seeking credit adjustment for earlier year in which tribunal had already decided the matter but no refund was worked out by the AO yet.

E4e Business Solutions India Pvt Ltd vs ITO [TS-374-ITAT-2017(Bang)-TP-S.P No.79/bang/2017 dated 21.04.2017

1136. The Tribunal granted stay of outstanding demand to the assessee for AY 2012-13 for a period of 180 days or till appeal disposal, whichever is earlier, subject to payment of Rs 50 lakhs on or before May 15, 2017 considering the fact that out of a demand of Rs 3.02 cr on account of TP-adjustment assessee had already paid Rs 1 Cr (25% of demand).

Biesse Manufacturing Company Pvt Ltd vs DCIT [TS-394-ITAT-2017(Bang)-TP-S.P No.81/bang/2017 dated 21.04.2017

1137. The Tribunal granted further extension of stay of demand to the assessee for AY 2011-12 for a period of 3 months or till disposal of appeal, whichever is earlier. Relying on the decision in the case of Pepsi Foods it held that if the delay in disposal of appeal was not attributable to the assessee, stay had to be extended. Further, it held that the stay was subject to the condition that assessee should not seek adjournment without any reasonable and just cause.

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

1138. The Court, following co-ordinate bench's ruling in assessee's own case dismissed Revenue's appeal challenging power of Tribunal to extend interim order of stay beyond 365 days and held that where the delay in disposing appeal was not attributable to the assessee, Tribunal had the power to grant extension of stay beyond 365 days in deserving cases.

Pr. CIT vs. Pepsi Foods Pvt. Ltd- [TS-558-HC-2017(DEL)-TP]- ITA 363/2017 and 364/2017 dated 03.07.2017

1139. The Tribunal, noting that the TP-adjustment arose as the TPO had rejected the transaction by transaction approach followed by assessee and adopted aggregation approach without giving due regard to the fact that the activities undertaken by the assessee were two separate activities which were not closely inter-linked/inter-connected to each other and profitability of each activity had been determined separately by the assessee, granted stay of outstanding demand of Rs. 47.34 lakhs for a period of 6 months or till disposal of appeal, whichever was earlier subject to payment of Rs. 10 lakhs on or before 31st march 2017.

RTA Alesa AG vs DCIT-TS-561-ITAT-2017(DEL)-TP-ITA No. 1659/del/2017 dated 24.03.2017

1140. The Tribunal, noting that the assessee had paid Rs. 8 Lakhs out of the total demand of 33.57 lakhs, granted stay of demand to the assessee for a period of 6 months or till disposal of appeal, whichever is earlier subject to payment of Rs. 9 lakhs on or before 2nd June 2017 for AY 2012-13. The demand arose due to TP-adjustment of Rs. 66.16 lakhs made in the case of the assessee (engaged in the business of contract development and technology support for pharmaceutical companies). The Tribunal opined that taking into account the merits of the case, the financial position of the assessee and the balance of convenience, it was a fit case for grant of stay on recovery of demand subject to the condition that a further sum of Rs.9,00,000/- on or before 2/6/2017 was paid by the assessee.

Indegene Pvt Ltd vs ACIT-TS-506-ITAT-2017(bang)-TP- IT(TP)A No.5911Bang/2017) dated 26.05.2017

1141. The Tribunal noting that the appeal had already been heard and order was awaited, granted further stay of demand to the assessee for AY 2010-11 till July 21, 2017 or till disposal of appeal whichever was earlier. The DR of Revenue had opposed the extension of stay but could not point out any reason or basis to reject the request of the assessee and therefore the assessee was granted extension of stay of demand.

Manipal Global Education Services Private Limited vs DCIT- [TS-536-ITAT-2017(Bang)-TP]-IT(TP)A No.236/bang/15 dated 09.06.2017

1142. The Tribunal, noting that the assessee had duly paid Rs. 2 crores fulfilling conditions imposed under earlier stay order, granted extension of stay of outstanding demand of Rs 16.84cr to assessee for AY 2012-13 for a period of 90 days or till disposal of the appeal whichever was

earlier, subject to the condition that the assessee would not seek adjournment without justifiable reasons.

Epson India Private Limited vs ACIT- [TS-549-ITAT-2017(Bang)-TP]- S.P. No.105/Bang/2017 dated 02.06.2017

1143. The Court, noting that Tribunal had directed the assessee to deposit 50% of the demand (20% within 7 days of its order and balance within 180 days in 6 monthly installments) out of which assessee had already discharged 20% of the demand, restricted partial payment of outstanding demand to 30% instead of 50% as directed by Tribunal vide an interlocutory stay order. Since 20% of the tax demand was already deposited, the Court directed assessee to deposit the remaining 10% within one month. Considering that main appeal was pending before Tribunal for last one year along with the connected appeals filed earlier, HC directed the Tribunal to decide the pending appeals expeditiously, preferably within 6 months from date of the present order.

Google India Pvt Ltd vs ACIT/DIT-TS-594-HC-2017(Kar)-TP-Writ petition no. 13601/2017 (T-IT) dated 17.07.2017

1144. The Court, admitted Revenue's SLP challenging Punjab & Haryana High Court up-holding Tribunal's stay extension beyond 365 days. The High Court had relied upon co-ordinate bench ruling in assessee's own case for AY 2009-10 which had upheld Tribunal's power to grant stay beyond 365 days.

Pr.CIT vs Carrier Air Conditioning and Refrigeration Ltd-TS-611-SC-2017-TP-18885/2017 dated 31.07.2017

1145. Where the assessee itself submitted that the stay petition is not pressed as the appeal was scheduled for final hearing in 2 weeks time, the Tribunal dismissed the application.

Geodesic Yongnam Structural Pvt Ltd vs DCIT-TS-653-ITAT-2017(Bang)-TP-ITA no 140/bang/2017 dated 11.08.2017

1146. Noting that the delay in complete disposal of appeal was not attributable to the assessee, the Tribunal extended stay beyond 365 days. It noted that the Tribunal had passed an interim order rejecting the technical aspect that the claim of the assessee that the assessment order was time barred and that the hearing of the appeal and decision on merit had been adjourned.

The Himalaya Drug Company vs ACIT-TS-656-ITAT-2017(Bang)-TP-S.P. No. 142/bang/17 dated 11.08.2017

1147. The Tribunal, granted stay of outstanding demand of Rs. 92.05 crores for AY 2013-14 for a period of 3 months or till disposal of appeal whichever was earlier, subject to payment of 25% of the disputed outstanding demand and directed assessee to make payment of 10% on or before August 14, 2017 and remaining 15% on or before August 24, 2017. It accepted assessee's submission that it had a good prima facie case and in view of its financial condition it could make a payment of maximum 25% of the disputed demand in 2 instalments subject to which stay was granted for the balance demand.

The Himalaya Drug Company vs ACIT-TS-657-ITAT-2017(Bang)-TP-ITA no. 114/bang/2017 [IT(TP)A no. 1385/bang/17] dated 11.08.2017

1148. Relying on the decision in the case of Pepsi Foods P. Ltd [TS-281-HC-2015(DEL)], wherein it was held that the Tribunal had the power to grant extension of stay beyond 365 days, the Tribunal granted further extension of stay of demand for a period of 6 months or till disposal of appeal, whichever was earlier, subject to the condition that no adjournment would be taken without any valid reason.

Vodafone Mobile Services Ltd vs DCIT-TS-578-ITAT-2017(Bang)-TP-IT(TP)A no. 1160 & 1162/bang/2015 [stay petition no. 261 & 262/bang/2016 dated 28.06.2017

1149. The Tribunal, noting that the demand arose due to TP-adjustment in respect of payments made for advisory & managerial services to AE and similar adjustment was made in preceding AYs 2009-10 and 2010-11 which were pending before Tribunal for adjudication, granted stay of outstanding demand for a period of 180 days or till disposal of appeal whichever was earlier, subject to payment of Rs. 10 lakhs for each AY by September 30, 2017. Further it directed

assessee to furnish proof of demand deposit within 10 days for such deposit and fixed hearing for December 18, 2017

Emerson Climate Technologies (India) Pvt. Ltd vs. DCIT-TS-742-ITAT-2017(PUN)-TP- ITA Nos. 359 & 2847/PUN/2016 dated 15.09.2017

1150. The Tribunal noted that the demand arose due to TP-adjustment in respect of assessee's payment of royalty/technical know-how to AE whereas the royalty paid for preceding AYs 2010-11 and 2011-12 as per the same rate (5% on local sales and 8% on value of export sales net of Indian taxes) was accepted by AO/TPO. Accordingly, it granted stay of outstanding demand for a period of 6 months or till appeal disposal, whichever was earlier subject to payment of Rs 1 crore on or before October 15, 2017.

Firmenich Aromatics (India) Private Limited vs DCIT-TS-764-2017(Mum)-TP - SA No.280/Mum/2017 dated 25.09.2017

1151. The Apex Court admitted Revenue's appeal against High Court order upholding Tribunal's power to grant stay beyond 365 days.

Pr. CIT vs. Teradata India Pvt. Ltd-TS-790-SC-2017-TP- 15969/2017 dated 03.10.2017

1152. The Tribunal, noting that demand arose due to TP-adjustment on account of comparables selection and considering that even if 1 company (eClerx Services) was excluded from the list, assessee's margin would fall within 5% tolerance range, opined that there is a prima facie case in assessee's favour in respect of exclusion of eClerx Services on grounds of functional dissimilarity in view of Rampgreen Solutions HC ruling. Accordingly, it granted stay of outstanding demand of Rs. 2.40 cr for a period of 180 days or till disposal of appeal, whichever was earlier. Further, noting from the docket entries that the appeal filed by the assessee was being adjourned from time to time mostly on the behest of Revenue and observing that assessee had already paid 76% of demand, it held that it would be just to grant stay of the outstanding demand of tax and interest.

Quislex Legal Services Private Limited vs ACIT-TS-792-ITAT-2017(HYD)-TP dated 29.09.2017

1153. The Tribunal, noting that the coordinate bench had earlier granted conditional stay of outstanding demand of Rs. 92.05 cr for a period of 3 months or till disposal of appeal whichever was earlier, subject to payment of 25% of the disputed outstanding demand in 2 installments and that the appeal was heard and order awaited, granted further stay of demand upto October 30, 2017.

The Himlaya Drug Company vs DCIT-TS-791-ITAT-2017(BANG)-TP dated 15.09.2017

1154. The Tribunal granted conditional stay of outstanding demand of Rs. 3.32 cr for a period of 1 month or till disposal of appeal whichever was earlier, subject to payment of Rs. 50 lakhs on or before 22 september 2017.

Puma sports india pvt ltd vs DCIT -TS-811-ITAT-2017(BANG)-TP dated 08.09.2017

1155. The Tribunal granted stay of outstanding demand of Rs. 14.40 cr (including interest) to assessee till disposal of appeal or for a period of 180 days from the date of order, whichever was earlier. Noting that demand arose due to TP-adjustment on account of AMP-expenses and provision of IT support services and considering that the assessee did not have adequate funds to meet its regular operational requirements and if demand was enforced, it would severely affect assessee's business operations, the Tribunal granted stay of demand with the condition that if the terms were violated, the stay shall stand vacated.

Alcon Laboratories (India) Private Limited vs. ITO-TS-869-ITAT-2017(Bang)-TP SA No.209/Bang/2017 dated 03.11.2017

1156. The Tribunal, considering assessee's submission that TP-adjustment should have been limited to transactions undertaken with related parties and not on entire purchases and also noting that assessee had filed rectification application seeking to correct this apparent error and had already

discharged demand of Rs.2.49cr, granted stay of outstanding demand of Rs.5.30cr for a period of 6 months or till appeal disposal, whichever was earlier.

M/s Lexmark International (India) Pvt Ltd vs DCIT-TS-886-ITAT-2017(kol)-TP-ITA No. 235/kol/2017 dated 10.11.2017

1157. The Tribunal, noting that demand inter alia arose due to TP-adjustment on account of AMP expenses and considering assessee's submission that issue was covered in assessee's favour by earlier Tribunal orders, granted stay of tax demand (including interest and other charges) of Rs. 64.84 cr subject to deposit of 5% demand by assessee within 15 days from the date of order.
GlaxoSmithKline Consumer Healthcare Ltd vs. ACIT-TS-905-ITAT-2017(CHANDI)-TP-ITA No. 1528/Chd/2017 17.11.2017

1158. The Tribunal, noting that demand inter alia arose due to TP-adjustment worked out on all transactions undertaken by assessee (with AEs and non-AEs) instead of limiting it to transactions with AE only, held that such an approach was untenable inasmuch the objective of the transfer pricing assessment in Chapter-X of the Act was to determine the income arising from an international transaction entered with associate enterprises alone and not in relation to non-associated enterprise transactions. Accordingly it granted stay on outstanding demand of Rs. 7.26 crore for a period of 6 months or till disposal of appeal whichever was earlier subject to payment of Rs. 10.97 lakhs.
Owens-Corning (India) Pvt. Ltd vs. ACIT-TS-922-ITAT-2017(MUM)-TP SA NO. 473/MUM/2017 dated 17.11.2017

1159. Where the Tribunal in its interlocutory order, had stayed balance amount of Rs. 95 lakhs out of the total demand (on account of Royalty adjustment) subject to the payment of 50 lakhs and also fixed final appeal hearing on December 14, 2017, the Court, held that since the time gap was of only 15 days between the cut-off date of deposit Rs.50 lakhs and the date of hearing, the interest of revenue would not be seriously prejudiced even if the payment of balance amount was stayed till the final decision of tribunal. Accordingly, it accepted assessee's request for demand payment of only Rs.30 lakhs as against Rs.50 lakhs directed in the interlocutory order.
Kaypee Electronics & Associates Pvt. Ltd vs. DCIT- TS-919-HC-2017(KAR)-TP-W.P. No. 52737/2017 dated 21.11.2017

1160. The Court accepted assessee's civil miscellaneous petition and stayed Tribunal's stay order directing payment of Rs.50 Lakh till the next date of writ appeal hearing (on quantum adjustment). It considered assessee's submission that the AO's finding that incurrence of AMP expenses was a separate international transaction was contrary to Sony Ericsson HC ruling and also observed that issue involved in writ (on quantum adjustment) was that Tribunal should not have remanded the issue but decided it itself. Observing that the impugned order of the Tribunal did not record any reason as to why an amount of Rs.50 lakhs should be deposited, instead recorded that prima facie case and balance of convenience lies in favour of assessee, the Court granted stay till the next date of hearing. It further clarified that pendency of the present writ petition would not come in the way of the Tribunal deciding the appeal of the petitioner and would not be a ground to adjourn the matter.
Casio India Company Pvt Ltd -TS-918-HC-2017(DEL)-TP W.P.(C) 9945/2017 dated 10.11.2017

1161. Where the Tribunal had earlier granted conditional stay upto 10th November 2017, subject to payment of 25% of the then outstanding disputed demand and considering assessee's submission the fact that the delay in disposal of appeal was not attributable to the assessee, the Tribunal granted extension of stay on collection of outstanding disputed demand of Rs 69.04 Crores to assessee up to December 31, 2017 or till the disposal of appeal noting that the appeal has been fixed for hearing on December 21, 2017.
The Himalaya Drug Company vs. ACIT-TS-937-ITAT-2017(Bang)-TP 263/Bang/2017 (In IT (TP) A No. 1385/Bang/17) 24.11.2017

1162. The Tribunal, considering the existence of a prima facie case and noting that out of the disputed demand of Rs. 3.03 Crores, assessee had made payment to the extent of Rs. 0.45

Crores and refund adjustment was made by AO of Rs 1.61 Crore, granted stay up to January 31, 2018 or till the disposal of appeal, whichever is earlier.

Swiss Re Global Business Solutions India Pvt. Ltd. vs. ACIT-TS-936-ITAT-2017(Bang)-TP 250/Bang/2017 (In IT (TP) A No. 2028/Bang/17) dated 24.11.2017

1163. The Tribunal granted stay of outstanding demand of Rs.2.59 cr to assessee for a period of 3 months or till appeal disposal, whichever is earlier, subject to payment of Rs. 50 lakhs for AY 2013-14. Further, it clarified that assessee should not seek adjournment in course of the hearing of this appeal without justifiable reasons.

Oaknet Healthcare Pvt. Ltd (Formerly known as Adcock Ingram Healthcare Pvt. Ltd.) vs. DCIT-TS-938-ITAT-2017(Bang)-TP 264/Bang/2017 (In IT(TP)A No. 2097/Bang/2017 dated 24.11.2017

1164. The Tribunal considering assessee's submission that it had a prima facie case and its financial position was bad, granted stay of outstanding demand of Rs. 5.62 cr for a period of 6 months or till appeal disposal, whichever is earlier, subject to payment of 40% of demand on/before December 31, 2017.

WM Global Technology Services (India) Pvt. Ltd. vs. ACIT-TS-939-ITAT-2017(bang)-TP dated 24.11.2017

1165. The Tribunal considering the fact that the assessee had already discharged 50% of total disputed demand of Rs. 3.31 crores and the appeal had been already fixed for December 11, 2017, the Tribunal granted stay of outstanding demand of Rs. 1.65 crores till 31st December 2017 or disposal of appeal, whichever was earlier.

Citrix R & D India Pvt Ltd vs DCIT-TS-945-ITAT-2017(Bang)-TP 249/Bang/2017 (In IT (TP) A No. 543/Bang/16) dated 24.11.2017

1166. Where the assessee claimed to be a market research company and had made payments to AE towards shared market research tools, ALP of which was computed at Nil by TPO and TP-adjustment of Rs.7.50cr was made, the Tribunal, considering assessee's submission that co-ordinate bench in assessee's own case for AY 2008-09, AY 2010-11 and AY 2011-12 had dealt with TP-additions and granted / extended stay, granted stay of outstanding demand of Rs.3.67cr to assessee for AY 2012-13 for a period of 180 days or till appeal disposal, whichever is earlier, subject to payment of Rs.50 lakhs on or before November 30, 2017.

Ipsos Research Private Limited (in which Synovate India Private Limited has been amalgamated) vs. ACIT-TS-987-ITAT-2017(Mum)-TP dated 24.11.2017

1167. Where the assessee had made an effort to justify that prima facie the additions (payment of technical fees and reimbursements from AE) were not sustainable in the eyes of law as the expenses were incurred wholly and exclusively for the purposes of business of the assessee and great prejudice would be done if entire demand was pressed for payment, the Tribunal, granted stay of outstanding demand of Rs. 4.86 crores for a period of 180 days or till disposal of appeal whichever was earlier, subject to 2 conditions (1) Revenue to adjust outstanding refund of Rs. 1.05 crore arising consequent to Tribunal order for AY 2008-09 within 2 weeks after necessary verifications and (2) assessee to further deposit Rs. 40 lakhs by December 31, 2017.

UPS Jetair Express Private Limited vs ACIT-TS-986-ITAT-2017(Mum)-TP dated 24.11.2017

1168. The Tribunal, considering assessee's submission that it was not pressing the stay petition but required an early hearing granted as appeal hearing for January 2, 2018 and dismissed the petition for stay of outstanding demand of Rs. 1.39 crores as not pressed.

Rittal India Pvt. Ltd. vs. DCIT-TS-1024-ITAT-2017(Bang)-TP S.P. No. 270/Bang/2017 (in IT(TP)A No. 2494/Bang/2017) dated 08.12.2017

1169. The Tribunal considering assessee's submission that 50% of demand was already discharged and assessee had good prima facie case granted stay of outstanding demand of Rs. 1.62 crores

for a period of 3 months or till disposal of appeal, whichever was earlier subject to payment of Rs. 15 lakhs on or before 15th December 2017.

Capco Technologies Pvt. Ltd. vs. ITO-TS-1026-ITAT-2017(BANG)-TP S.P. No.219/Bang/2017 (in IT(TP)A No. 1981/Bang/2017) dated 08.12.2017

1170. The Tribunal, noting that assessee had already discharged 50% of outstanding disputed demand, granted stay of outstanding demand of Rs.1.65cr till December 31, 2017 or till appeal disposal, whichever is earlier, for AY 2011-12.

Citrix R & D India Pvt. Ltd. vs. DCIT-TS-1029-ITAT-2017(bang)-TP-S.P. No.249 & 267/Bang/17 dated 24.11.2017

1171. The Tribunal considering assessee's submission that appeal was already heard and orders were awaited, granted extension of stay of demand for AYs 2011-12 to 2013-14

Mercedes Benz Research & Development India Pvt. Ltd vs. DCIT-TS-1058-ITAT-2017(Bang)-TP dated 15.12.2017

1172. The Tribunal noting that stay was granted / extended on 4 earlier occasions and appeal was heard by Tribunal on July 26, 2017, however, appeal was released for fresh hearing on October 26, 2017 and thereafter it was posted for hearing on November 22, 2017 on which day Revenue sought adjournment, granted further extension of stay of demand upto 31.03.2018 or till disposal of appeal whichever was earlier as the delay in disposal of appeal was not attributable to the assessee.

Epson India Pvt. Ltd. vs. ACIT-TS-1018-ITAT-2017(Bang)-TP S.P. No. 268/Bang/2017 (in IT(TP)A No. 293/Bang/2017) dated 15.12.2017

1173. Where the TPO suggested TP-adjustment even on non-AE transactions and in respect of corporate tax additions, and the issues were restored back to AO for de-novo adjudication in earlier years, the Tribunal granted stay of outstanding demand of Rs 225.922 crores to the assessee for AY 2013-14.

Wipro GE Healthcare Pvt. Ltd vs. DCIT-TS-1056-ITAT-2017(Bang)-TP SP No.275/Bang/2017 (In IT(TP)A No.2525/Bang/2017) dated 15.12.2017

1174. Where the demand arose due to TP adjustment in respect of AMP expenses and before High Court, the assessee relied on Valvoline Cummins ruling to contend that AMP-expenses cannot be characterized as an international transaction, however, Revenue relied on Luxottica India ITAT ruling to state that it can no longer be contended that AMP-expenses are to be kept away from ALP fixation, the Court, noting that appeal was pending before Tribunal post remand, held that the demand to pay 20% was justified and directed the assessee to deposit Rs. 15 crore in 2 installments. Accordingly, it disposed assessee's writ petition in respect of Tribunal's refusal to grant interim orders for suspending the tax demand.

Pepsico India Holdings Pvt. Ltd vs. ACIT-TS-1064-HC-2017(DEL)-TP W .P.(C)11454/2017& C M N o.46706/2017 dated 22.12.2017

1175. The Tribunal granted the assessee stay of outstanding demand (arising out of TP adjustments) for a period of 3 months or till appeal disposal, whichever was earlier, subject to payment of Rs.50 lakhs on or before November 30, 2017. It noted that the assessee had opening cash in hand of Rs. 502.79 lacs in November 2017 and accordingly held that it could not be said that the financial position of the assessee was such that it could not make at least part payment of the outstanding disputed demand. It further clarified that the assessee should not seek any adjournment without justifiable reasons and if the assessee did so the stay granted would be automatically vacated.

CAE India Pvt Limited vs ITO-TS-1075-ITAT-2017(Bang)-TP dated 10.11.2017

Others

1176. The Tribunal reversed CIT(A) order directing aggregated approach for benchmarking of off shore software consultancy service during AY 2005-06, relying on its order in the assessee's case for AY 2004-05 directing AO to independently benchmark the two transactions.

SAS Research & Development India Pvt Ltd - TS-1069-ITAT-2016(Pun)-TP

1177. The Tribunal relying on the decision of HC in the case of Knorr Bremse India Private Ltd [TS-558-HC-2015(P&H)-TP] (wherein it was held that closely linked transaction can be components of a single transaction) and decision in the case of Sony Erricson Mobile Communication India Pvt Ltd [TS-96-HC-2015(Del)-TP] (wherein the HC held that CUP method, RP method and CUP method could be applied to a transaction or closely linked or continuous transactions), deleted TP adjustment of Rs 1.12 crores on sale of chemical product by assessee to its non-AEs for AY 2006-07 permitting aggregation of transactions under CUP method. The TPO had made adjustment considering highest sale price to non-AE against average price adopted by the assessee based on aggregation of transaction. It also relied on the Apex Court ruling in Radhasoami Satsang [TS-12-SC-1991], wherein it was held that there was no good reason to take a different stand now and claim that aggregation of transactions could not be permitted in the current assessment year when the same was accepted in the earlier assessment years.

Gulbrandsen Chemicals Pvt Ltd - TS-1026-ITAT-2016(Ahd)-TP

1178. The Tribunal allowed selection of foreign AEs (engaged in sales and distribution activities or secondary manufacturing) as tested party, being the least complex entity, while benchmarking assessee's international transactions drawing support from assessee's Advance Pricing Agreement (APA) signed with CBDT for AY 2014-15, wherein the CBDT had approved selection of foreign AEs as tested party with TNMM as the most appropriate method. The Tribunal further observed that the assessee's functional, assets & risk (FAR) analysis as well as international transactions for APA year as well as year under appeal were identical and adequate financial data for comparison on region basis/country were available. Further, even though no separate books of accounts were maintained for the units, the Tribunal also allowed the section 80IB/80IC deduction claim for AY 2008-09 on the ground that Sec 80IA(7) only provided that accounts of the eligible undertaking should be audited by an accountant and it did not talk about maintenance of 'separate books of accounts'.

Ranbaxy Laboratories Ltd - TS-707-ITAT-2016 (Del)

1179. Where the assessee had made sales of cloth guiders to its AE as well as to Non-AEs but offered a discount of 15% as bulk discount to sales made to its AEs stating that the discount offered to the AE could not be compared to Non-AEs as there was no other customer who purchased the similar volume of cloth guiders (185 purchased by AE, Non-AEs purchased less than 50 each) and the AO rejected the contention of the assessee stating that no evidence / agreements had been brought on record to substantiate this fact, the Tribunal relying on the decision in the assessee's own case for AY 2007-08 and 2008-09 (TS-1059-ITAT-2016 (Ahd) – TP) remitted the issue back to the AO to decide the matter afresh after giving adequate opportunity of being heard to the assessee.

Erhardt + Leimr (India) Pvt Ltd v DCIT – TS-72-ITAT-2017 (Ahd) – TP - ITA No. 352/Ahd/2015 dated 06.02.2017

1180. Where the assessee had declared two entities viz. Star Brands Ltd and Dynamic Technologies Ltd to be AEs in its Form 3CEB and subsequently during assessment proceedings contended that the disclosure in Form 3CEB was incorrect as the said parties were not its AEs due to change in the shareholding patterns and directors, the Tribunal observed that the assessee had not explained as to why it had not filed a confirmation or certification from the auditors who signed the 3CEB stating that the two companies were erroneously included in the list of AEs and therefore rejected the plea of the assessee. Noting that the assessee had benchmarked its transactions by applying CPM with mark-up on salary and rent (and not other expenses) in accordance with the agreement with its AE, which was objected to by the TPO, it remitted the matter to the TPO for further verification observing that if the assessee had not incurred other costs, they could not be considered for computing mark-up.

Techsource Services Pvt Ltd v ITO – TS-29-ITAT-2017 (Mum) – TP - ITA No.6966/Mum/2014 dated 04.01.2017

1181. The Tribunal upheld the CIT(A)'s order deleting TP adjustment on the advertisement segment (benchmarked individually) and held that the aggregation of 'advertisement sale' and 'channel distribution' segments for benchmarking was justified as the advertisement revenue was directly co-related to channel viewership and sale of advertisement airtime increased with number of cricketing events and therefore the two segments were closely linked. It rejected Revenue's argument that the assessee had merged two segments with a view to conceal loss incurred in the 'advertisement sale' segment for the instant year and upheld the assessee's contention that, in the earlier years, it was only acting as a commission agent, thereby soliciting advertisements for its AE for fixed commission, whereas in the instant and subsequent years, it had shifted to a distribution model pursuant to relaxation of foreign exchange regulations. Accordingly, it held that both the activities viz. distribution of channels and aired advertisement were interrelated and inextricably connected and therefore were to be aggregated and since the operating margin of the aggregate transactions exceeded the margin of comparables, it held no addition was warranted.

ACIT v ESPN Software India Ltd – TS-128-ITAT-2017 (Del) – TP - ITA No. 2059/Del/2012 ITA No. 3457/Del/2013 dated 08.12.2017

1182. The Tribunal admitted the additional ground raised by assessee objecting to TP adjustment made/confirmed by TPO/DRP when assessee was claiming exemption u/s 10A. However, it dismissed the argument of the assessee that since all of its income was exempt from tax in India, there was no intention to shift profit outside India as AEs were located in USA where tax rates were higher than in India based on the decision of Mumbai Tribunal in case of Tata Consultancy Services Ltd [TS-521-ITAT-2015(Mum)-TP], and held that the decision of Tata Consultancy Services was held inapplicable in case of Gruner India Pvt. Ltd[TS-202-ITAT-2016(DEL)-TP] wherein it was held that assessee's eligibility to claim deduction did not operate as a bar on determining ALP of the international transactions undertaken, and enhancement of income due to TP-addition could not be considered for allowing deduction benefit.

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

1183. The Tribunal upheld the assessee's selection of foreign AE as tested party for benchmarking international transaction of provision of IT/IT enabled services for AY 2010-11, rejecting the Revenue's contention that reliable data was not available in respect of foreign comparables. Relying on the decisions of the Tribunal in Ranbaxy Laboratories [TS-173-ITAT-2016(DEL)-TP], General Motors [TS-215-ITAT-2013(Ahd)-TP] and Development Consultants [TS-3-ITAT-2008(Kol)], it held that there was no bar in treating foreign AE as tested party merely because data of comparable companies were not available so long as the following two conditions were fulfilled i.e. i) data should be available in public domain and ii) assessee has furnished all relevant data to tax administration. Noting that both these conditions were fulfilled as the relevant data from Global Symposium database used by assessee was available in public domain and had also been furnished to the TPO including entire detail of search process, business description and P&L accounts, the Tribunal held that the Revenue could have accessed the said sources and conducted comparability analysis. It also observed inconsistencies in TPO's approach noting that the foreign AE had been accepted as tested party in preceding year as well as in the current year for benchmarking marketing support services. Accordingly, it allowed the assessee's appeal.

IDS Infotech Ltd. Vs DCIT - TS-184-ITAT-2017(CHANDI)-TP - ITA No.130/Chd/2016 dated 09.03.2017

1184. The Tribunal set aside the order of the CIT(A) deleting TP addition in respect of assessee's international transaction pertaining to 'Purchase of material' for AY 2005-06 as all the points taken note of by the Id. CIT(A) in deleting the transfer pricing addition lacked valid reasoning and suffered from certain inconsistencies viz.

1). The CIT(A) had held that TP adjustment cannot be made on the entire transactions of the assessee including transactions other than the international transactions whereas the TPO had computed the TP-addition not on entity level but only for a sum of Rs. 74.70 lac in respect of that

part of the excess profit relating to the international transaction of purchase of raw material from AEs

2). The CIT(A) excluded 5 companies having turnover ranging between Rs.176 to Rs. 598 Cr as against assessee's turnover of Rs.27.71 Cr, which in the view of the Tribunal was contrary to the direct HC judgment in the case of Chryscapital Investment Advisors (India) P. Ltd [TS-173-HC-2015(DEL)-TP], wherein it was held that high or low turnover was not a criteria for excluding an otherwise comparable company.

3). The CIT(A) erred in considering the net profit margin only of Unit 2 of the assessee contending that both its units earned job work receipts

4) For the purpose of benchmarking the transactions of the assessee, the CIT(A) considered the AE as a comparable.

Further, noting that the assessee had not applied any method for ALP determination on the contention that no comparable was available, the Tribunal observed that assessee's TP study report was absolutely devoid of relevant information required to be mandatorily maintained as per Sec 92D r.w. Rule 10D. It also rebuked CIT(A)'s observation that there was no intent to avoid tax absent any unrecorded transactions or undisclosed facts, as such reasoning was completely extraneous with respect to ALP determination. Accordingly, it remitted the issue to the file of the AO / TPO for reconsideration.

ACIT vs. Progressive Tools & Components Pvt. Ltd - TS-200-ITAT-2017(DEL)-TP –

1185. Where the assessee had already withdrawn appeal filed by it before the Tribunal with regard to the Transfer pricing issues arising for the relevant year on the ground that the issues had been resolved under the MAP proceedings which had been accepted by the Tribunal in its earlier order, the Tribunal dismissed the Revenue's appeal for the same year holding that its appeal had become infructuous as the issues had already been resolved.

Syantec Software India Pvt. Ltd vs ACIT - TS-163-ITAT-2017(PUN)-TP- ITA No. 538/PUN/2015 dated 06.03.2017

1186. The Tribunal applied a mark-up of 17.5% approved in MAP with USA and Canada on assessee's IT services transactions with AEs in UK and Australia for AY 2007-08 following the decision of the co-ordinate bench in J. P. Morgan Services (P) Ltd. vs. DCIT [TS-578-ITAT-2015(Mum)-TP] wherein the Tribunal held that the mark-up of 17.5% which was adopted for USA and Canada in MAP proceedings, should be adopted in respect of other countries if there was no distinction in facts. Observing that the assessee had entered into international transactions with its AE in four countries i.e. 1) USA, 2) Canada, 3) UK and 4) Australia, out of which as per MAP with USA and Canada (covering 96 percent of the transactions), a mark-up of 17.5% was agreed, the Tribunal held that since there was no distinction in facts, then the impugned margin determined would be applied to the remaining 4% transactions as well. Accordingly, applying same margin of 17.5% on transactions with UK and Australia AEs, it held that no separate adjudication was called for in respect of TP grounds raised by assessee

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

1187. The assessee, an Indian branch of Calyon Bank (that provided ECB loans to Indian borrowers) provided financial analysis of the borrowers, general market conditions and regulatory environment to its Head office. The TPO had made an adjustment of 25 percent of the interest and commission received by the foreign head office from its Indian customer, treating the same as profit attributable to the Indian branch, which was restricted to 20 percent by the CIT(A). The Court upheld the order of the Tribunal wherein the Tribunal held that the interest earned by the foreign branch was not to be included for the purpose of attributing income to the Indian branch as it had not contributed to the loan amount which had been provided by the foreign branch. Accordingly, it dismissed the appeal of the Revenue and held that the Tribunal was justified in directing the AO/TPO to make TP adjustment at 20% of fees & other charges earned by assessee for arranging foreign currency loans for its existing clients.

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

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

1188. The Tribunal following the decision of the co-ordinate bench in the assessee's own case in AY 2008-09 directed the AO/TPO to consider assessee's objections regarding comparables selected by the AO / TPO for the purpose of benchmarking the commission income received by the assessee from its AE with respect to sale of fixed income & derivative products on behalf of its AE i.e. that the comparables selected by the TPO did not have any derivative transactions, that the margin of the comparables were not correctly computed and that the some of the comparables had different functions and risks. It also directed TPO to apply arm's length margin only to operating costs related to AE transactions.

Societe Generale [TS-314-ITAT-2017 (Mum)-TP] - / ITA No.1854/Mum/2015 dated 19.04.2017

1189. The assessee rendered call center / ITeS services to its AEs (which were benchmarked under TNMM) and also to non-AEs. Its international transaction of call center services were split into 'US operations' and 'UK operations'. For its US operations, the AE viz. Mphasis Corp (Mcorp) entered into contracts directly with ultimate customers and the assessee provided ITeS directly to the customers under a back to back arrangement with MCorp and as a return for the marketing activity carried on by MCorp, a selling commission of 7% was paid by AE while the entire revenue collected from ultimate customers in US was passed on to assessee. With respect to operations in Europe, Mphasis UK (AE), carried out marketing activity for a selling commission of 4%, however, in this case, assessee entered into contracts directly with the ultimate customers. In its TP study, assessee selected foreign AE's i. e Mphasis Corp, USA and Mphasis, UK as tested parties claiming them to be least complex as they were providing only marketing services. The cost of telecom equipment ownership and maintenance was reimbursed by assessee to the AEs on actual costs. The TPO accepting the ITES services to be at ALP, proceeded to determine the ALP of the selling commission, telecom cost, establishment charges and reimbursement of expenses paid at Nil alleging that there were no services provided by the AE.

With respect to reimbursement of expenses towards telecom cost, establishment charges and reimbursement of other expenses, assessee submitted that it had provided various additional documents to demonstrate that the reimbursements were actually at cost. The Tribunal opined that since the assessee had filed additional evidence to substantiate that reimbursement towards telecom cost, establishment charges and other expenses are only on cost basis, in the interest of justice, the matter required fresh adjudication/remand to the AO/TPO to examine additional evidence whether reimbursement of expenses towards telecom cost and establishment charges were actually on cost. It also opined that assessee's submissions regarding selection of AE as tested party also required fresh consideration by TPO. Thus, it restored the entire TP-adjustment to the file of AO/TPO for fresh adjudication in accordance with law after affording due opportunity to the assessee.

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

1190. The Tribunal rejected assessee's contention that since Chapter X has not been referred to in section 4 & 5 TP adjustment could not be subjected to tax. It held that as per section 4 of Income tax Act, 1961, income tax is chargeable on Total Income and as per section 5, total income includes all income received or deemed to be received in India or income that accrues or arises or is deemed to accrue or arise in India. It held that unless it is shown that the International transaction is not liable to tax, no dispute could be raised about the applicability of Chapter X because section 5 provides that subject to the provisions of the Act, the Total Income includes various types of incomes and since Chapter X is part of the Act, the same has to be applied wherever applicable. Noting that Chapter X provides for the manner of computation of income from an international transaction, it held that there was no merit in the submission of the assessee.

Insilica Semiconductors India Pvt Ltd [TS-346-ITAT-2017(Bang)-TP- ITA No. Dated 15.03.2017

1191. The Tribunal, set aside the order of the TPO/DRP making an adjustment solely on account of alleged location savings and dismissed the TPO's contention that conducting a trial in India led to location savings in the hands of the assessee as the regulations, compliance and investigating costs were lower. Noting that the TPO's quantification of location savings was merely based on web article and not actual costs, it further held that location savings were only relevant in the cross-border transaction for the limited purpose of examining and investigating a transaction and not as a basis for determining the ALP and consequent adjustment. It also held that so far as the transactions were not entered into solely for the purpose of avoiding tax, addition on account of location savings was not sustainable. The Tribunal further clarified that even the concept of BEPS is relevant only for transaction solely focused on tax evasion.

Parexel International Clinical Research Pvt. Ltd (Earlier known as Parexel International Synchron Pvt. Ltd) vs. DCIT-TS-580-ITAT-2017(Bang)-TP-ITA No. 254/bang/2016 and 292/bang/2016 dated 16.06.2017

1192. The Tribunal admitted assessee's additional ground for AY 2007-08 seeking consideration of overseas AE as a 'tested party' and remitted the matter to the file of AO/TPO for fresh enquiry and determination as complete details were not available on record but were filed as additional evidence. Referring to the definition of 'tested party' under OECD TP guidelines in absence of corresponding definition in domestic law, it directed the AO / TPO to consider the following relevant factors while determining whether the foreign entity could be considered as a tested party viz. (a) whether it was the least complex entity (b) whether reliable and accurate data for comparability was available and (c) whether the data available could be used with minimal adjustment.

Nivea India Private Ltd vs DCIT-TS-668-ITAT-2017(mum)-TP-ITA no. 121/mum/2013 dated 21.08.2017

1193. Where the assessee had charged its AE for provision of network services on a provisional basis and subsequently reduced the fee charged by way of a credit note and the AO rejected the credit notes on the ground that they were issued to reduce / suppress taxable income, the Tribunal, noting that the AE's ledger accounts had included the credit note in its books for working out the final fees, restored the matter to the file of the AO for fresh adjudication.

Reach Network India Pvt Ltd – TS-664-ITAT-2017 (Mum) – TP-ITA no. 5632/mum/2013 dated 05.07.2017

1194. Since there was a discrepancy in the turnover reflected in the assessee's Transfer Pricing study (Rs.3.97 crore) and value of international transaction in the additional ground of appeal filed by the assessee (Rs. 6.13 crore), the Tribunal remitted the matter to the AO / TPO for re-consideration noting the assessee's submission that a fresh Transfer Pricing study had to be conducted due to the aforesaid error.

Gameloft Software Pvt Ltd – TS-660-ITAT-2017 (Hyd) – TP – ITA No 25 / Hyd / 2012 dated 09.08.2017

1195. The Tribunal, noting that assessee had entered into an arrangement with its AE for provision of network support services as per which amount receivable from AE was determined as per formulae viz. (Return on costs + return on assets) – (External customer Revenue + ISP Revenue + other income) and the assessee had originally raised invoices of Rs. 15.76 cr on AE on provisional basis which was subsequently followed by credit note of Rs 2.49 cr as assessee estimated that income receivable as per the agreement would be less than invoices raised, held that the aforesaid facts were not analyzed properly by the AO/FAA during assessment/appellate proceedings and accordingly, restored the matter to the file of AO for fresh adjudication.

Reach Network India Private Ltd vs. ITO-TS-664-ITAT-2017(Mum)-TP-ITA No. 5632/mum/2013 dated 05.07.2017

1196. Where the assessee clubbed its revenue from sale of air time along with its revenue from distribution / advertisement / sale of business while benchmarking its international transactions on the ground that there were common features in both the streams of revenue viz., sale of

airtime involved bulk sale of product / service to the customer and distribution too involved sale of product / service through a network which was upheld by the Tribunal on the ground that there was direct correlation between the revenue earned from both the streams, the Court held that issue of aggregation or segregation of two transactions was entirely a fact dependent exercise and could not be treated as a question of law. Accordingly, it dismissed Revenue's appeal.

CIT (LTU) vs ESPN Software India Ltd-TS-873-HC-2017(DEL)-TP – ITA No. 882, 890 and 891 of 2017 07.11.2017

1197. The Tribunal held that where the assessee's primary activity was to manufacture and sell IC engines and components, then the activities of importing engine parts and components, payment of royalty against receipt of know-how, provision of procurement support services to the AEs to help the sourcing of components, receipt of IT support services, design services and payment of technical knowhow fees, etc. were closely linked to the export of manufactured IC engines. Further, the Tribunal, relying on the decision in assessee's own case for AY 2007-08 [TS-165-ITAT-2017(PUN)-TP] and Rule 10A(d) and 10B of the Rules as well as OECD Guidelines, held that, in appropriate circumstances, where there was existence of closely linked transactions, the same could be grouped and considered as one composite transaction for the purpose of determining ALP. Accordingly, it directed TPO to aggregate the various activities undertaken by assessee under the head of 'manufacturing activities' for the purpose of benchmarking.

Cummins India Limited vs ACIT-TS-933-ITAT-2017(PUN)-TP ITA No.2417/PUN/2012 dated 30.10.2017

1198. The Tribunal dismissing Revenue's appeal, upheld assessee's aggregation of IT and ITeS services provided to Associated Enterprises (AEs) under a single composite contract for AY 2010-11. Referring to OECD's TP guidelines, UN TP Manual and UK Transfer Pricing Guidelines wherein due recognition has been given to contractual terms of the agreement for undertaking TP-analysis & provides for aggregate analysis of transactions encapsulated under a single portfolio held that since the terms of the composite agreement entered into with its AE for totality of services on the basis of 'bundled pricing approach' had been consistently followed by the assessee, its action of entering into composite agreement with its AE for rendering bundled services of IT and ITES **could not** be doubted and the benchmarking could only be done with the total services (i.e IT and ITES) rendered by the assessee. Further, the Tribunal held that TPO's reliance on AS-17 Segment Reporting for comparison of the margins of AE and Non-AE transactions was highly unwarranted since purpose of the Segmental Reporting was totally different and could not be used to bifurcate between AE and Non-AE transactions. Accordingly, it deleted TP-adjustment noting that assessee's 27.50% margin was above 20% margin specified in Safe Harbour Rules.

Data Core (India) Pvt. Ltd vs. ITO-TS-962-ITAT-2017(KOL)-TP I.T.A No. 387/Kol/2015 dated 06.12.2017

1199. The Tribunal accepted the assessee's contention that the TP adjustments arising during the year under consideration were on account of the ill advice received by the assessee whereby it benchmarked its transactions on an entity level. However, as the assessee had revised the approach to the transaction by transaction approach for which is submitted additional evidence, the Tribunal, relying on the decision of the Apex Court in N. Balakrishnan Vs. M. Krishnamurthy held that the assessee should not suffer because of earlier wrong legal advice which the assessee is ready to correct. Accordingly, it set aside the matter to the file of the TPO for readjudication.

Epcos India Private Limited vs JCIT-TS- 985-ITAT-2017(KOL)-TP- ITA No. 322/kol/2016 dated 5.12.2017

1200. Where the assessee contended that due to attachment of bank account, the assessee was unable to continue its operations and make tax payments and was experiencing severe cash crunch and liquidity position, the Tribunal observing that the issues involving T.P. adjustment, prima facie appeared to be covered in favour of the assessee and if the effect to the earlier order of the Tribunal in assessee's own case was given, then, there would not be any demand at all,

directed to lift the attachment of bank accounts till disposal of appeal. Further, considering assessee's contention that refund of Rs. 40 lakhs was due to the assessee, the Tribunal directed the Revenue to adjust the same towards outstanding demand.

Planet Online P Ltd v ACIT-TS-1059-ITAT-2017(Hyd)-TP S.A. No.167/Hyd/2017 dated 27.12.2017

II. International Tax

a. Royalty / Fees for technical services

Royalty

1201. The Tribunal held that payment towards IT support services by assessee (an Indian company) to its associated enterprise ('AE') in Canada would not be taxable as royalty under domestic law [u/s 9(1)(vi)] as also under Article 12(3) of the India-Canada DTAA, the payments were in the nature of reimbursements of expenses incurred by the payee on assessee's behalf without any income element embedded therein, also there were specific cost allocations which were borne by the assessee. Rejecting Revenue's contention that payment was taxable as royalties being consideration towards "use or right to use any industrial, commercial or scientific equipment" held that although service may involve use of equipment but that did not vest right in the assessee to use the equipment.

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

1202. The Tribunal rejecting the revenue's contention that charges paid by the assessee on account of the use and hire of a ship amounted to royalty within the meaning of section 9(1)(vi) and article 12 of the respective tax treaties since ship is an equipment, held that on perusal of time charter agreement, the captain/master of the vessel crew and other staff of the ship were controlled by the FSC and not the assessee, further, repairs, maintenance and insurance related expenses of the ship were borne by the Foreign Shipping Companies (FSC). Therefore payment of hire charges by the assessee to foreign shipping companies (FSC) for transportation on time charter basis could not be regarded as royalty within the meaning of section 9(1)(vi).

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

1203. The Court rejecting the Revenue's stand that software was a 'copyright' in terms of Explanation 2(v) to Sec 9(1)(vi) of the Act and also under Article 12(3) of India-China DTAA, held that the consideration received by assessee (a Chinese telecom company) for supply of software to Indian companies, could not be regarded as royalty since the supply of software was in the nature of sale of goods i.e transfer of copyrighted article and not transfer of copyright itself. The software was an integral part of the telecom equipment supplied by the assessee. Further, the supplies made (of the software) enabled the use of hardware sold, without the software the hardware was not possible.

ZTE Corporation [TS-33-HC-2017(Del)]

1204. The Court held that where assessee had entered into agreement with US company for use of software owned by US company and said agreement specifically forbade assessee from decompiling, reverse engineering or disassembling software and it provided that assessee would use software only for internal business operation and would not sub-license or modify same, consideration payable by assessee was for use of copyrighted article and not for use of copyright and, hence, could not be considered as royalty within meaning of article 12(4) of India-US DTAA.

First Advantage (P) Ltd. [2017] 77 taxmann.com 195 (Mumbai Tri.)

1205. The Tribunal held that payments received from an Indian bank for data processing support services provided by the assessee through a network of computer systems in Hong Kong was not taxable as royalty under section 9(1)(vi) since the infrastructure facilities provided by the

assessee (in the form of data centre, storage facility, etc. for payer's banking operations) were merely to ensure quality, standard and safeguards, adopted in the course of data processing and there was no transfer or application of technology to the payer. It further observed that there was no use or income from leasing of equipment as provided in Explanation 2(iva) to section 9(1)(vi). It also held that payments received by the assessee would not qualify as fees for technical services as the assessee had provided only standard facility for data processing without any human intervention.

Atos Information Technology HK Ltd. [TS-54-ITAT-2017(Mum)] (ITA NO. 237,238,239 &240/MUM/2016)

1206. The Tribunal held that payment by the assessee (an Indian outbound call centre) to US Entities towards International Private Leased Circuit (IPLC) and connectivity charges for use of dedicated private bandwidth in underwater sea cable was neither royalty nor FTS under the Act as well as India-USA DTAA and accordingly no TDS u/s 195 was deductible. It held that since there was no human intervention involved and the "make available test" was not satisfied under DTAA, it was not in the nature of FTS. It further held that since, the payment made to US entities was for transmission of call data and did not involve use or right to use any industrial commercial or scientific equipment and since, the control of equipment was also with the non-resident parties and not leased to the assessee, the non-resident parties did not provide use of any 'process' to the assessee, which were of patentable nature having exclusive ownership rights. Consequently, the payments did not amount to royalty under Act as well as the DTAA.

Geo Connect Ltd. [TS-39-ITAT-2017(DEL)]

1207. The Tribunal held that software embedded in an equipment cannot be regarded as giving any independent right to use software and accordingly, consideration is paid for purchase for 'copyrighted article' which cannot be treated as royalty.

HITT Holland Institute of Traffic Technology B.V. v. DDIT [2017] 78 taxmann.com 101 (Kolkata - Trib.) (IT APPEAL NO. 574 (KOL.) OF 2014)

1208. The Tribunal held that software payments by the assessee to a Singaporean company was not royalty as per Article 12(3) of India-Singapore DTAA since the software license agreement provided assessee the right to use the computer software and not right to use copyright in the computer software. It observed that Article 12(3) covers 'use of/right to use of any copyright of literary....' and not right to use software unlike Explanation 4 to section 9(1)(vi). As per section 90(2), the assessee could be governed by beneficial DTAA provisions and accordingly, the payment made did not fall under the definition of royalty as per Article 12(3). It further held that though computer software would be recognized as literary work as per Copyright Act but to constitute royalty as per Article 12(3) of DTAA, the consideration should have been paid for the use or right to use copyright in the literary work and not the right to use the literary work itself.

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

1209. The assessee credited the account of its Italian group company in its books of accounts in respect of royalty on technical know-how without deducting the tax u/s 195 since the actual payment of royalty was made in the subsequent year. The AO made a disallowance u/s 40(a)(i) due to non-deduction of TDS and held the assessee to be assessee in default u/s 201(1)/(1A). The Tribunal observed that as per Article 13 of India- Italy DTAA, taxability in the hands of the non-resident is triggered at the time of payment by the resident and accordingly, held that unless the actual payment took place, the taxability under article 13 of Indo Italian DTAA did not arise. Relying on the decision of the Apex Court in the case of GE Information Technology [2010] 327 ITR 456 (SC), it held that the tax was not deductible u/s 195 since the royalty was not taxable at the time of credit as per the DTAA. With respect to the rate of tax, the Tribunal observed that Section 115A of the Act prescribed the tax-rate of 10% as against the tax-rate of 20% on royalties under Article 13(2) of DTAA and held that as per Sec. 90 of the Act, beneficial rate is to be applied i.e. 10% as per the Act, despite taxability being triggered as per the DTAA on the receipt basis.

Saira Asia Interiors Pvt. Ltd. [TS-134-ITAT-2017(Ahd)] [ITA No.673/Ahd/2014]

1210. The Tribunal held that professional fees paid by the assessee-company to a US entity for rendering 'Strategic and Financial Counselling' services was not in the nature of royalty under

Article 12(3) of India-US DTAA since the payment was made by the assessee towards rendition of (a) business promotion, (b) marketing, (c) publicity and (d) financial advisory services and not for the use of any information concerning industrial, commercial or scientific information in possession of the service provider. It clarified that the mere fact that the assessee had benefitted from rich experience of the service provider while availing of these services was wholly irrelevant. It further held that the payment did not constitute fees for included services under Article 12(4) of India-US DTAA as the 'make-available' test was not satisfied.

Marck Biosciences Ltd. [TS-128-ITAT-2017 (Ahd)] [ITA No. 203/Ahd/2014]

1211. The assessee was engaged in the business of manufacture and sale of motorcycles using technology licensed by Honda Motor Co. Ltd., Japan ('HMCL') for which it had entered into a License and Technical Assistance Agreement ('LTAA') which prohibited the use of know-how for the purpose of exports. Subsequently, a separate Export Agreement ('EA') was also entered into whereby HMCL accorded consent to assessee to export specific models of two wheelers to certain countries on payment of export commission @ 5% of the FOB value of such exports. The AO recharacterized the export commission as royalty, considering the EA as an extension of the LTAA and disallowed the payment made under section 40(a)(i) since no tax had been deducted at source. The Court, observing that the EA and LTAA were two distinct agreements upheld the order of the Tribunal wherein it was held that the said payment could not be considered as royalty or FTS as HMCL had neither transferred or permitted the assessee to use any patent, invention, model, design or secret formula, nor had HMCL rendered any managerial, technical or consultancy services. The Court also observed that the attempt at re-characterizing the transaction as one involving payment of royalty overlooked the fact that the payment under the LTAA was treated by the assessee itself as royalty. Accordingly, it dismissed the appeal of the Revenue.

CIT vs. Hero Motocorp Limited - TS-180-HC-2017(DEL) - ITA 923/2015 dated 08.05.2017

1212. The Tribunal held that the payment made by the assessee to the non-resident company (in Singapore) to access a publicly available database could not be taxed as royalty as neither did the assessee receive any knowledge as to how the databases were maintained nor did it receive any license for commercial exploitation of the copyright with regard to the database maintained by the payee. It held that the assessee had merely got a limited right to use the information solely belonging to the payee which amounted to use of 'copyrighted information' which could not be taxed as royalty under Article 12 of India-Singapore DTAA since there was no transfer of all or any rights in respect of copyright of literary work.

Kinsey Knowledge Centre India Pvt. Ltd. [TS-288-ITAT-2017(DEL)]

1213. The Tribunal upheld the disallowance under Section 40(a)(i) of the Act and held that the payment made by the assessee to Google Ireland for granting distribution rights of 'Adwords programme' was taxable as royalty under Section 9 as well as under the provisions of the India-Ireland DTAA. It rejected assessee's stand that it was merely a reseller of advertisement space and no rights in the intellectual property of the Google were transferred to it and held that as per the distribution agreement the assessee had received technology enabling it to undertake focused target marketing and received access to various data with respect to the age, gender, region, language, taste habits, food habits, cloth preference, etc., which it used for selecting the advertisement campaign. It held that the intellectual property (IP) of Google vested in the search engine technology, associated software and other features, and hence use of these tools by the assessee for performing various activities, including accepting advertisements, providing before or after sale services and use of secret process, clearly fell within the ambit of 'royalty'. Further it dismissed assessee contention that initiation of TDS default proceedings beyond 4 years was bad in law and taking note of the amended law u/s. 201 (which requires initiation of proceedings within 6 years for the resident) held that the same treatment was to be afforded to non-residents as well in light of the non-discrimination clause contained in the DTAA.

Google India Private Ltd vs Addl CIT [TS-468-ITAT-2017(Bang)- IT(TP)A.1511 to 1518/Bang/2013 dated 23.10.2017

1214. The Tribunal held that the payment made by assessee to its parent in Italy towards software licenses purchased during AY 2009-10 to 2015-16 was not in the nature of royalty to attract deduction of tax u/s 195. It observed that even though the software license agreement permitted creation of unlimited software license copies, the same could be used by assessee only for internal business and assessee was not allowed to sub-license, assign or transfer such software and therefore the assessee was given only a right to use copyrighted software for limited term. Further, relying on the decision in the case of Dassault Systems Simulia Corporation, it held that though Finance Act 2012 widened the definition of Royalty w.e.f June 1976, there was no such amendment in the India-Italy DTAA as regards to definition of Royalty (article 13) and therefore the assessee was justified in harboring a view that payments made by it did not fall within the meaning of the term 'Royalty' as used in DTAA and thus assessee could not be saddled with a liability for failure to deduct tax source.

Saipem India Projctcs Pvt Ltd-TS-484-ITAT-2017(CHNY)- ITA No. 1862, 1863, 1868/mds/2017 dated oct 23, 2017

1215. Where the assessee utilized data racks space (for storage of electronic data) owned and maintained by Cinenet USA, for which it paid storage charges to Cinenet who maintained the server outside India and the AO characterized such payments as royalty, the Tribunal remitted the matter to the file of the AO directing him to examine taxability under the India-USA DTAA and also to examine how the electronic data was transmitted to the server in the USA.

Ceequences Technologies (P.) Ltd v DCIT - [2018] 89 taxmann.com 178 (Chennai - Trib.) - IT APPEAL NO. 138 (MDS.) OF 2017 dated 28.12.2017

1216. Where the assessee, a distributor, made payments for the cost of rights in the cinematographic films for exhibiting the same in India through various mediums, the Tribunal held that from a plain reading of clause (v) to Explanation 2 to section 9(1)(vi) it was clear that there was a specific exclusion for exhibition of cinematographic films from the purview of "royalty". Accordingly, noting that the law had expressly excluded consideration paid for exhibition of cinematographic films from the ambit of section 9(1)(vi), it held that the assessee could not be considered as an assessee in default under Section 201 of the Act for non-deduction of tax on such payments.

Indo Overseas Films v ITO - [2017] 81 taxmann.com 378 (Chennai - Trib.) - IT APPEAL NO. 2404 (MDS.) OF 2016 dated 16.02.2017

1217. Where the assessee, engaged in the business of generation of power, entered into an agreement with a Norway based company for the purpose of carrying out research work related to extraction of electric energy from tidal waves but made payments to the said company for purchase of equipments and appliances and no research activity took place during the course of the transaction, the Tribunal held that the AO was unjustified in taxing the said payment as royalty by merely relying on the agreement. Accordingly, it held that the aforesaid transaction represented a sale of goods by the Norway company and held that since the Norway company did not have a PE in India, the payment made by the assessee was not liable to deduct tax at source on such payments. Accordingly, it held that the assessee could not be treated as an "assessee in default" under Section 201 of the Act.

Aatash Power (P.) Ltd v ITO - [2017] 78 taxmann.com 202 (Ahmedabad - Trib.) - IT APPEAL NO. 477 (AHD.) OF 2016 dated 30.01.2017

1218. Where the assessee made payments to a German based company for sharing its standard operating procedures (SOPs) access to database, email server, hardware and software etc, the Tribunal held that since it was consideration for sharing of scientific, or for that purpose industrial and commercial experiences, same was taxable in India as royalty under article 13(3) of India-Germany DTAA. Accordingly, it upheld the AO's order issued under Section 201 of the Act.

Oncology Services India (P.) Ltd v ADIT - [2017] 82 taxmann.com 42 (Ahmedabad - Trib.) - IT APPEAL NO. 2990 (AHD.) OF 2013 dated 01.06.2017

1219. The Assessee, a Netherland based company entered into service agreement (MSA) with WIPRO/IBM to provide IT services to various Shell Entities pursuant to which it provided restricted software/network access and related IT support services to WIPRO/IBM. The AO sought to tax the receipts as royalty as the amounts received for providing access to software. The Tribunal held that the access to software was not for use of any copyright and that the right

to access/use of software was subject to various terms and conditions and was granted to WIPRO for very limited use in its own business and not otherwise. Further, it noted that the agreement restricted WIPRO from modifying the software and also provided that the software would be used only for providing services to Shell entities. Further, it observed that the software continued to be owned by the assessee and what WIPRO/IBM was getting is mere access to the software and the source code embedded in the software had not been imparted to them. Accordingly, it held that there was no use or right to use any process as held by the Assessing Officer and that the payments received by assessee could not be treated as 'royalty' under article 12(4) of India-Netherlands DTAA.

DDIT (IT) v Shell Information Technology International BV - [2017] 80 taxmann.com 64 (Mumbai - Trib.) - IT APPEAL NOS. 5051 (MUM.) OF 2009 dated 15.03.2017

Fees for technical services

1220. The Tribunal rejecting Revenue's contention that commission payments constitute 'fees for technical service' (FTS) held that commission paid to non-resident export commission agents by assessee (an Indian company engaged in manufacturing steel pipes) was not taxable in India for AY 2010-11 & Section 195 TDS was not applicable. To analyze TDS applicability, the tribunal listed down three categories based on agent's tax residency jurisdictions:-

(a) Jurisdictions with which India has tax treaties but DTAA does not have specific FTS article (i.e. Thailand, UAE)

(b) Jurisdictions with which India has tax treaty and such DTAAs further have a specific FTS clause [on lines similar to domestic FTS provision u/s 9(1)(vii)] and

(c) Jurisdictions with which India does not have any tax treaty.

With respect to the first category the court held that payment was not taxable in India since there was no specific FTS article in respective DTAAs and further the NRs do not have PE in India. Rejecting the Revenue's contention receipt could be taxed under other income article of the treaty held that when a particular nature of income is dealt with in the treaty provisions, and its taxability fails because of the conditions precedent to such taxability and as specified in that provision are not satisfied, that is the end of the road for taxability in the source state. With respect to category (b) and (c) held that taxability in these cases had to be decided on the basis of the provisions of domestic law. Rejecting Revenue's reliance on AAR ruling in SKF Boilers & Driers Pvt. Ltd. wherein commission paid to non-residents was held as taxable u/s 9(1)(i) read with Sec 5(2)(b) on the grounds that the right to receive the commission arose in India, the court opined that when no operations of commission agent's business were carried on in India, Explanation 1 to Sec 9(1)(i) takes the entire commission income outside the ambit of deeming fiction u/s 9(1)(i) r.w. 5(2)(b). Analyzing the scope of scope of managerial, consultancy and technical services to lead to taxability as FTS u/s 9(1)(vii), and held that unless there was a specific and identifiable consideration for the rendition of technical services, taxability u/s 9(1)(vii) would not get triggered.

Welspun Corporation Limited [TS-7-ITAT-2017(Ahd)]

1221. The Tribunal held that where the assessee-company made payment to U.K based company for rendering designing services, the said payment was nothing but FTS as defined in article 13 of DTAA and accordingly upheld the 40(a)(i) disallowance made by the AO.

Vis-à-vis payment made by the assessee to a German company for marketing services (i.e. Services for arranging business meetings with importers outside India), the Tribunal held that the said services could not be treated as be FTS either under the Act or under the DTAA because no managerial or technical consultancy services were provided by the foreign payee.

DCIT v Mira Exim Ltd - [2017] 81 taxmann.com 303 (Delhi - Trib.) - IT APPEAL NO. 125 (DELHI) OF 2014 dated 24.04.2017

1222. The assessee, a wholly owned Indian subsidiary of Chinese holding company, entered into an agreement with Hunan, a Chinese company, to train Chinese engineers in English language for setting up of steel plant in India for which its holding company made payment on behalf of assessee for and the assessee subsequently repaid said payment to holding company without deducting tax at source. The AO held that the aforesaid services obtained by the assessee were technical services and therefore held that the payment made being fees for technical services ought to have been made after deduction of tax at source. Accordingly, the AO disallowed the expenses under Section 40(a)(i) of the Act. The Tribunal rejected the assessee's contention that the said payments were in the nature of mere reimbursements to its holding company and therefore not liable to TDS. However, it relied on the decision of the co-ordinate bench in Lloyds Register Industrial Services (India) (P.) Ltd. v. Asstt. CIT [2010] 36 SOT 293 wherein it is held that as per common sense training expenses could not be called as "fee for technical services" and that even highly qualified personnel might require training to carry out the job for which they are recruited and the person imparting training could not be said to be rendering technical, managerial or consultancy service. It held that training was a continuous process because technology was changing very fast and therefore, expenses incurred towards training cannot be termed as "fee for technical services. Accordingly, it deleted the disallowance made under Section 40(a)(i) of the Act.

Ershisanye Construction Group India (P.) Ltd. v DCIT - [2017] 84 taxmann.com 108 (Kolkata - Trib.) - IT APPEAL NO. 756 (KOL.) OF 2015 dated 12.04.2017

1223. The Tribunal held that absent a specific Article taxing fees for technical services under the India-Saudi Arabia DTAA, income of the assessee in the nature of fees for technical services would be taxed as per the Article on 'Other Income'. It held that since the assessee was a resident of Saudi Arabia and the DTAA provided that other income would only be taxable in the state of residence, it held that fees for technical services received by the assessee would not be subject to tax in India.

Electrical material Center Co. Ltd. [TS-451-ITAT-2017(Bang)] - IT (TP) A No. 1104 (Bang) 2013 dated 28-09-2017

1224. The Tribunal held that since there was no specific taxability provision under the India-Thailand tax treaty with respect to taxability of fees for technical services, the amount earned by non-resident companies as fee for technical services were only species of business profits and since payee companies did not have PEs in India, amount in question was not liable to tax in India. It dismissed the contention of the AO that since there was no Article on Fees for technical service under the DTAA, the taxability of the said payments would be governed under the Act. It held that the DTAA is an alternate tax regime and therefore where a payment / receipt was not subject to tax under the DTAA it could not be taxed under the Act. Accordingly, it held that the assessee was not liable to deduct tax at source on such payments.

DCIT v Ford India Ltd - [2017] 78 taxmann.com 5 (Chennai - Trib.) - IT APPEAL NOS.673 TO 840 (CHENNAI) OF 2015 dated 31.01.2017

1225. The assessee made payments to a Singapore based company viz. RAP for services such as advice and guidelines in security practices, operations management on IT infrastructure, compliance to corporate policies on usage of IT services etc. It contended that since no income had accrued or arisen in India to RAP income was not liable to tax in India and therefore did not deduct tax on such payments. The AO contended that payment in question being in nature of technical fees paid to non-resident, income deemed to accrue or arise in India under section 9(1) (vii). The Tribunal, noting that the AO had not thoroughly examined nature of services rendered by RAP and whether or not they were rendered outside India or rendered in India, set aside the order of the AO and remanded the matter for fresh adjudication.

Rhodia Specialty Chemicals India Ltd. v Add CIT - [2017] 81 taxmann.com 423 (Mumbai - Trib.) - IT APPEAL NOS. 622 & 830 (MUM.) OF 2014 dated 24.04.2017

1226. The assessee made payment for server maintenance charges and testing and development charges to its parent company in Italy on which no tax was deducted at source. The AO made addition under section 40(a)(i) treating the said payments as FTS. Vis-à-vis server maintenance charges, the Tribunal held that since they were paid for usage of intranet, internet, mail data backup, etc., located at Germany and assessee was merely using technology provided by parent

company and no managerial, consultancy and technical services were provided by parent company, the payment made was not FTS.

Vis-à-vis the testing charges, it observed that the assessee-company manufactured parts according to drawing and specifications and designs of parent company and, subsequently, sent to Italy for testing on their efficiency and strength, activity of testing, operating of machine and noting of actual reading and determining whether it would suit to design specifications or not. It held that though these activities were specialized activities which only a technical person can do and amounted to technical services, since the services were rendered outside India it was not taxable. Accordingly, it held that no disallowance under section 40(a)(i) was called for.

Cooper Standard Automotive India (P.) Ltd. v ACIT - [2017] 84 taxmann.com 200 (Chennai - Trib.) - I.T. APPEAL NO. 785 (MDS.) OF 2014 dated 12.04.2017

1227. The Tribunal held that the consultancy fees received by the assessee (a Netherlands based entity) from ZPMC (a Chinese entity) pursuant to the supply of cranes to assessee's Indian group entity under the terms of Main Purchase Agreement ('MPA') @ USD 15,000 / 50,000 per crane supplied would not be taxable in India. Noting that the services were rendered by assessee outside India i.e China to a non-resident i.e. ZPMC and the same were utilized in manufacturing the cranes outside India i.e. in China, it held that the amount would not be deemed to accrue or arise in India as per section 5 read with section 9 and hence would not be taxable in India. Further, it held that Article 12 of DTAA between India and Netherlands would be applicable only if the services rendered were in the nature of information concerning technical/industrial/commercial knowledge or experience or skill. Accordingly, it concluded that, consultancy fees received by the assessee from ZPMC were not FTS and therefore not chargeable in India. Further, it held that since the actual receipt of fees was in the subsequent AY, it could not be taxed in the impugned year.

APM Terminal Management B.V vs DCIT-TS-386-ITAT-2017(Mum)-ITA No. 3621/mum/2015 dated 06.09.2017

1228. Where the Indian company provided marketing and sales support services to assessee (Dutch Company) for the NetApp products, the Tribunal held that support services rendered by the assessee to customers in India **did** not amount to FTS as it failed the 'make-available' test under DTAA.

Net App BV [TS-40-ITAT-2017(DEL)] (ITA No. 4781/Del/2013)

1229. The Tribunal held that income earned by Linklaters (UK based LLP engaged in providing legal/consultancy services) in respect of services rendered in India was neither FTS nor Independent Personal Service. It rejected the revenue's stand that the assessee had made available knowledge to its clients and that the entire receipts were FTS on the ground that mere rendition of services did not fall within the gamut of the expression 'make available' unless the recipient was in a position to deploy similar skills or technology or techniques in future without the aid or assistance of service provider and consequently, the legal advisory services provided by the assessee failed the make available test. It further held that Article 15 – Independent Personal Service applies only to individuals and not partnership firms. It observed that the assessee had service PE in India on account of its personnel staying in India for more than 90 days and remitted the matter back to AO for examination with respect to taxability as business income. Further, relying on co-ordinate bench ruling in the assessee's own case, it rejected stand of revenue that the assessee was not eligible for treaty benefit being a fiscally transparent entity.

Linklaters LLP [TS-36-ITAT-2017(Mum)] (I.T.A. No.1690/Mum/2015)

1230. The Apex Court held that sum received by the Assessee by way of reimbursement of cost of the global telecommunication facility provided to its agents cannot be treated as FTS. Further, relying on decision of Kotak Securities Ltd. (2016) 383 ITR 1 (SC), it held that this was a common facility provided by assessee to its agents to enable them to discharge their role more effectively, which was an integral part of shipping business and accordingly, it could not be

treated as fees for technical services. It further observed that since there was no profit element embedded in the payments which was accepted by the TPO to be in the nature of reimbursements and at arm's length, it could not be income chargeable to tax.

A.P. Moller Maersk A/S [TS-70-SC-2017] (Civil Appeal No.8040/2015)

1231. The Tribunal held that the payment received by the assessee (Swiss company engaged in providing operations and management services to airports) from Bangalore International Airport Authority Ltd. ('BIAL') for secondment of skilled personnel constituted FTS under the Act as well as under India-Swiss DTAA as all the secondees had expertise in the field of management and were holding very high managerial position. It observed that secondees were under the employment of the assessee and not with BIAL and accordingly, it rejected assessee's contention that payments were salary reimbursements as the seconded personnel worked under the direct control and supervision of BIAL, satisfying the employer-employee test.

Flughafen Zurich AG [TS-96-ITAT-2017(Bang)] (I.T.(I.T) A. No.1525/Bang/ 2010)

1232. The Tribunal held that payment made to Singaporean entity for rendering post production services was not FTS under Article 12 of India-Singapore DTAA as no technology or skill was made available to the assessee. It further held that in absence of the work carried out through non-resident's PE in India, the payment could not be taxed as business profits under Article 7 of DTAA.

Red Chillies Entertainment Pvt Ltd [TS-86-ITAT-2017 (Mum)]

1233. Where the assessee entered into an agreement with ICC pursuant to which the assessee was granted 'promotional, advertising, marketing and other commercial rights' on a worldwide basis in connection with ICC events and was designated as the 'Official Partner of ICC' and also was allowed to use ICC logo, marks etc., the Tribunal held that 'Right fees' paid by the assessee was exclusively for use of Marks of ICC for purposes of promotion and advertisement and not for manufacture and sale of licensed products and no part of 'Rights fee' was attributable to the use of marks for the manufacture and sale of licensed product (which was separately covered in the agreement). Accordingly, it held that the payment was not in the nature of royalty u/s 9(1)(vi) or FTS u/s 9(1)(vii) and consequently, TDS u/s 195 was not applicable.

Reebok India Company vs. DCIT [2017] 79 taxmann.com 271 (Delhi - Trib.)

1234. The Tribunal held that payment made by ONGC (as representative assessee) to a Canadian university ('Non-resident' or 'NR') for collaborative research, participation, training and maintenance services of air injection equipment (used for increasing the recovery of oil) constituted FTS under Article 12 of India-Canada DTAA for AYS 2010-11 and 2011-12. It rejected the NR's stand that know-how/technology was not made available to ONGC and observed that the service agreement not only contemplated participation but also provided for training and collaborative research between the personnel of NR and ONGC, pursuant to which know-how was shared with ONGC personnel; Further, it rejected NR's alternate stand that even if the receipts were taxable, the same were to be taxed under section 44BB (special provision for oil exploration companies) since the services were directly associated with extraction and production of mineral oil by holding that Section 44BB was applicable only in cases where consideration was received for services relating to exploration activity which were not in the nature of technical services. Also, it accepted Revenue's plea that since the NR itself was not involved in extraction or production of mineral oil, Section 44BB was not applicable.

ONGC as representative assessee for M/s University of Calgary, Alberta, Canada [TS-175-ITAT-2017(DEL)] - ITA No.4877/Del/2013 and 1327/Del/2016 dated 28/04/2017

1235. Assessee, a joint venture between Marks and Spencer and Reliance retail, entered into an agreement with M&S whereby the assessee was provided personnel to carry out the functions in the area of management, setting up of business, property selection and retail operation, product and merchandise selection and setting up merchandise team, for which it reimbursed the salary expenditure of 4 employees deputed to it. AO held that the sum was chargeable to tax as fees for technical services and therefore passed an order u/s 201 by treating the assessee as 'assessee in default'. The Court upheld the order of the Tribunal wherein the Tribunal held that i) the impugned payment was not FTS since the technology was not 'made available' by payee to

the assessee, that ii) the payment was a reimbursement of expenses and therefore in the absence of profit element in the said payment no tax was to be deducted and that iii) that TDS u/s 195 was not applicable on reimbursement as it was actually a payment made to the employees deputed in India under seconded agreement but routed through M&S. It also upheld the finding of the Tribunal that since the said payments were already subject to tax in India in the hands of the employees as it was a clear case of deputation of officials / employees, there was no question of treating the assessee in default for non-deduction of tax..

DIT (International Taxation) vs. Marks & Spencer Reliance India Pvt. Ltd - TS-178-HC-2017(BOM) - INCOME TAX APPEAL NO. 893 OF 2014 dated 03.05.2017

1236. The assessee, a non-resident company incorporated in USA was engaged in grading and certification of diamonds. It entered into a training and technical service agreement with GIA India for training the employees of GIA India and providing technical services for the implementation of grading policies, procedures and processes for which it raised separate debit notes for 'fee for training and technical services' (FTS) rendered by it to GIA India (on which tax had been paid) and also on account of reimbursement of travel expenses, group health insurance and other minor incidental expenses incurred by it pertaining to the same. The AO held the impugned sum as part of FTS and made an addition of the same, which was upheld by the CIT(A). The Tribunal referred to the agreement entered into between the parties and observed that assessee was entitled to receive only amount incurred by way of "cost to employ" the individuals with a markup of 6.5% and held that expression cost to 'employ' individuals is different from the expression cost incurred to 'depute' a person. It held that cost of employment would clearly mean and include only internal costs that were incurred by assessee to employ an individual and that any costs incurred over and above that to depute an individual for a particular assignment which was not assessee's internal assignment would be an external cost borne or paid by it on behalf of GIA India and could not be treated as a service. Further, noting that there was no profit element in the reimbursement made, it held that the payment could not be chargeable to tax in India.

Gemological Institute International Inc vs. DCIT - TS-189-ITAT-2017(Mum) - ITA No.4659/Mum/2014 & ITA No.385/Mum/2016 dated 09 .05.2017

1237. The Tribunal deleted the disallowance made by the AO u/s 40(a)(i) for AY 2003-04 for delay in depositing TDS u/s. 195 on payment made by the assessee (an Indian company) to German and UK entities for professional and corporate maintenance charges applying relief under non-discrimination article under respective DTAA's, since similar payments to residents did not attract the disallowance in the event of non-deduction of TDS prior to amendment made by FA 2004. With respect to server maintenance charges paid for accessing server belonging to German parent and usage of intranet, internet, mail data back-up etc., the Tribunal relying on Bharti Cellular [TS-6095-HC-2008(DELHI)-O] held that TDS u/s. 195 was not applicable as the payment did not amount to FTS in absence of human involvement and was in the nature of reimbursement of expenses. With respect to payment of testing and development charges paid to entity in Italy for the services rendered in Italy, the Tribunal held that payment constituted FTS having regard to 'human intervention since the activity of testing, operating of the machine was a specialized activity which only a technical person could do. However, since the services were rendered outside India and utilized in India, it held that explanation to section 9(2) was introduced by Finance Act 2007 w.e.f.1976 and as on the date of assessment there was no provision to tax the FTS rendered outside India and therefore, no tax was deductible u/s 195.

Cooper Standard Automotive India Pvt. Ltd TS-311-ITAT-2017(CHNY) (ITA No.785/Mds/2014 dated April 12, 2017)

1238. The Tribunal held that consideration received by the assessee (a UAE based group company) from ABB Ltd. (assessee's Indian counterpart) pursuant to rendering technical services, constituted 'royalty' under Article 12 of India-UAE DTAA. It rejected assessee's argument that the amount was not taxable in India as neither did the DTAA have a specific FTS article nor was Article 22 ('other income') applicable as assessee did not have a PE in India. It observed that the service agreement gave opportunity to ABB Ltd of using the information pertaining to industrial /commercial / scientific experience belonging to the assessee which would fall within the ambit of

'royalty' definition under Article 12(3) of India-UAE DTAA. It further held that furnishing of consultancy services by the assessee through its employees would fall within the ambit of service PE under Article 5(2)(i) of India-UAE DTAA. It rejected assessee's stand that since the employees remained in India only for 25 days, service PE clause was not triggered and held that in the present age of technology where the services, information, consultancy, etc., could be provided with various virtual modes, services could be rendered even without the physical presence of employees of the assessee. It further held that for triggering PE, services or activities should have been rendered for more than 9 months and stay of the employees was not required for more than 9 months. It also rejected the assessee's reliance on co-ordinate bench ruling in assessee's own case for AY 2012-13 wherein it was held that FTS was not taxable in India in absence of assessee's PE in India since there was no examination by coordinate bench with regard to the nature of activities of assessee as to under which clause of DTAA such activities would fall.

ABB FZ-LLC [TS-256-ITAT-2017(Bang)]

1239. The Tribunal held that payment received by the assessee (US software company) for rendering implementation, consultancy and maintenance services in connection with 'customized' software licensed to Indian customers, amounted to Fees for Includes Services ('FIS') under Article 12(4) (a) of India-US DTAA (which provides that FIS includes payments for the rendering of any technical or consultancy services if such services are ancillary and subsidiary to the application or enjoyment of the right, property or information for which a payment described in paragraph 3 (i.e. 'royalties') is received). It rejected the assessee's stand that since no knowledge was made available to the Indian customers, the amount could not have been taxed as FIS u/s 12(4)(b) and held that for article 12(4) the fee for included services may fall in clause (a) or clause (b) and compliance of both clauses wasn't necessary. Further, relying on the Karnataka High Court ruling in the case of Samsung Electronics Ltd, it held that payment from software supply amounted to royalty. On going through the technical services contract it noted that the services provided by the assessee were for the effective use of the customized software licensed to Indian customers. Accordingly, it held that the contract was for rendering services complimentary and supplementary to the licence which would be taxable as per Article 12(4)(a).

i2 Technologies US Inc. [TS-263-ITAT-2017]

1240. Where assessee engaged in trading in jewellery, precious and semi-precious stones, made payments to various foreign parties for rendering services such as online advertisement, webpage security certifications, maintenance of database of customers, etc, the Tribunal held that since said the services did not fall within meaning of 'technical services' under section 9(1) (vi), assessee was not required to deduct tax at source while making payments in respect of services in question. Accordingly, it deleted the disallowance made under Section 40(a)(i) of the Act.

ACIT v Carat Lane Trading (P.) Ltd - [2018] 89 taxmann.com 434 (Chennai - Trib.) - IT APPEAL NO. 213 (MDS.) OF 2017 dated 28.12.2017

b. Permanent Establishment

1241. Where the Indian company provided marketing and sales support services to assessee (Dutch Company) for the NetApp products, the Tribunal held that the Indian company did not constitute PE of assessee. It rejected the revenue's stand that the Indian company constituted assessee's fixed place PE in India on the ground that I Co. was carrying on its own business as commission agent of assessee and held that there needs to be a clear-cut distinction between the business of the assessee as well as the business carried on by the Indian company itself for its own purposes. It further rejected the revenue's stand that the Indian company's local 'sales outlets' constituted fixed place PE in India under the Article 5(2)(h) of DTAA and observed that offices were only providing marketing support function and were not making any sales. It also rejected the revenue's stand that Indian company constituted assessee's dependent agent PE as the Indian company had the authority to conclude contracts by virtue of common directors who are eligible to sign contracts on behalf of foreign company as well as Indian agent on the ground that

common director does not amount to constitution of PE. It further held that Indian company was legally and economically independent and was compensated at arm's-length basis by the assessee in terms of the agreement entered into between them.

Net App BV [TS-40-ITAT-2017(DEL)] (ITA No. 4781/Del/2013)

1242. Assessee, a company incorporated in USA, was part of GE Group had set up a Liaison Office (LO) in India with permission of RBI for undertaking purely liaison activities. However, pursuant to survey conducted at LO premises in India, it was observed that actual activities carried on from fixed place of LO did not remain confined only to those of a communication channel as the LO premises was constantly occupied/permanently used by expats who were working in India for GE overseas entities carrying out sales activities. Accordingly, the Tribunal upheld the order of the AO treating the LO as a fixed place PE of the assessee. Further, the Tribunal also noted that the GE group entities in India along with expatriates deputed by the assessee were undertaking marketing activities and sales functions of the entire GE group and that GE India along with the deputed employees had the authority to conclude contracts on behalf of the group. Accordingly, it Indian entities of the GE Group as well as the expatriates/employees of overseas GE entities constituted dependent agency PE.

For the purpose of attribution of income to the PEs, the Tribunal noted that AO carried the exercise of attribution in two parts, viz., calculation of total profit from the sales which was worked out at 10% applying Rule 10(iii) and second, attribution of such profit to marketing activities, which was taken at 35% of 10% relying on Delhi ITAT ruling in Rolls Royce. The Tribunal upheld the 10% total profit on sales arrived at by the AO but directed the AO to attribute only 26% towards marketing activities noting that the extent of activities of the overseas entity in making sales in India was roughly 1/4th of the total marketing effort.

GE Energy Parts Inc v ADIT - [2017] 78 taxmann.com 2 (Delhi - Trib.) - IT APPEAL NO. 671 (DELHI) OF 2011 dated 27.01.2017

1243. Where the assessee-company made payment of commission, legal and professional charges, outsourcing expenses to its AE, the Tribunal held that since the payments were not received by the AE in India and the AE did not have a business connection or PE in India, the assessee was not liable to deduct tax on the said payment and accordingly held that the AO was incorrect in disallowing the payments under Section 40(a)(i) of the Act.

IDS Infotech Ltd. v DCIT - [2017] 80 taxmann.com 88 (Chandigarh - Trib.) - IT APPEAL NO. 130 (CHD.) OF 2016 dated 09.03.2017

1244. The AAR, relying on Explanation 1 to section 9(1)(i) (which specifies that only that part of income which was due to operations in India would be deemed to accrue or arise in India) held that where the Applicant an Indian company entered into two agreements with a French company ('MFPM') viz. (i) Umbrella Agreement for design, engineering, manufacturing and supply of machinery and equipment from outside India; and (ii) Services agreement, in relation to supervision of installation services rendered by different external suppliers and to coordinate the start-up and ramp-up services rendered by those suppliers, no income from off shore supply of equipment would be taxable in India as the transaction was completed outside India. However, it held that payments made for services of supervision rendered by MFPM to Applicant as per services agreement would be chargeable to tax in India as the activities of supervision took place in India.

Michelin Tamil Nadu Tyres (P.) Ltd., In re - [2018] 89 taxmann.com 217 (AAR - New Delhi) - A.A.R. NO 1218 OF 2011 – dated 19.12.2017

1245. Where the assessee, a Denmark based company, gave its vessel under charter hire arrangement for ONGC's operation of exploration and exploitation of oil and natural gas, since the crew on board were not employees of assessee and did not work under direction and control of assessee and, moreover, since the management of assessee responsible for taking decisions relating to assessee's business were in Denmark, it could not be said to have a Service PE in India in terms of article 5(2)(a) of India - Denmark DTAA.

Maersk A/s v ACIT - [2017] 86 taxmann.com 77 (Delhi - Trib.) - IT APPEAL NOS. 3905 (DELHI) OF 2009 dated 08.06.2017

1246. The assessee, a US based company, was engaged in business of supply, installation and commissioning, of software which were used in connection with prospecting for production, exploration and extraction of minerals oils, which it supplied to various Indian companies. The assessee had also rendered services relating to installation and commissioning of software. The AO opined that title of goods (being software) was to pass outside India but owing to fact that installation and commissioning of software was required to be carried out in India, a part of income from sale of software was taxable in India. The Tribunal referring to the records of the case observed that the assessee had not participated in the installation activities for a period more than 10 to 15 days in India and therefore did not satisfy the criteria for constitution of service / installation PE. It further noted that the assessee did not have any office in India either and therefore did not have a fixed place of business in India. Accordingly, since the income derived by the assessee from sale of software was business income and the assessee did not have a PE in India, it held that the AO was not justified in taxing a part of the impugned income in India.

ACIT v Landmarks Graphics Corp - [2017] 87 taxmann.com 311 (Delhi - Trib.) - I.T. APPEAL NOS. 573, 2486 (DELHI) OF 2006 dated 12.07.2017

1247. The Court dismissed the appeal of the Revenue and held that merely keeping books of accounts, apportioning a portion of telephone expenses to the assessee's LO or having a common manager for its LO and Project Office (PO) was not sufficient to conclude that the assessee's LO was being used to carry on the business and therefore, held that the LO did not constitute a PE in India. It also noted that the RBI had accepted the functioning of the assessee's LO for over three decades and that the assessee was adhering to the conditions imposed by RBI, one of which was to not carry any business or trading activity in the LO.

Mitsui & Co. Ltd. TS-310-HC-2017(DEL) (ITA 13/2005 dated July 27, 2017)

1248. The Tribunal held that the assessee's Indian group entity viz., SIPL, engaged in procuring business from Indian advertisers for a commission of 15% of business receipts did not constitute a dependent agent PE under Article 5(6) of India-Netherlands DTAA as SIPL i) was acting in the ordinary course of business ii) undertook agency activities for other entities as well and iii) was not authorized to enter into any agreement with any client independently. It also observed that as per CBDT Circular No. 742 the rate of commission of 15% payable to Indian agents was as per industry norms and at ALP and therefore, no further attribution of profits could have been made in the hands of the assessee.

International Global Networks BV TS-340-ITAT-2017(Mum) (ITA No. 5689 to 5695/Mum/2014 dated July 26, 2017)

1249. The assessee, engaged in supplying telecom equipment was a US based subsidiary company of Nortel Networks, Canada and had an indirect subsidiary company in India viz. Nortel Networks India. Nortel Networks, Canada also had a Liaison office in India. Since Reliance, India required an Indian company to bid for its contract of supply of optical hardware and provision of related installation and commissioning services, Nortel India entered into the said contract and assigned all its rights under the optical hardware contract to the assessee retaining the services contract. The AO / CIT(A) alleging that the entire contract was a whole and that the installation and negotiation was done by Nortel India, held Nortel India and the LO as a fixed place of business, dependent agent PE, business connection, place of management, sale outlet, installation PE and Service PE under the India-US DTAA. The Tribunal relying on the order the Court in the assessee's own case held that mere existence of business connection without evidence of the attributable profits in India would not lead to taxability in the hands of the assessee and since the supply of equipment was done by the assessee outside India there was no income attributable on that account. Vis-à-vis the installation, commissioning and testing, the Tribunal held that the said services were provided by Nortel India on its own account and not on behalf of the assessee and therefore no installation or service PE existed. Further, it held that there was no evidence that the premises of LO or Nortel India were at the disposal of the

assessee and therefore it could not constitute a fixed place PE as well. As regards dependent agent PE, it held that there was no evidence brought on record to prove that Nortel India habitually concluded contracts on behalf of the assessee and accordingly held that no dependent agency PE existed as well. Accordingly, it held that the assessee was not taxable in India.

Nortel Networks India International Inc v ADDIT – (2017) 51 CCH 0129 Del Trib – ITA No 3313 to 3315 / Del / 2012

1250. The Tribunal held that to determine whether a Service PE existed in India, the solar days and not the man days were to be taken into consideration. Accordingly, it held the AO erred in considering 4 of the assessee's service engineers as a Service PE as they were present in India for a period of 90 days each (thereby amounting to 360 man days) without appreciating that their presence in solar days i.e. 90 days was less than the 182 days threshold laid down under Article 5(3)(b) of India-Saudi Arabia DTAA. Accordingly, it held that there was no Service PE in India. It further held that the co-ordinate bench ruling in the case of ABB FZ-LLC [[TS-256-ITAT-2017\(Bang\)](#)] (wherein in the context of an assessee rendering management services, the Tribunal held that physical presence in India was not relevant for the formation of a Service PE) would not apply to the assessee's case as the impugned services for consideration in the instant case were that of the service engineers which required physical presence in India.

Electrical material Center Co. Ltd. [TS-451-ITAT-2017(Bang)] - IT (TP) A No. 1104 (Bang) 2013 dated 28-09-2017

1251. The Apex Court dismissed Revenue's appeal and held that the Indian subsidiary of the US based assessee providing the assessee with support services which in turn permitted the assessee to render management and support services to its customers located outside India could not be considered as a) a fixed place PE of the assessee and no part of the main business of the assessee was carried on by the Indian subsidiary b) a Service PE as none of the assessee's end customers were located in India or received services in India c) a Agency PE as the Indian subsidiary did not have the authority to conclude contracts on behalf of the assessee. Further, without prejudice to the existence of PE, the Court held that since the transactions between the assessee and the Indian subsidiary were held to be at ALP, no further profits could be attributed.

Assistant Director of Income-tax-1, New Delhi v. E-Funds IT Solution Inc. 86 taxmann.com 240 (SC)

1252. The Tribunal held that project office(PO) in India of the assessee (Dutch company) did not constitute PE of assessee in India under Article 5 of India-Netherlands DTAA since the PO was for establishing Traffic Service system and no part of the contract execution was carried out through the PO in India and it was used only to collect money and pay certain expenses on behalf of the assessee. It further held that PO did not constitute installation PE in India since no installation activity were undertaken during the relevant AY and only maintenance services were undertaken (through a contractor in India). Consequently, the profits arising out of off-shore supply of equipments were also not taxable in India

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

1253. The Tribunal attributed 30% of profits to Indian branch of Singapore-based assessee in respect of direct sales in India by the head-office on the ground that the assessee had booked all expenses incurred on marketing activity for direct sale without receiving any corresponding income. It rejected the assessee's argument that AO had applied 'force of attraction rule' and held that where the Indian branch office renders some services in respect of the direct sales made by the head office, the determination of income for such services, cannot be brought within the ambit of force of attraction rule and that the AO had applied 'profit attribution' principle by confining income computation only to the extent of contribution of marketing services rendered by the Indian branch. Relying on the provisions of section 44BB and 44BBB, it directed computation of assessee's profit @ 10% of total sales in India and attributes 30% of such profits to Indian PE i.e. at 3% (30% of 10%) relying on various decisions.

Nipro Asia Pte Ltd. [TS-66-ITAT-2017(DEL)] (ITA No.4078/Del/2013)

1254. Where the assessee (PE of foreign bank) had paid interest on foreign currency loan availed from its UK HO, the Tribunal denied the deduction of interest paid on the ground that as per Article 7(5) r.w. Article 7(7) of India-UK DTAA, the interest deduction would be subject to domestic tax law and as per the Income-tax Act, interest paid by the branch to HO is not deductible, being payment made to self.

Standard Chartered Grindlays Pty Ltd. [TS-113-ITAT-2017(DEL)]

1255. The assessee i.e. Formula One World Championship ('FOWC'), a company incorporated under the laws of the United Kingdom, had entered into an agreement with FIA and Formula One Asset Management Ltd ('FOAM') (i.e. an associate company of FOWC) by way of which it was licensed all the commercial rights in the Championships for a period of 100 years. For the purpose of conducting a racing event i.e. the Formula one grand prix in India, FOWC entered into a Race Promotion Contract with Jaypee Sports International Ltd ('Jaypee') granting it the right to host, stage and promote the Formula One event in Buddh International Circuit in India for a consideration of USD 40 million for a period of 5 years. Vide a separate agreement, Jaypee had two associated companies of FOWC. The High Court had held that the consideration paid to FOWC was not royalty under Article 13 of the DTAA and that Buddh International Circuit constituted FOWC's fixed place PE India since FOWC and its employees had full access to the Buddh International Circuit and FOWC was granted access for a period of 6 weeks at a time during each season / each race and that the access was for a period of 5 years i.e. the duration of the Race Promotion Contract and Jaypee's capacity to act was extremely limited. Accordingly, it held that FOWC carried on business in India within the meaning of expression under Article 5(1) of the DTAA. Referring to the arrangement between the assessee and its affiliates on one hand and Jaypee Sports on the other hand, the Apex Court observed that the arrangement clearly demonstrated that the entire event was taken over and controlled by FOWC and its affiliates and accordingly, rejected the assessee's stand that since the duration of the event was only 3 days, there was limited access granted which was not sufficient to constitute the degree of permanence necessary to establish a fixed place PE since for the entire period of race, the control was with FOWC. Further, it held that mere construction of the track by Jaypee was of no consequence while determining whether FOWC had disposal over the track. Accordingly, it upheld the findings of the High Court and held that the tests laid down for constitution of a PE viz. stability, productivity and dependence were satisfied. It concluded that the Buddh International Circuit was the fixed place of business at the disposal of FOWC and that the taxable event i.e. earnings from the grand prix had taken place in India and therefore FOWC was liable to pay tax in India on such income earned by it. However, it clarified that TDS obligation of Jaypee u/s 195 on the payments made to FOWC was limited to the appropriate portion of income which is chargeable to tax in India and directed the AO to compute the same.

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

C. Capital gains

1256. The Tribunal confirmed capital gains tax on Cairn UK Holdings over sale of its shareholding in Cairn India Holdings Ltd. (resident of USA) to Cairn India Ltd as shares of Cairn India Holdings Ltd. derived their value solely from the assets located in India as per Section 9(1)(i) of the Act. It observed that the assessee by virtue of being holding company of Cairn India Holdings Ltd. had held rights in control and management of shares of nine Indian subsidiary companies of Cairn India Holdings Ltd. which controlled Oil & Gas sector in India and accordingly, it categorized these rights as 'property' as defined under Explanation to section 2(14) of the Act. Accordingly, it rejected assessee's arguments that the transaction was genuine group restructuring as a result of which management and control remained in the same hands and accordingly, conditions stipulated in the definition of the term 'property' were not satisfied. It further rejected assessee's contention that no real income had accrued to the assessee on the ground that the financial statements of the assessee reflected that the assessee had earned substantial gain on sale of shares and on account of taxes not paid by it due to exemption claimed on capital gains. It also rejected assessee's contention that this was transfer by way of exchange and not sale and accordingly, FMV of the asset received in consideration for the assets transferred should be

taken as full value of consideration and cost of acquisition should be stepped up to the fair value of the shares of Cairn India Holding Ltd. on the date of acquisition and upheld AO's computation of capital gain by deducting from full value of consideration, the actual cost of acquisition incurred by the assessee for acquisition of the property i.e. original cost of shares.

Cairn UK Holdings Limited [TS-89-ITAT-2017 (Del)] [ITA No. 1669 /Del/2016]

1257. The Tribunal rejected the assessee's contention that since Indo-UK DTAA notified in the year 1994 provided for taxation of capital gains tax as per domestic tax laws of the contracting state, the domestic law prevailing in 1994 should be applied and held that provision in the DTAA cannot make the domestic law static and such article in DTAA also cannot limit the boundaries of domestic tax laws.

Cairn UK Holdings Limited [TS-89-ITAT-2017 (Del)] [ITA No. 1669 /Del/2016]

1258. Where during A.Y. 2011-12, the assessee bought back its shares from its 99% holding company in Mauritius and claimed exemption for the capital gains under Article 13(4) of India-Mauritius DTAA and the AO treating the buy-back as colourable device to transfer the accumulated profits, treated the same as dividend u/s 2(22)(d) liable to DDT u/s 115-O, the Tribunal held that buy-back payment to the extent of fair market price (FMP) would not be treated as colourable device and accordingly, capital gains benefit under Article 13(4) of India-Mauritius DTAA would be available. Further, relying on CBDT circular 3/2016, it held that buy-back of shares pre-2013 would be taxable as capital gains as per the provisions of sec 46A of the Act and could not be recharacterized as dividend. However, it held that in case the buy back price was not based on the real valuation and was artificially inflated by the parties then it was certainly a device for transfer of the reserves and surplus to the holding company by avoiding the payment of tax and it would be treated as colourable device and accordingly, the payment over and above FMP would fall within the ambit of section 2(22)(d) subject to DDT. Accordingly, it remitted the matter to the AO to determine the FMP of the shares as on the date of buy back.

Fidelity Business Services India Pvt. Ltd. [TS-110-ITAT-2017(Bang)]

1259. The assessee (Dutch company) sold its shares in an Indian company (engaged in the business of developing, maintaining and operating an industrial park) to a Singapore company. The assessee contended that Article 13(5) of India-Netherlands DTAA provides that the gains on alienation of any property not referred under any other clause would be taxable in Netherlands and therefore gains on sale of shares of Indian company were not taxable in India. Accordingly, it claimed refund of taxes deducted by the seller. The AO contended that the value of the shares was derived from the immovable properties in India and held that Article 13(1) which provides that gains on alienation of immovable property may be taxable in India would apply. It rejected the assessee's contention that Article 13(5) would apply since that was the residuary clause. Accordingly, it rejected the assessee's claim of refund of taxes deducted. The CIT(A) upheld the order of the AO. The Tribunal held that a share in a company could not be considered to be immovable property and accordingly, Article 13(1) would not apply. It accepted the assessee's contention that capital gains were not taxable in India as per Article 13(5). The Court approved the Tribunal's findings that alienation of shares by assessee did not fall under Article 13(1) of the DTAA and by virtue of residuary clause in Article 13(5), gains would be exempt from taxation in India.

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

1260. Rejecting the allegation of the Revenue that the assessee (a Mauritius company) was a mere shell company having no business/commercial substance and not eligible to the benefits of Article 13 of the India-Mauritius DTAA, the Court observed that it was holding a Category 1 Global Business License issued by Financial Services Authority of Mauritius, valid TRC and held shares of TIL for 13 years which proved that the assessee was not a shell company. Accordingly, it held that the assessee was eligible to treaty benefits and therefore the capital gains arising to it in respect of transfer of shares of Tata Industries Limited ('TIL') to Tata Sons Limited ('TSL') was not taxable in India in view of Article 13 of India-Mauritius DTAA.

JSH (Mauritius) Ltd. TS-308-HC-2017(BOM) (W.P. No. 3070 of 2016 dated July 28, 2017)

1261. Where the assessee, a Spanish company, had invested in some Indian companies which were in business of developing properties in India, the Tribunal held that the AO was unjustified in invoking the provisions of Article 14(5 of DTAA between India and Spain) (governing taxability on account of transfer of immovable property) to tax the income arising from the sale of shares of the Indian companies as the assessee was holding shares in an Indian company and not holding any immovable property in India. Accordingly, it held that the taxability of sale proceeds would be governed by Article 14(6) of the DTAA, as per which the gains would be taxable only in Spain and therefore concluded that capital gains derived by the Spanish assessee from sale of shares of the Indian companies could not be taxed in India.

ADIT v Merrill Lynch Capital Market Espana S.A.S.V - [2017] 86 taxmann.com 161 (Mumbai - Trib.) - IT APPEAL NOS. 2824, 4987 (MUM.) OF 2012 & 4578 (MUM.) OF 2014 dated 11.09.2017

1262. The assessee, a tax resident of Singapore registered as Foreign Institutional Investor (FII) in debt segment, claimed capital gain on sale of debt instruments as exempt under Article 13(4) of India-Singapore DTAA which was disallowed by the AO by applying Article 24 of DTAA (which provides for restriction of claim of exemption of income to the extent of repatriation of such income to other country (Singapore)). The Tribunal noted that assessee was taxable in Singapore on its worldwide income (which was also supported by a letter provided by the Singapore Revenue authorities) and held that Article 24 of the DTAA would only apply where income paid from sources in one Contracting state (India) which was exempt from tax or enjoy tax at a reduced rate, was taxable on remittance basis in the other state in which the recipient was resident (Singapore). Accordingly, it held that Article 24 of the DTAA would not be applicable in the case of the assessee as its worldwide income was taxable in Singapore and therefore the issue of remittance of the said income was not relevant. Further, it also held that Article 24 would only apply to the income which is either 'exempt' from tax in India or 'tax at a reduced' rate in India whereas in the case of the assessee the capital gains were not taxable in India and was only taxable in Singapore. Therefore, for both the reasons mentioned above, it held that Article 24 was wrongly invoked by the AO.

Citicorp Investment Bank (Singapore) Ltd. v DCIT - [2017] 81 taxmann.com 368 (Mumbai - Trib.) - IT APPEAL NO. 793 (MUM.) OF 2015 dated 24.03.2017

d. Independent Personal Services

1263. The Tribunal deleted addition under section 40(a)(i) for TDS default on payments made by assessee company to NR individuals for providing engineering services on the ground that services provided by both the individuals fell under the ambit of independent personal services (IPS) and their stay in India was less than 183 days. The Tribunal further observed that even when payments within the purview of IPS were treated as FTS, such payments would be taxed under the article governing IPS and not FTS under the relevant clauses of DTAA.

ABC Bearing Ltd [TS-23-ITAT-2017(Mum)]

1264. Where the assessee paid professional fees to its independent director and did not deduct tax since the director had not stayed in India for more than 90 days in view of Article 15 of India-UK DTAA, however, the AO treated the amount as taxable in India as per Article 17 of India-UK DTAA (Director Fees) and disallowed the fees paid as tax was not deducted, the Tribunal held that Article 17 was not applicable since the payment to the director was on account of professional services rendered by him and not in the capacity as a member of Board of Director of company and accordingly, held that the payment was not liable to be taxed in India in view of Article 15 of India-UK DTAA.

Nagpur Power & Industries Ltd. vs. DCIT (2017) 49 CCH 0113 Mum Trib (ITA No. 5808/Mum/2013 & 6468/Mum/2014

e. Salary

1265. The assessee, a non-resident individual, was a Marine Engineer, employed as a master on a foreign bound ship with M/s. Wallem Ship Management Ltd. for which he received remuneration outside India in foreign currency. The remuneration was directly credited by the foreign company in his NRE bank account in India. The assessee claimed that the remuneration received was not taxable in India as the point of payment of the remuneration was outside India and that the mere transfer of the payments by the foreign company in his NRE account in India would not render the receipt to be "income received in India" as per section 5(2)(a). The AO contended that as per section 5(2)(a), irrespective of the residential status and whether or not the income was received in foreign currency or Indian currency, income received/deemed to be received in India was taxable in India. Accordingly, he taxed the income on the ground that the said income was received in India as per section 5(2)(a). The CIT(A) upheld the order of AO. The assessee contended before the Tribunal that as per CBDT Circular No. 3/2017 [which states that the salary accrued/accruing to a non-resident seafarer for services rendered outside India on a foreign going ship (with Indian flag or foreign flag) would not be included in the total income merely because the said salary was credited in the NRE account maintained with an Indian bank by the seafarer], the remuneration received would not be taxable u/s 5(2)(a). The Tribunal observed that the salary credited to NRE A/c could be of two types, 1) Salary directly credited by employer to NRE A/c of seafarer maintained with an Indian Bank 2) Salary credited to the seafarer A/c maintained outside India and later on transferred to the NRE A/c in India. It further observed that the second situation was clearly outside the purview of provisions of section 5(2)(a), as it was a mere transfer of assessee's fund from one bank account to another which would not give rise to "Income". However, the Circular was unclear whether both or only the second type of situation was covered by it. Accordingly, it gave benefit of doubt to the assessee and held that the circular covered both type of situations. It relied on the Apex Court decision in the case of Commissioner of Customs vs Indian Oil Corporation Ltd 267 ITR 272 (SC) wherein it was held that the Revenue was bound by the CBDT circulars even though the circular was contrary to statute. Accordingly, it held that the remuneration received by the assessee would not be taxable in India.

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

f. Withholding tax

1266. The Tribunal held that the treaty provisions by virtue of section 90(2) which override the charging provision of domestic law would also override the provision of section 206AA irrespective of non-obstante clause contained therein and that accordingly, section 206AA cannot override the beneficial DTAA rates. Drawing analogy from Karnataka HC ruling in case of Kaushallaya Bai & others (W.P. NOS. 12780 - 12782 OF 2010, it held that section 206AA would not apply to non-residents who were not required to obtain PAN. It further observed that unlike GAAR provisions which override treaties, there was no such provision to give overriding effect to the provisions of section 206AA over tax treaties.

Nagarjuna Fertilizers [TS-67-ITAT-2017(HYD)]

1267. The assessee entered into a secondment agreement with its holding company whereby certain employees were placed by the holding company at the disposal and control of the assessee and the assessee had made remittances to its holding company in respect of reimbursement of payroll costs without deducting any tax at source as the payments were simple reimbursements without involving any profit element taxable in the hands of holding company and that the tax was duly deducted on the salaries paid to the employees. However, the AO contended that since the employees were of holding company, the payment was for services rendered by these employees and also work done by the employees had resulted in creation of a service PE and that the entire amount paid to the holding company was attributable to PE, taxable on gross basis @ 40% in absence of details of expenditure and accordingly, raised demand u/s 201 r.w.s. 195. The Tribunal held that payment made to holding company consisted of income chargeable to tax under the head 'income from salaries' and accordingly, there were no withholding tax obligations u/s 195 and that the assessee had already discharged the TDS obligations on salary payments and accordingly, withholding tax demand u/s 201 r.w.s 195 was not sustainable. . It

further held that the payments undisputedly were in the nature of the reimbursements, and, the income embedded in these payments had already been brought to tax in India in the hands of ultimate beneficiaries- i.e. the seconded employees, and accordingly, there could not have been any tax withholding obligations under section 195. As regards, AO's contention of existence of service PE, it held that whatever had been paid to the holding company was, in turn, paid by it to its employees seconded to the assessee and accordingly, there could not have been any profits in the hands of the service PE, and what was taxable in the hands of the PE under article 7(1) of India-USA DTAA was not the gross receipt but the profits attributable to the PE.

Burt Hill Design (P.) Ltd. v. DDIT [2017] 79 taxmann.com 459 (Ahmedabad – Trib

1268. The assessee had borrowed monies from Standard Chartered, Mauritius and HSBC, Mauritius and had paid interest on the same without deducting TDS u/s 195. The AO held that the tax was deductible at source since related agreements were signed in India, hence the income had accrued in India and thereby disallowed the interest expense u/s 40(a)(i). The Tribunal allowed the assessee's claim granting the treaty protection under Article 11 (relating to interest) which provides for taxability in Mauritius and not in India. It rejected the Revenue's contention that since the related agreements were signed in India and the Indian affiliates had stood as guarantors to the borrowings by the assessee, the interest income had accrued and was taxable in India. It observed that none of the 3 tests laid down in Article 5(1) of India-Mauritius DTAA for constitution of fixed place PE were satisfied in present case, viz 1) physical criterion 2) subjective criterion and 3) functionality criterion and as Articles 5 and Article 7 (relating to PE and its attribution) were not applicable, Article 11 would apply. It further clarified that mere presence of affiliates of Standard Chartered Mauritius and HSBC Mauritius in India and the occasional use of the office of Indian affiliate did not lead to a conclusion that Standard Chartered Mauritius and HSBC Mauritius had PE in India. Accordingly, it deleted the disallowance of interest expense u/s 40(a)(i) and held that interest was not subject to TDS u/s 195.

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

1269. Assessee, a non-resident, entered into a contract with Coal India Ltd. (CIL) in connection with development of a mine in India and it filed its ROI declaring procurement fees received from CIL as income from rendering technical services on which tax @ 30% u/s 115A was paid by CIL. However, the AO held that the procurement fees was in the nature of commission and not technical fees and held it to be taxable @ 65% and also held that the tax paid by CIL on behalf of the assessee was income in the hands of the assessee which had to be grossed up. Accordingly, he levied interest u/s 234B for the default in payment of advance tax. CIT(A) held that since the assessee was a non-resident, the payer (i.e. CIL) was responsible to deduct tax at source in terms of section 195 and the liability of the assessee to pay advance tax had to be computed after giving credit to the tax deductible (whether actually deducted or not) and accordingly, the assessee could not be called upon to pay interest under section 234B and therefore, deleted the interest under section 234B. The Tribunal upheld the order of the CIT(A) and held that if the payer failed to deduct tax, the Revenue could take action against the payer u/s 201(1), however, in such a case, the question of paying advance tax by the non-resident would not arise and accordingly, interest u/s 234B would be inapplicable.

ADIT v. White Industries Australia Ltd. [2017] 81 taxmann.com 33 (Kolkata - Trib.) (ITA Nos. 477, 478 & 507 (KOL) OF 2010)

1270. The Tribunal held that non-resident commission agents based outside India rendering services of procuring orders cannot be said to have a business connection in India and therefore commission payments to them cannot be said to have been either accrued or arisen in India. It dismissed the contention of the Revenue that the right to receive the commission arises in India when the order gets executed by the assessee and held that the assessee was not liable to deduction under section 195 of the I.T. Act on account of foreign agency commission paid outside India for promotion of export sales outside India. Accordingly, it deleted the disallowance made by the AO under Section 40(a)(i) of the Act.

Divya Creation v ACIT - ITA No.5603/Del/2014 dated 14.09.2017

1271. The Court confirmed the Tribunal's order and held that commission paid by assessee (engaged in garments exports) to an Indian agent on behalf of the foreign entity was taxable in India and

accordingly disallowed it under section 40(a)(i) as requisite withholding tax had not been deducted. Noting that concurrent orders of the lower authorities confirmed the position that commission had actually been received in India, the Court held that Circular No. 786 of 2000 (wherein it was clarified that commission remitted directly to foreign agent abroad was not taxable in India) was not applicable.

Smt. Fathima Harris vs. ITO-TS-390- HC-2017(MAD)- -T.C. (Appeal) no 121 of 2009- dated 27.04.2017

1272. The Tribunal held that the payments made by the assessee to M/s EAT towards annual maintenance contracts would fall under the category of works contracts i.e business receipts in the hands of M/s EAT and therefore the same was not taxable in India since M/s EAT did not have a PE in India. Accordingly, it held that the assessee was not required to deduct tax at source u/s 195 of the Act and deleted the disallowance made under Section 40(a)(i) of the Act.

DHL Air Limited vs DCIT (International taxation) (2017) 51 CCH 152 Mum.Trib ITA No. 1438/mum/2017 dated 04.10.2017

1273. The assessee, engaged in development of international trade, procured raw materials and finished products from various Group entities on which no tax had been deducted. On appeal to the Court, there was a difference in opinion between the Hon'ble Judges – one Judge holding that Section 195 of the Act would be applicable on such payments irrespective of whether the recipient had a PE in India as all of them evidently had business connections in India and that the deduction provisions would apply in the hands of the payer so long as the transactions are chargeable to tax and the other judge holding that since the recipients did not have a PE in India there was no requirement for deduction of tax in India. Accordingly, the matter was placed before the Hon'ble Chief Justice for appropriate orders.

CIT v Mitsubishi Corporation India P Ltd – (2017) 87 taxmann.com 217 (Del) – ITA No 180 of 2014

1274. The Tribunal held that the reimbursement of expenses for intranet and SAP charges made by the assessee to its German holding company constituted royalty under the Act as well as DTAA and therefore the assessee ought to have deducted tax on the same. It held that the SAP software was customized and the payment was made for the use of licensed software and therefore the payment made by the assessee constituted payment for use of scientific equipment under the Act as well as DTAA. It rejected the contention of the assessee that since the payment was only a reimbursement of expenses, no tax was to be deducted, noting that the assessee failed to produce any agreements, contracts or working to substantiate its claim. It held that if the contention of the assessee was to be accepted then all payments to a third party routed through a holding company would be considered as reimbursement of expenses, rendering the provisions of the Act and DTAA redundant.

SMS Iron Technology Pvt Ltd – TS-555-ITAT-2017 (Del) ITA No. 4480 to 4486 /Del / 2014 dated 25.10.2017

1275. Where the assessee made payments on account 'staff cost', 'travelling', 'advertising & promotional expenses' and 'other miscellaneous expenses' to its overseas entities and the same were in the nature of mere reimbursement of costs without any mark-up, the Tribunal, following the decision of the Court in IT v. Siemens Aktiengesellschaft, [2009] 310 ITR 320/177 Taxman 81 (Bom.) held that the assessee was not liable to deduct any tax on the impugned payments as they were mere reimbursements and did not have any income element. Accordingly, it upheld the CIT(A)'s deletion of the disallowance under Section 40(a)(i) of the Act.

Pfizer Products India (P.) Ltd v ACIT - [2017] 87 taxmann.com 243 (Mumbai - Trib.) - I.T. APPEAL NOS. 1457 & 1535 (MUM.) OF 2015 dated 01.09.2017

1276. Where the assessee made payment of software maintenance charges, data communication charges etc to its AE, the Tribunal noting that the payment was in nature of reimbursement of expenses without any mark up held that the same was not liable to tax in India and deleted the addition made by the AO under Section 40(a)(i) who contended that the said payments were

royalty on which the assessee ought to have deducted tax at source @ 10 percent as per the India-France DTAA.

Societe Generale v DCIT - [2017] 81 taxmann.com 244 (Mumbai - Trib.) - IT APPEAL NO. 1854 (MUM.) OF 2015 dated 19.04.2017

1277. The assessee, a foreign company, received payment towards management services and IT support services rendered to Indian company. The Indian entity, i.e., Calderys had withheld taxes at the rate of 20 per cent from the payment made to the assessee since the assessee-company did not have any PAN at the time of receipt of said payments. However, in the return of income, the assessee claimed that the same was taxable at the rate of 10 per cent being royalty/FTS, as per article 13 of DTAA between Indian and France and accordingly claimed refund in its return of income. The AO denied refund and was of the view that Indian entity had to withhold taxes on such payments as per provisions of section 206AA since the assessee did not have a PAN. The Tribunal, referring to Section 90(2) of the Act (which states that DTAA's would override domestic law, in cases where the provisions of DTAA's are more beneficial to the assessee) and held that the provisions of section 206AA could not override the provisions of the DTAA. Accordingly, it upheld the order of the CIT(A) allowing the assessee its refund claim.

DCIT v Calderys France - [2017] 84 taxmann.com 301 (Pune - Trib.) - IT APPEAL NO. 1265 (PUN.) OF 2015 dated 14.07.2017

Uniphos Environtronic (P.) Ltd v DCIT - [2017] 79 taxmann.com 75 (Ahmedabad - Trib.) - IT APPEAL NO. 947 (AHD.) OF 2016 dated 06.02.2017

g. Foreign Tax Credit

1278. The Tribunal set aside CIT(A)'s order disallowing foreign tax credit (FTC) claimed by the resident assessee (an individual) with respect to taxes withheld on dividend income earned in US. It directed the AO to compute the admissible tax credit after examining i) the residential status of the assessee under treaty (since for claiming treaty benefits, the assessee needs to be resident under the Act as well as under Article 4 of India-US DTAA), ii) whether amounts shown as dividends were actually in the nature of dividends, iii) whether tax deducted in US was in accordance with the provisions of Article 10 of the India-US DTAA and iv) whether the FTC claimed by the assessee was lower of tax withholding rates in US or Indian tax on such income (which was to be restricted to the rate specified under Article 10 of DTAA).

Bhavin A. Shah [TS-130-ITAT-2017(Ahd)] [ITA No.933/Ahd/2013]

1279. Pursuant to search and seizure operation u/s 132, the AO made addition on account of undisclosed deposit u/s 153A based on the assessee's HSBC Swiss bank statement received through information under DTAA through Foreign Tax & Tax Research (FT & TR) division. The Tribunal noted that the bank statement obtained by the AOs did not have any signature of a bank official, name of the bank or place where the branch of the bank was situated and that the AO had not mentioned the same in his assessment order and instead had asked the assessee to furnish the bank statements of impugned account, the existence of which was denied by the assessee. It also noted that nothing was brought on the record to substantiate that the documents were obtained by the AO under any DTAA. Accordingly, it deleted the addition made denying the authenticity of the documents and accordingly, set aside the assessment order u/s 153A.

Shyam Sunder Jindal [TS-143-ITAT-2017(Del)] [ITA No. 5448/Del/2016]

1280. The assessee had received dividend from its JV company in Oman which was exempt by virtue of Article 8(bis) of Omani Tax Laws and it claimed tax credit in India as per Article 25(4) of India- Oman DTAA (which provides that credit would be granted for the tax which would have been payable in Oman but is not paid due to tax incentives granted in Oman to promote economic development). The same was allowed by the AO. However, CIT during the revisionary proceedings u/s 263 observed that the FTC would be allowed only if the tax was paid in Oman or where the tax was not payable due to the tax incentives granted in Oman to promote economic development and since under the Omani Tax Laws dividend was absolutely exempt, no tax was paid and it could not have been said that any specific exemption was granted for the purpose of tax incentives for economic development under Article 8(bis.) as the dividend was exempt across

the board with no exception . The Tribunal allowed the FTC claim of the assessee which was upheld by the Court by relying on the letter of Oman Ministry of Finance wherein it was clarified that Article 8(bis.) was inserted to promote economic development by attracting investments. Accordingly, it rejected the Revenue's contention that Article 8(bis) exemption could not be construed as an incentive granted under Oman's tax laws so as to qualify for the benefit under Article 25(4).

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

1281. The assessee had rendered certain technical services to its Chinese subsidiary, on which taxes were withheld in China as per Article 12 of India-China DTAA. However, since the assessee had failed to claim the foreign tax credit (FTC) in its return of income, it claimed the same before the AO. The AO relying on the Apex Court's decision in case of Goetze India [TS-21-SC-2006-O] rejected the claim of the FTC made by the assessee. The CIT(A) without examining the claim of FTC, rejected the AO's contention and directed the AO to grant FTC to the assessee. Relying on the jurisdictional High Court rulings in the case of UTI Bank Limited [ITA No. 382 to 384 of 2016] and Mitesh Impex [TS-5339-HC-2014(GUJARAT)-O], the Tribunal held that it would be permissible to raise the claim for the first time before the appellate authority or the Tribunal when facts necessary to examine such claim are already on record and accordingly, powers of the appellate authorities were not fettered by the Apex Court's decision in Goetze India. However, since the CIT(A) had not examined the claim of FTC, it remitted the matter back to CIT(A) to decide it afresh.

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

1282. The assessee had earned foreign incomes on which taxes were withheld in respective source countries (Rs. 55.61 lakhs) and it had claimed foreign tax credit (FTC) in India for the same. The AO had allowed FTC upto Rs. 3.10 lakhs and CIT(A) had confirmed the same but he allowed expense deduction u/s 37(1) for the balance amount not allowed as credit. The Tribunal reversed the CIT(A)'s order and denied the deduction u/s 37(1) of the Act for that portion of foreign taxes paid for which credit was not available u/s Sec. 90/91. The Revenue contended that tax expense cannot be allowed as deduction u/s 37(1) since the same would be hit by the bar u/s 40(a)(ii), however, the assessee contended that provisions of Section 40(a)(ii) applied only for tax as defined u/s 2(43) (i.e. Indian income-tax) and that it would not extend to the taxes paid abroad. The Tribunal observed that as per the explanation to Sec. 40(a) (ii), tax would also include any sum which is eligible for credit of tax u/s 90 / 90A/ 91 and accordingly, rejecting the assessee's contention, held that the same was covered by the scope of Sec 40(a) (ii). Relying on the Apex Court decision in the case of Smimthkline & French India Ltd it disallowed the deduction of foreign tax as an expense u/s 40(a)(ii).

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

1283. The Tribunal allowed foreign tax credit ('FTC') claimed by assessee (an Indian company engaged in software development) in respect of taxes withheld in Singapore and Indonesia on receipt from software license sale and annual maintenance contract (AMC). It noted that the assessee claimed FTC by taking into consideration gross receipts & adjusted the same against its MAT liability and that the Revenue restricted FTC claim only to the extent of corresponding 'income' that had suffered tax in India. It computed the said tax as the actual MAT liability divided in the same ratio as the corresponding foreign receipts bore to the overall turnover of the assessee. The Tribunal, noting the language in the DTAAs and the UN and OECD Conventions, held that the expression used in the FTC Articles was 'income', which essentially implied 'income' embedded in the gross receipt, and not the 'gross receipt' itself, held that, in principle the assessee's argument that 'gross receipts' were to be considered for computing FTC could not be accepted. However, since the facts of the case of the assessee were unique i.e. vis-à-vis software license sale / income (i.e.its main business was carried on in India and only some isolated transactions leading to the impugned income had taken place in Singapore and Indonesia which did not require any activity on the part of the assessee and therefore had no associated costs i.e. in the nature of passive earnings) it held that no part of the costs incurred in India was to be allocated to earnings from Singapore and Indonesia. Further, as regards the income from AMC, the Tribunal held that the assessee had allocated the costs corresponding to

this income on a proportionate basis and since no defects were pointed out by the Revenue it rejected the AO's approach of allocating costs in proportion of turnover. It also held that the actual tax attributable to such income was to be determined by apportioning the actual tax paid under MAT provisions in the same ratio that the doubly taxed profit bore to the overall profits. Accordingly, the appeal of the assessee was partly allowed.

Elitecore Technologies Private Limited [TS-4-ITAT-2017 (Ahd)]

1284. The Tribunal held that taxes withheld in USA (i.e Federal and State tax) in the case of the assessee individual would not be added back while computing income taxable in India. It rejected the Revenue's contention that since the assessee was ordinarily resident in India, by virtue of section 5(1)(c), the federal taxes and state income taxes withheld in the USA, was part of assessee's taxable salary income in India and held that for clause (c) of section 5(1), grossing up of income is not required and only net income after TDS is to be taxed in India. Noting that since the AO had determined the amount of credit of tax paid in USA after including the US tax amount as an income taxable in India, it aside the determination of tax credit under Article 25 to the file of AO for fresh decision with the direction that the tax withheld in US should not be added back to quantify the income taxable in India.

Sunil Shinde vs. ACIT [TS-377- ITAT 2149] dated 31.08.2017

1285. The Tribunal held that the assessee was entitled to tax credits in respect of State income taxes paid abroad as section 91 does not differentiate between State and Federal taxes and provides for both types of Income taxes to be taken into account for purpose of tax credits against Indian Income Tax liability. However, it held that credit for all taxes paid abroad in any case cannot exceed Indian income tax liability in respect of same income.

Dr. Rajiv I. Modi v DCIT - [2017] 86 taxmann.com 253 (Ahmedabad - Trib.) - IT APPEAL NO. 1285 (AHD.) OF 2014 dated 21.09.2017

1286. The Tribunal relying on the Co-ordinate Bench ruling in the case of Essar Oil Ltd [TS-6680-ITAT-2013(MUMBAI)-O] and considering the term 'may be taxed in that other state' in Article 6(1) of India-UAE DTAA, held that income from Dubai Villa of the assessee was liable to be tax in India to the extent includible in the return of income and the credit of the taxes paid would be allowed in the other contracting state.

Shah Rukh Khan [TS-109-ITAT-2017(Mum)] [ITA No.623 & 4763/Mum/2013]

h. Shipping income

1287. Where the assessee, a Singapore based company, engaged in the business of operation of ships in international waters, sought the benefit of Article 8 of India-Singapore DTAA for its gross freight earnings collected from India and the Revenue denied the treaty benefit in view of Article 24 (Limitation of Relief) as the assessee could not show that freight income was remitted to Singapore, the Tribunal observed that the entire income was disclosed by the assessee in the return of income in Singapore, further, as per Singaporean income-tax law, such income was regarded as Singapore sourced income and assessed to tax in Singapore on accrual basis and not on remittance basis and accordingly held that Article 24(1) would not be applicable and allowed the treaty benefit to the assessee. It further held that it cannot be said that the shipping income earned from India is to be treated as exempt from tax or taxed at reduced rate, which is a condition precedent for applicability of Article 24 since India at the threshold does not have the jurisdiction to tax the shipping income of the non-resident entity.

APL Co. Pte Ltd. [TS-65-ITAT-2017(Mum)] (IT APPEAL NO. 4435 (MUM.) OF 2013)

1288. The assessee, a Singapore based ship company engaged in the business of operation of ships in the international traffic claimed exemption under Article 8 of the India-Singapore DTAA but the AO denied the deduction on the ground that there was no evidence that the money had been actually remitted to Singapore and had suffered tax in Singapore. Accordingly, the AO denied treaty benefits under Article 24. The assessee during the Tribunal hearing filed a certification from the Singapore Authorities stating that the income had been brought to tax in Singapore. However, during the hearing, the Tribunal observed that as per the Singapore tax laws, the income of the assessee did not seem to be taxable in Singapore itself and therefore as per Article 24 if income has not suffered tax in Singapore, no benefit under the DTAA could be

granted. It held that there was a difference between 'subject to tax' and 'liable to tax'. In light of the new developments in the case, the Tribunal remitted the matter to the file of the CIT(A) for fresh adjudication.

BP Singapore Pte Ltd v ITO – ITA NO 409 / Rjt / 2016

1289. The Tribunal held that the income of assessee (a UAE Co.) arising from operation of ships in India was not taxable as per Article 8 of India-UAE DTAA and held that the Revenue was incorrect in denying treaty benefits claiming that assessee could not be treated as a resident of UAE as its directors and shareholders were not UAE residents and its AGM was held outside UAE. It noted that the assessee was 'liable to tax' in UAE by the virtue of incorporation in UAE and hence it satisfied the 'residency condition', and rejected Revenue's invocation of tie breaker rule under Article 4(4) (which determines residence based on place of effective management - POEM) holding it would come into play when the assessee is resident of both the Contracting States but it was not the AO's case that assessee was a resident of India. Further, it upheld CIT(A)'s observation that since the Board meetings and important decisions were taken at Dubai and senior staff including MD were resident of Dubai, assessee's POEM was in UAE, and held that the place of holding of AGM and residential status of shareholders was not a relevant factor for determining residential status of the company. Further, it rejected Revenue's invocation of Limitation of Benefit ('LOB') clause under Article 29 of India-UAE treaty on the ground that entire share capital of the assessee was held by German entities and held that in order to invoke Article 29 what had to be established was whether or not the assessee company was not formed in the UAE. It further held that whether the company was to be formed in UAE or in Germany, would not have made any material difference as the Indo-German DTAA also granted similar treaty protection with regard to taxability of shipping profits.

ITO v Martrade Gulf Logistics FZCO -UAE - TS-575-ITAT-2017(Rjt) - ITA Nos. 7 to 9/Rjt/2011 dated 28.11.2017

1290. Where the assessee, a Singapore based company, engaged in the business of operation of ships in international waters, sought the benefit of Article 8 of India-Singapore DTAA (as per which its income would be solely taxable only in Singapore and not in India) for its gross freight earnings collected from India and the Revenue denied the treaty benefit in view of Article 24 (Limitation of Relief clause which states that the benefit claimed under the DTAA would be restricted to incomes that have been remitted to Singapore) as the assessee could not show that freight income was remitted to Singapore, the Tribunal observed as per Singaporean income-tax law, such income was regarded as Singapore sourced income and assessed to tax in Singapore on accrual basis and not on remittance basis and accordingly held that Article 24(1) would not be applicable and allowed the treaty benefit to the assessee..

Far Shipping (Singapore) Pte Ltd v ITO - [2017] 84 taxmann.com 297 (Hyderabad - Trib.) - IT. APPEAL NOS. 399 TO 436 (HYD.) OF 2017 dated 16.06.2017

1291. The assessee, a tax resident of Germany, was engaged in transportation of cargo to ports outside India and vice versa. It would transport cargo on vessels owned /chartered/pooled by it as well as on slot arrangement and in certain special circumstances such as where size of vessels was too large to enter Indian ports the assessee would transport cargo on feeder vessels from origin port to hub port and then cargo would be transported from hub port to destination port on vessels owned/chartered or pooled by assessee. The AO opined that assessee was not eligible for benefit of article 8 of DTAA in respect of freight earned by it from feeder vessels as they were neither owned, chartered or leased by assessee. The Tribunal noted that the coordinate bench in assessee's own case relating to earlier assessment year had followed order passed in case of DIT (International Taxation) v. Balaji Shipping U. K. Ltd. [2012] 211 Taxman 535/24 taxmann.com 229 (Bom.), and held that benefits of DTAA between India and Germany would be available to assessee in respect of revenue earned from feeder vessels obtained under slot hire arrangements. Accordingly, following the said decision it held that in the absence of any change in circumstances, benefit of article 8 of DTAA was to be granted to assessee in respect of revenue earned from feeder vessels in assessment year in question as well.

Hapag-Lloyd AG v DCIT - [2017] 87 taxmann.com 305 (Mumbai - Trib.) - I.T. APPEAL NO. 1441 (MUM.) OF 2017 dated 31.10.2017

i. **Section 44BB**

1292. The Apex Court held that the mobilization fee received by the foreign assessee from ONGC for the transport of oil rigs to the drilling site was to be included in the amount subject to tax under Section 44BB of the Act. It held that on a joint reading of Sections 44BB, 5 and 9, the amount received by the assessee would be considered as income earned in India. Further it upheld the findings of the High Court and Tribunal and held that the mobilization fee was part of an indivisible contract and therefore the contention of the assessee that it was a mere reimbursement of expenses bearing no income element was invalid. It further held that as per Section 44BB of the Act whatever amount was paid to the assessee was to be treated as income of the assessee and therefore dismissed the assessee's appeal.

Sedco Forex International Inc. vs. Commissioner of Income-tax [2017] 87 taxmann.com 29 (SC) Civil Appeal No. 4906 of 2010 dated 30.10.2017

1293. The assessee, an Australian company, engaged in providing engineering and construction services to oil and gas companies received amounts for both work carried on in India as well as outside in India and only offered the income for work carried on in India as income relying on a statement prepared under software under the percentage completion method. The AO rejected the assessee's computation and held that both income for work carried on in and outside India were includible in the income which was taxable under Section 44BB of the Act which the assessee agreed to during the hearing before the Tribunal. The Tribunal in the interest of natural justice acceded to the assessee's requested to permit it to furnish the accounts to the satisfaction of the AO for the purpose of computation of income and directed it to furnish the financial statements and other documents as required under the law and held that after affording adequate opportunity of being heard to the assessee, the AO may decide the issues in accordance with the law.

DDIT v Clough Projects International Pty Ltd - (2017) 51 CCH 0163 MumTrib – ITA No. 2952/Mum/2010, 4930/Mum/2014, 4931/Mum/2014 (C.O. No. 09/Mum/2011, 61/Mum/2016, 62/Mum/2011 dated 06.10.2017

1294. The Tribunal held that section 44BB does not envisage only direct use of plant and machinery in prospecting for or extraction or production of mineral oils and, therefore even amounts received by assessee from hiring of barge used for offshore accommodation of employees was to be taxed under section 44BB of the Act.

Valentine Maritime (Gulf) LLC v ADIT - [2017] 78 taxmann.com 109 (Mumbai - Trib.) - IT APPEAL NOS. 8694 AND 9239 (MUM.) OF 2010 dated 18.01.2017

1295. Where the assessee, a UK company had entered into a JV and was awarded a contract by RGPPL, an Indian company on Engineering Procurement and Construction basis and offered its income from engineering services and purchases within India for tax under section 44BBB but did not offer income arising out of procurement of offshore equipments for taxation, the Tribunal held that the AO erred in contending held that provisions of section 44BBB were applicable on the amount of offshore procurement as well, as it was part of same EPC contract. It observed that the contract entered into with RPPGL, in its consideration clause, had separately identified aggregate consideration payable in respect of different components of contract, namely, design and engineering services (onshore/offshore), import of equipment/material as well as equipment/material to be procured from within India and therefore held that the entire contractual revenue on account of offshore procurement could not be brought to tax under section 44BBB as consideration received by assessee for offshore supply of equipment was not chargeable to tax in India.

DCIT v Whesoe Oil & Gas Ltd - [2017] 87 taxmann.com 342 (Mumbai - Trib.) - IT APPEAL NO. 4673 (MUM.) OF 2015 dated 03.11.2017

j. Assessment / Appeals

1296. The Tribunal, relying on decision in the case of ESPN Star Sports [TS-164-HC-2016(DEL)] and Honda Cars Ltd. [TS-5110-HC-2016(DELHI)-O], quashed draft as well as final assessment order passed by the AO as the assessee was not an 'eligible assessee' as defined u/s 144C(15) and since the assessee was an AOP between two Japanese companies it could not be treated as a foreign company. It further rejected Revenue's stand that since the project was erected in earlier years and the assessee's business was discontinued, set-off of losses u/s 72 should have been denied since the expenditure incurred by the assessee in preceding years was directly connected with earning of income received in current AY. Accordingly, the Tribunal allowed the carry forward of loss.

Mitsui Marubeni Corporation [TS-85-ITAT-2017(DEL)] (I.T.A. No. 5658/Del/2010)

1297. The Apex Court dismissed Revenue's SLP against Delhi High Court judgment where the Court had quashed the AAR order rejecting assessee's application for advance ruling u/s 245R on the alleged ground that the questions for which reference was made, were part of the pending proceeding since notice was issued u/s 143(2) and further held that notice issued u/s 143(2) did not address itself to any specific question and that the issue of notice would be insufficient to attract automatic rejection of said application under proviso to section 245R(2). The High Court had directed AAR to process assessee's application and independently deal with it on merits in accordance with law.

Sage Publications Ltd. [TS-108-SC-2017] (SLP No. 3174/2017)

1298. Where the reason recorded by the AO for issuing notice u/s 148 to the non-resident assessee proceeded on the assumption that assessee had business connection in India since large withdrawals were made from NRO bank account and return of income was not filed despite assessee having accrued interest income from NRO A/c, the Court held that the same could not form reasonable belief that income had escaped assessment and that the assessee was not required to file return as per section 115G. Accordingly, it quashed the notice issued u/s 148 as the same was without jurisdiction and bad in law.

Mr. Cyrus Kersi Vandrevala [TS-91-HC-2017(BOM)] (W.P. No. 2551 of 2016)

1299. The assessee had incurred the expenditure for the purchase of advertisement space from Google Ireland on which it did not deduct tax contending that the said amount was not chargeable to tax. However, the AO disallowed the same u/s 40(a)(i) on the ground that the assessee constituted dependent agent PE of Google Ireland and the payment made was in the nature of royalty and he also made an ALP adjustment in respect of the same. While pursuing the remedy before the DRP, the assessee made an application for stay of outstanding demand before the AO which was declined by him and consequently, relying on the CBDT Memorandum dated 29.12.2016 (which provides that in case demand is disputed by the assessee before CIT(A), then AO shall grant stay subject to payment of 15% of demand by assessee) filed the stay application before the Tribunal contending that the payment of demand be restricted to 15%. The Tribunal held that the assessee failed to establish the prima-facie case for demand non-recovery and that, the expenditure was rightly disallowed by the AO treating the assessee as dependent agent PE. It also noted that the assessee had sound financial position to pay the demand. It further rejected the assessee's contention that the addition on account of royalty u/s 40(a)(i) would lead to double additions as the addition was also made for the same transaction while computing the ALP u/s 92C and held that the disallowance u/s 40(a)(i) and the computation of income from international transaction regarding to ALP under Chapter X of the Income-tax Act operated in two different fields and had no co-relation with each other. It further held that the assessee would not suffer any irreparable loss / injury if the stay was not granted as it could get full refund with interest if assessee's appeal was allowed on merits. Further, relying on Karnataka High Court ruling in case of Flipkart India [TS-97-HC-2017(KAR)], it held that CBDT Instruction dated 29.02.2016 (providing guidelines for stay of demand at first appeal stage) would not be applicable to proceeding before the Tribunal and the same applied only to the proceedings pending before CIT(A). Accordingly, it directed the assessee to deposit 50% demand (20% within 7 days and balance in 6 monthly installment).

Google India Private Limited [TS-133-ITAT-2017(Bang)] [SP No. 45/Bang/2017]

k. **Others**

1300. Where as per Article XI of DTAA entered into between India and Malaysia as prevalent during AY 1992-03, tax on dividends was liable to be levied in the country where the income had accrued, the Apex Court following its decision in the case of CIT v. Torquise Investment & Finance Ltd. [2008] 300 ITR 1/168 Taxman 107 (SC), held that dividend income received by the assessee from a foreign country was exempt from taxation.

DCIT v Tripti Trading & Investment Ltd - [2017] 80 taxmann.com 287 (SC) CIVIL APPEAL NO. 1521 OF 2007 dated 09.03.2017

1301. The Tribunal held that guarantee fees received by non-resident assessee-company in respect of guarantees provided to support credit facilities availed by its subsidiaries in India was taxable as "other income" under Article 23 of India -UK DTAA (taxable at 40%) and not as 'interest' under Article 12 (subject to taxation at 15%). At the outset it rejected assessee's argument that such fees could not be taxed in India as they were received pursuant to the global corporate guarantee agreement with the banker outside India and held that it was not the entering of the global corporate agreement outside India that occasioned the assessee to charge the guarantee commission, but it was the act of the subsidiary in availing the loan that accrued the guarantee commission to the assessee". Referring to definition of term 'interest' u/s 2(28A) as well as Article 12(5) of the treaty, it held that the term 'interest' with its widest connotations, relates to payments made by the receiver of some amount, pursuant to a loan transaction and therefore could not include any payments made to stranger to the privity of loan transactions, though it was incidental to such loan. It therefore held that so long as the assessee was a stranger to the privity of contract of loan between the Indian entity and the banker, it could not categorize the corporate/bank guarantee recharge amount as interest for the purpose of taxation. It also rejected assessee's claim to treat guarantee fee/commission as 'business profits', noting that the assessee was in the business of manufacturing certain products and not providing corporate/bank guarantee.

Johnson Matthey Public Ltd. Company v DCIT - TS-578-ITAT-2017(DEL) - ITA No.-1143/Del/2016 dated 06.12.2017

1302. Where the assessee had filed a revision petition u/s 264 seeking MFN clause benefit under the protocol to India Netherlands DTAA with respect to the payment of fees for technical services (FTS) to a Dutch party, which was rejected by the Commissioner holding that no notification was issued by CBDT making beneficial provisions under India Finland treaty applicable to India-Netherlands treaty, the Court held that protocol to the India-Netherlands DTAA itself provided for automatic application of subsequent treaty and therefore, no such separate notification was envisaged to be issued for enforcing such subsequent treaty with another OECD country. Accordingly, it set-aside the CIT's revisionary order u/s 264 and considering the fact that no detailed discussion on the factual aspect of the matter about payment of FTS was made, directed the CIT to decide the revision petition filed by the assessee u/s 264 de novo.

Apollo Tyres Ltd vs CIT-TS-585-HC-2017(KAR)-ITA No. W.P No. 31738 of 2016 dated 28.11.2017

1303. Where the assessee, an Indian member of KPMG International (KPMGI), Switzerland, a mutual association, made payment towards reimbursement of cost to KPMGI, (as per the Membership Agreement) to enable it to discharge its function, the Tribunal held that the said payment was not taxable 1) on the grounds of 'mutuality' since, there was complete identity between the contributors and participators and further the actions of the participators and contributors were in furtherance of the mandate of the association and 2) in any case there was no profit element in the impugned transaction.

KPMG [TS-150-ITAT-2017(Mum)] [ITA No.2493/Mum/2012]

1304. The Tribunal allowed the assessee's appeal by allowing its claim of deduction in respect of profit shared with DRL, Switzerland ('DRL, SA') for AY 2009-10. Pursuant to tripartite 'out of court' settlement of patent infringement dispute with GlaxoSmithKline (GSK) regarding manufacturing of certain generic drug, assessee had entered into an agreement with DRL SA whereby DRL SA undertook liability insurance and Shelf Stock Adjustment ('SSA') risk and also agreed for sharing assessee's R&D and legal costs for which the assessee agreed to share 50% of its profits arising from marketing the product in the US with DRL SA. The AO observed that the agreement between the assessee and the DRL SA was not reported properly in 3CEB report or in T.P. documentation to show that the same was within arms length range and therefore contended that the transaction between DRL, India and DRL, USA was an arrangement of profit shifting from India to Switzerland. Against this, DRP concluded that, 25% of the total profit paid to DRL Swiss, by DRL USA, was taxable profit in the hands of the assessee and was diverted to Switzerland. Noting the above agreement Tribunal rejected the Revenue's stand that the transaction between assessee and DRL SA was a colourable device to shift profit from India to Switzerland and held that if there was no such arrangement, the assessee would have borne the entire costs towards SSA which, in the instant case, was borne by DRL SA. It held that the agreement between DRL India and DRL SA could not be doubted and further stated that the Revenue was not entitled to analyse the business decision taken by assessee for sharing profits.

Dr. Reddy's Laboratories Limited. vs. Add. CIT - TS-186-ITAT-2017(HYD) - ITA.No.294/Hyd/2014 dated 28.04.2017

1305. The assessee (Dutch company) sold shares of an Indian company to the Singapore company. It received interest from the Singapore company for delay in payment of consideration. The assessee claimed that receipt of interest was in Netherlands and therefore it did not accrue or arise through or from any property in India or from any asset or source of income in India or through transfer of a capital asset situated in India and accordingly was not taxable in India. Accordingly, it claimed refund of taxes deducted by the Singapore company. The AO contended that the interest arose through a transaction involving sale of a capital asset situated in India and would therefore be deemed to have accrued or arisen in India under Section 9(1)(v) of the Act. Accordingly, it rejected the assessee's TDS refund claim. The CIT(A) upheld the order of the AO. The Tribunal observed that section 9(1)(v) of the Act had no applicability and therefore, the interest could not be said to accrue or arise or to have deemed to accrue or arise in India. It rejected the AO's contention that the interest was paid on account of a transaction involving the sale of a capital asset in India since the interest was paid to compensate for the delay in remitting the sale consideration. Accordingly, it held that the same was not taxable in India. The Court upheld the Tribunal's order and held that such interest was not taxable u/s. 9(1)(v) of the Act as there was no debt incurred or monies borrowed for any business purposes. Accordingly, it held that the same was not taxable in India as per Article 11(1) of India-Netherlands DTAA which provides that it would be taxable in Netherlands.

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

1306. The Court upheld the order of the Tribunal wherein it was held that forex gain arising to the assessee (Indian company) on receipt of royalty/interest income (which was exempt under India-Malaysia treaty) from Malaysian JV company was taxable in India notwithstanding the fact that the royalty/interest income was not taxable. It held that the gain on account of foreign exchange variation could not be attributable to royalty and interest earned in Malaysia, but was a benefit/income arising from subsequent transaction i.e. difference in exchange rate at the time of remittance of royalty/interest income from Malaysia.

Ballarpur Industries Ltd. TS-315-HC-2017(BOM) (ITA No. 11 of 2002 dated August 1, 2017)

1307. The Court restrained Vodafone Group Plc. UK (defendant) from initiating parallel arbitration proceedings under India-UK Bilateral Investment Promotion and Protection Agreement ('BIPA'), while the arbitration under India-Netherlands BIPA was pending. The Court observed that pursuant to retrospective amendments to Sec. 9 where the tax liability was imposed on Vodafone

International Holdings B.V ('VIHBV') in respect of acquisition of stake in Hutchinson Essar Limited ('HEL') for its failure to deduct TDS on capital, VIHBV, the subsidiary of defendant group, had invoked the arbitration clause under the India-Netherlands BIPA. The Court held that the reliefs sought by the defendant under the India-UK BIPA and by its subsidiary i.e. VIHBV under the India-Netherlands BIPA were virtually identical and since the defendant as well as its subsidiary VIHBV were part of the same corporate group, they could not file two independent arbitral proceedings as that would amount to abuse of process of law.

Vodafone Group PLC United Kingdom TS-344-HC-2017(DEL) (I.A.9461/2017 in CS(OS) 383/2017 dated August 22, 2017)

1308. The Court held that, salary of a non-resident seafarer for services rendered outside India on-board foreign ships accrues outside India and is not assessable in India even if received by the seafarer into the NRE bank account maintained in India by the seafarer

Sumana Bandyopadhyay vs DDIT- ITA No. ITAT 374 of 2016 dated 13.07.2017

1309. Where pursuant to an agreement with Indian subsidiary, assessee-US company rendered various services to Indian subsidiary only in USA and no part of same was rendered in India and compensation payable by Indian subsidiary to assessee for services covered only cost actually incurred by assessee and no profit element or mark-up on cost was to be added to it, the Tribunal held that since expenses incurred out of India earlier paid by assessee were reimbursed in India by Indian subsidiary, the assessee being not recipient of sums in question and being only a conduit for payment by Indian subsidiary to third party service provider, said payment could not be charged to tax in hands of assessee.

ACIT vs Timken Company ITA No. 387 & 398 of 2010 dated 29.11.2017

II. Domestic Tax

a. Income

1310. The Court held that the transport subsidy received by the assessee could not be regarded as a revenue receipt since the same was to encourage investment in difficult and far-flung states, stimulate industrial activity in backward region, generate employment opportunities, bring about development in the N.E states and was not for providing higher profits to the assessee. Applying the purpose test the court observed that there could be no straightjacket formula for distinguishing a capital receipt from a revenue receipt and the answer had to be decided on the circumstances of each case.

Shiv Shakti Flour Mills (P) Ltd [TS-694-HC-2016(GAUH)]

1311. The Court dismissed Revenue's appeal in respect of taxability of non-interest bearing refundable security deposit received by assessee as a revenue receipt since the security deposit recovered from the members at the time of their enrollment as a club member was refundable on occurrence of contingencies mentioned in the Rules, Regulations and Byelaws. Further, merely because the security deposit was not kept apart and/or subsequently the amount of security deposit was utilized for other purposes such as construction and providing amenities at the club, the same would not lose the 'character of deposit'.

Gulmohar Green Golf and Country Club Ltd [TS-691-HC-2016(GUJ)]

1312. The Tribunal dismissed appeal of the Revenue and held that the amount received by the assessee on forfeiture of share warrant application money was a capital receipt and not a revenue receipt as it was not earned from regular business activities carried on by the assessee and hence it could not be included in the total income of the assessee.

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

1313. Where mobilization advance given to the contractor by the assessee for the purpose of contract work of laying down the railway line and the same was intrinsically connected with the capital expenditure of the appellant prior to the commencement of its business, the Tribunal held that the interest income earned by the assessee on mobilization advance which was later adjusted against charges payable to the contractor and which had gone on to reduce the cost of construction, was rightly treated by the assessee as capital receipt and not income from other sources. Tribunal, accordingly, deleted the addition of the same and allowed appeal of the assessee.

Angul Sukinda Railway Ltd. V. Income Tax Officer - (2017) 49 CCH 0149 Cuttack Trib (ITA No. 197/CTK/2016)

1314. The assessee, following mercantile system of accounting had advanced loan to two parties. On request of the debtors, it agreed to waive interest on the loan advanced and since no interest was realized it did not offer the interest income to tax. However, the AO noting that the assessee continued to receive the principal amount from the debtors and that the loan advanced was not declared as bad debt and that the assessee was following mercantile system of accounting, taxed the interest income in the hands of the assessee. The CIT(A) and the Tribunal upheld the order of the AO. The Court relying on the Apex Court rulings in the case of Shoorji Vallabhdas [TS-1-SC-1962] and Poona Electric [TS-9-SC-1965] held that no tax could be levied on hypothetical income. Accordingly, it deleted the addition of interest made by the AO.

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

1315. The Tribunal dismissed Revenue's appeal and held that where the Assessee had invested in share application money not immediately required for the purpose of its business in fixed deposits, the interest earned on such fixed deposits was rightly reduced from its Capital Work in Progress and was not taxable as IFOS as it was a capital receipt. The Tribunal distinguished the decision of SC in Tuticorin Alkali Chemicals (227 ITR 172) and followed the decision of Madras HC in VGR Foundations (298 ITR 132).

ITO vs. Alliance Hospitality Services Pvt. Ltd. (2017) 50 CCH 0257 Mum Trib (ITA No. 3191/Mum/2013 dated August 22, 2017)

1316. Where the assessee had invested the compensation received by her from the Govt. on account of compulsory acquisition of land and had invested the same in the temporary fixed deposit, the Court dismissed the appeal of the assessee and held that the interest received was taxable as IFOS irrespective of the fact that the final determination of compensation was still pending as the right to receive the said income had accrued in the hands of the assessee under the mercantile system of accounting. It dismissed the assessee's contention that since enhanced compensation receivable by her was not yet finally determined by the Court, no income could accrue to her.

Premlata Purshottam Paldiwal TS-321-HC-2017(BOM) (ITA No. 17- 20 of 2011 dated August 1, 2017)

1317. Where the assessee (an artist and film director) transferred its sole proprietary concern to Radaan Pvt Ltd (where she was a director and substantial shareholder) and received non-compete fees from the said company, the Court observed that though the exclusivity of engagement with the company was portrayed, the assessee continued to render services to the third parties subject to the consent of the company and payment of 5% of her receipts and accordingly, held that the non-compete fee was a colourable device/sham. Accordingly, it rejected the assessee's contention that non-compete fees received was capital in nature and held that the same was chargeable to tax.

R.Radikaa, Radaan Media Works India Ltd TS-339-HC-2017(MAD)(T. C.A.Nos.1365 of 2007 and 1175 of 2008 dated August 8, 2017)

1318. The assessee was engaged in the business of turnkey plantation [i.e. to create and develop plantations for Western Coal fields Ltd (WCL)] whereby it sowed seeds and developed nurseries on its own land and then transplanted the grown plants in the areas identified by WCL post which it also maintained the plants for 2-3 years using its own men and material. The Court upheld the

Tribunal's order wherein it held that the entire activity was divisible into two stages viz., 1. where the assessee sowed seeds and developed the plants on lands belonging to it and 2. where the trees/plants were transplanted on lands belonging to WCL and the assessee maintained the plants for 2-3 years using its own men and material. It held that only income arising from the 1st stage was exempt u/s 10(1) and income from Stage 2 was taxable. However, since there was no bifurcation between first and second stage, it held that the gross income earned after reducing the entire amount expended at stage I was taxable.

The Forest Development Corporation of Maharashtra Limited TS-325-HC-2017(BOM)(ITA No. 77 of 2004 dated August 3, 2017)

1319. The Court relying on its decision for the earlier year in the case of the assessee held that maintenance charges received by the assessee was to be treated as its income and rejected the assessee's contention that the maintenance charges received was not its income since the amount was received in trust for specific performance on behalf of the members. Since the assessee had shown the amount of ground rent and maintenance charges together in the balance sheet, it restored the matter to the file of AO to determine the amount of maintenance charges.

Pr. CIT vs. Delhi State Industrial Infrastructure Development Corp. Ltd. (2017) 99 CCH 0187 DelHC (ITA No. 375/2015 dated August 17, 2017)

1320. The Court held that amount received by assessee, running a manufacturing unit in a specified backward area, by way of exemption of sales tax payments under the UP state subsidy scheme was taxable as a revenue receipt. The Court noted that the assessee had the flexibility of using the amounts retained for any purpose, not necessarily capital. Further, the Court observed that under the UP State subsidy scheme, the assessee was allowed to retain the sales tax amounts collected from customers/service users, subject to the quantitative limit of 100% of capital expenditure and that the said quantitative limit indicated therein was only a reference point.

CIT vs. Bhushan Steels & Strips Ltd. (2017) 83 taxmann.com 204 (ITA No. 315 of 2003 & others dated July 13, 2017)

1321. Where the assessee, engaged in the setting up of power projects required certain desired net-worth, pursuant to which the assessee's parent had stepped in and invested funds in assessee's shares, out of which certain amount was temporarily parked in FDs from which the assessee earned interest income, the Tribunal relying on the decisions of the Apex Court in Challapalli Sugar Mills (citation) and Bokaro (citation), held that such interest earned by assessee being integrally and inextricably linked with setting up of power project, was a capital receipt which was to be set-off against pre-operative expenditure and was not taxable as income from other sources. It distinguished Revenue's reliance on the Apex Court ruling in Tuticorin Alkali Chemicals & Fertilizers Ltd. observing that in that case, the surplus funds available out of borrowed funds was invested in fixed deposit during the pre-construction period whereas in the assessee's case the fund invested in fixed deposits was inextricably linked to setting up the power project.

Solarfield Energy Two Pvt Ltd vs ITO-TS-409-ITAT-2017(mum)- ITA no. 5076/mum/2016 dated 11.09.2017

1322. The Court allowed assessee's (a general insurance company) claim for exemption in respect of profit on the sale of investments applying CBDT circular 528 of 1988 (which provided that profit and loss on sale of investments would not be taken into account in calculation of insurance profits) for AY 2005-06 and rejected Revenue's stand that Circular No. 528 was not applicable to assessee and that no exemption can be claimed as assessee's entire income was to be treated as business income in terms of Sec. 44 (insurance specific). The Court held that since the CBDT circular which was beneficial to the Assessee had not been withdrawn, it was binding on the Revenue authorities. Further, the Court observed that what an insurance company was deprived of by omission of Rule 5(b) (which provided adjustments to balance of profits disclosed in annual accounts) was provided to it by the Circular. Accordingly, it held that for the period during which there was no Rule 5(b) (like in case of subject AY) the profits on sale of investments were not taxable in the hands of general insurance companies.

CIT vs. Oriental Insurance Co. Ltd. TS-361-HC-2017 (ITA No. 372/2015 dated August 30, 2017)

1323. The Court held that unutilized Cenvat credit could not be added to closing stock of the assessee where the assessee was following exclusive method of accounting (i.e. recording the purchases exclusive of excise duty) since no income was generated to the extent of Cenvat credit.

CIT vs. DIAMOND DYE CHEM LTD. (2017) 99 CCH 0138 MumHC ITA No. 146 of 2015 dated 07/07/2017

1324. Where the assessee had received application money for allotment of plots in advance but there were certain unsuccessful applicant who failed to claim refunds, the Tribunal held that the AO erred in taxing all the unclaimed refund liability as income of the assessee the moment it became unclaimed, noting that there could be a number of reasons for why the refunds remained unclaimed and there was always a possibility of the refunds being claimed in the future or being adjusted by way of allotment of plots. However, it also disagreed with the contention of the assessee that none of the unclaimed refunds were its income and held that as admitted by the assessee itself, since the refund would become barred by limitation after a period of 3 years, liabilities which had been outstanding for a period of more than 3 years were to be treated as income of the assessee after excluding a) refunds against which Court cases have been filed seeking allotment of plots b) refunds which were subsequently adjusted by way of adjustment of plots and c) amounts subsequently adjusted by way of refund claimed even after expiry of 3 years.

Haryana State Industrial & Infrastructure Dev Corp Ltd v ACIT – TS -541-ITAT-2017 (Chandi)

- ITA Nos.184 & 185/Chd/2010 dated 16.11.2017

1325. Where assessee-law firm, following cash system of accounting, received certain advance payments from its clients for making payment of fees to Senior Advocates to appear on behalf of them before High Courts and Supreme Court, the Tribunal held that since said amount was received by assessee in fiduciary capacity to discharge certain obligations while representing case of its clients before various courts, same could not be brought to tax as assessee's income.

Associated Law Advisers v ITO - [2017] 87 taxmann.com 148 (Delhi - Trib.) - IT APPEAL NOS. 5336 & 5846 (DELHI) OF 2014 dated 08.11.2017

1326. Where the assessee received a sum of Rs.16.05 crore as compensation for settlement for loss of its bottling rights from Coca Cola USA, which it claimed to be a non-taxable capital receipt, the Court upheld the order of the Tribunal and held that the said receipt representing a loss of a source of income in itself was a capital receipt on which no tax was to be levied. It observed that as per an agreement with Coca Cola, the assessee was allotted the rights to carry on the bottling in Bangalore but subsequently, Coca Cola, in breach of the agreement, decided to set up its own bottling plant which led to a dispute between the assessee and Coca Cola pursuant to which the assessee received the impugned sum.

CIT v Parle Soft Drinks - TS-554-HC-2017 (BOM) - INCOME TAX APPEAL NO. 978 OF 2014 dated 17.11.2017

1327. The assessee engaged in the real estate business received an advance of Rs.8 crore from SIDCPL which it used to purchase land from HDFC Ltd. Since it could not repay the advance to SIDCPL, it entered into an MoU with SIDCPL wherein it undertook to distribute 87.12 percent of the profits arising on sale of the developed land to SIDCPL while retaining the balance and contended that the 87.12 percent of profits distributed by it was not taxable as its income as it amounted to diversion of profits by overriding title. The Tribunal noted that when the advance was given to the assessee there was no obligation on the part of the assessee to part with any of the receipts or even profit from the sale of such land and it was only when the assessee could not repay the advance to SIDCPL as agreed to and the assessee entered into an MOU to assign/nominate 87.12% of the share in the profit and therefore it was not a case of diversion of income by overriding title but was application / appropriation of income by the assessee. Further, it noted that as per the MOU only the profits were to be shared and losses, if any were

not to be shared and therefore held that if there was an obligation at the source, then the losses arising also would get shared. It also noted that in the earlier years, even though the MOU was prevalent, the assessee had not parted with the share of income and reflected the entire amount as its own income. Accordingly, it held that the entire income received by the assessee during the year was taxable in its hands.

ITO v Kamineni Builders - TS-574-ITAT-2017(HYD) - 149/Hyd/15 & 1486/Hyd/16 dated 30-11-2017

1328. Where the assessee received exemption of entertainment duty in Multiplex Theatre Complexes newly set up, for a period of three years, and thereafter payment of entertainment duty at subsidized rate of 25 per cent for subsequent two years under a Subsidy scheme provided by the State Governments, the Apex Court held that since the object of incentive schemes was to encourage development of Multiple Theatre Complexes, incentives provided to assessee (by way of waiver of duty / subsidized duty) would be capital in nature and not revenue receipts. Accordingly, it held that the AO was incorrect in treating the subsidy as a revenue receipt contending that it contributed towards the day-to-day running expenses.

CIT v Chaphalkar Brothers Pune – TS-589-SC-2017 - CIVIL APPEAL NOS. 6511-6514 OF 2012 dated 7.12.2017

1329. The Court allowed the Revenue's appeal and held that interest income from Bank deposits of the assessee which had accrued to assessee but was not received during the assessment year was liable to be taxed. It noted that the assessee produced no evidence to substantiate claim that interest was not payable by the bank in assessment year, but merely asserted that interest accrued was not entirely received and therefore held that the assessee was not justified in claiming that the interest income was hypothetical income moreso when the assessee was following the mercantile system of accounting.

PRINCIPAL COMMISSIONER OF INCOME TAX vs. PLANTATION CORPORATION OF KERALA LTD. - (2017) 100 CCH 0158 KerHC - ITA No. 121 of 2016 dated 20.12.2017

b. *Income from Salary*

1330. The Tribunal held that HRA exemption claimed by the assessee could not be allowed u/s 10(13A) as it was based on sham rent payments supported only by rent receipts from parent and the assessee produced no evidence arising in the normal course of transactions of hiring premises such as leave & license agreement, letter to society, payments through bank, electricity and water bill payments or any other correspondence and further even the assessee's parent's ITR did not reflect rent received from the assessee. The appeal filed by the assessee was, thus, dismissed.

Meena Vaswani v. Assistant Commissioner of Income Tax, Mumbai - [2017] 80 taxmann.com 2 (Mumbai-Trib.) (IT(A) Nos. 1983 to 1985 (Mum.) of 2015)

1331. The Tribunal allowed deduction to assessee-employee with respect to notice pay recovered from his salary by previous employers. The Tribunal rejected Revenue's stand that no deduction for notice pay was available u/s. 16 of the Act and since salary was taxable on due basis, the entire salary due from previous employer was taxable. It held that this was a case of recovery of the salary, for which Sec 16 was not to be referred and that assessee had actually received the salary from his previous employers after deducting the notice period as per the job agreement with them and thus only the actual salary received by assessee was taxable.

Nandinho Rebello v. Deputy Commissioner of Income Tax - [2017] 80 taxmann.com 297 (Ahmedabad- Trib.) (ITA No. 2378 (Ahd.) of 2013)

c. *Income from House Property*

1332. The Apex Court, upholding the decision of the Bombay High Court, dismissed assessee's appeal and held that rental income arising to assessee-firm from sub-licensing of shopping centre was taxable as 'house property' income and not business income for AY 2000-01. It noted that the assessee was allotted a plot of land by BMC on monthly license basis under

auction whereby assessee constructed the market area (i.e. Shopping Centre) thereupon and gave the same to various persons on sub-licensing basis. It held that based on the circumstances under which BMC auctioned the market area to assessee i.e. permitting assessee to carry out additions and alterations and allowing sub-letting of the shops and stalls, the High Court had rightly held the assessee to be a 'deemed owner' of the premises in terms of Sec 27(iiiib) read with Sec. 269UA(f) of the Act and accordingly correctly assessed income as house property income. It distinguished the co-ordinate bench rulings in Chennai Properties [TS-238-SC-2015] and Rayala Corporation Pvt. Ltd [TS-437-SC-2016] on the ground that in those rulings the assesseees were in the business of letting out of properties and derived entire income from letting out of properties whereas in the instant case, the assessee could not substantiate that its entire income or substantial income was from letting out of the property which was its principal business activity. It held that a mere entry in the object clause of the partnership deed of the assessee stating that the assessee is engaged in sub-letting of properties would not be a conclusive factor.

Raj Dadarkar & Associates vs. ACIT - TS-183-SC-2017 - CIVIL APPEAL NOS. 6455-6460 OF 2017 dated 09.05.2017

1333. The Court reversed the order of the Tribunal and held that license fee received by the assessee for giving the hotel along with furniture on license was taxable as business income and not income from house property. Noting that since the assessee's business was in losses it had decided to give the hotel as well as furniture on license, it dismissed the contention of the Revenue that the income was taxable as income from house property.

Palmshore Hotels P Ltd v CIT – TS-538-HC-2017 (Ker) - I. T. A. No.83 of 2013 dated 19.10.2017

1334. The Tribunal held that the hoardings rent received by assessee (a co-operative housing society) for granting permission to install hoardings in the compound was assessable as income from house property (on which standard deduction @ 30 percent was allowable) and not as income from other sources. It rejected Revenue's stand that in case of a co-operative society, the residential buildings are owned by the members and not by the society and therefore assessee society could not let out the residential buildings or any land appurtenant thereto, observing that the assessee- society was a tenement co-operative housing society in which ownership of the land and building vested in the society itself. It also rejected Revenue's stand that the land on which the hoardings were erected could not be termed as 'land appurtenant thereto' in terms of Section 22 as there was no building nearby and held that by virtue of the word 'or' used in the expression 'building or land appurtenant thereto', land is not required to be used as an integral part of the building as a unit

Bimanagar Co. Op. Housing Society Ltd [TS-441-ITAT-2017(Ahd)]- ITA No.423/Ahd/2012 dated 22.09.2017

d. ***Business Income***

1335. The Tribunal held that the assessee engaged in providing consultancy services could not be covered under section 44BBB of the Income Tax Act, 1961, since the said provisions mainly dealt with turnkey projects.

SMEC International (P.) Ltd 2017] 77 taxmann.com 4 (Delhi - Trib.)

1336. The Court held that the Assessing officer could not reject the assessee's claim and assess it at presumptive rate of 10% on the grounds that it had accounted projects as per Accounting Standard 7, where the foreign company engaged in erection, testing and commissioning of turnkey projects having project office in India prepared accounts and got them audited in accordance with Companies Act and section 44AB and claimed its profits to be lower than the 10% presumptive rate under section 44BBB(1). In terms of Companies Act, AS-7 will apply to a foreign company having project office in India.

Shandong Tiejun Electric Power Engineering Co. Ltd. [2017] 77 taxmann.com 266 (AHD Tri.)

1337. The Tribunal held that income from hiring of vessels (i.e tug boat) earned by assessee (a UAE company) is eligible for taxation on presumptive basis under section 44BB (special provision for computing profits and gains in connection with the business of exploration, etc., of mineral oils) on the ground that assessee was engaged in the business of providing facilities and/or services in connection with prospecting for or extraction or production of mineral oils and thus hiring of barge was in its course of business. Further, it observed that, the phraseology of Sec. 44BB does not envisage only direct use of the plant and machinery in the prospecting for or extraction or production of mineral oils, thus the factum of the vessel being used for the business of operation of prospecting for or extraction or production of mineral oils was enough to cover it within the scope of Sec. 44BB.

Valentine Maritime (Gulf) LLC [TS-29-ITAT-2017(Mum)]

1338. Where the assessee had disclosed income from sale of mutual funds / shares as short term capital gains and long term capital gains in its return but the AO taxed the income as income from business, the Court considering the material on record i.e. number of transactions, holding period, the disclosure of the impugned shares / mutual funds as investments in the balance sheet and the fact that in the earlier years, similar income had been treated as income from capital gains and not income from business income, allowed the appeal of the assessee and held that the AO was incorrect in treating the income from sale of such investments as business income.

Pr CIT v Jayantibhai M Patel – (2017) 98 CCH 0067 (Guj) HC – Tax Appeal No 38 of 2017, 76 of 2017

1339. The Court dismissed Revenue's appeal against the order of the Tribunal, wherein the Tribunal held that the gains on sale of certified emission reductions (CERs) could only be taxed at the point of time when they were actually transferred to the foreign entity and not when they are merely receivable. Applying the 'accrual' principles laid down by the Apex court in the case of Excel Industries Ltd [TS-506-SC-2013], the Court upheld the Tribunal's order holding that as neither the carbon receipts were sold nor transferred in favour of the foreign company in the year under consideration, the same could not be included as receipt/income in that year.

Kalpataru Power Transmission Ltd. [TS-100-HC-2017 (GUJ)] (ITA No. 141/2017) dated 02/03/2017.

1340. The Tribunal upheld CIT(A)'s order deleting the addition made by the Assessing officer u/s 28(iv) of the Act with respect to share application money written back in the books of account of the assessee. It held that amount received by assessee on account of share application money which was subsequently written back in books of account, could not be treated as income of the assessee either u/s 41(1) as it had never been claimed as a deduction in any of the years or u/s 28(iv) as the amount received was not in the course of a trading transaction but was a capital receipt. Revenue's appeal was, accordingly, dismissed.

Deputy Commissioner of Income-tax, Mumbai v. Nalwa Chrome (P.) Ltd [2017] 79 taxmann.com 413 (Mumbai-Trib.) (ITA Nos. 238 & 299 (Mum.) of 2015)

1341. Where the Revenue disallowed expenditure incurred by the assessee involved in planning and building Mass Transit System, the Tribunal held that infrastructure projects took time to be completed and the assessee could operate the Metro Rail System only after the infrastructure was built and where the assessee had acquired land, paid compensation to the displaced land owners, floated tenders and awarded contract for building infrastructure. The assessee had already started its business of planning the mass transit system and since the Revenue had not disallowed the business expenditure claimed in the earlier two years, Tribunal held that the said expenditure was allowable as business expenditure. It further held that where assessee earned interest on its business receipts which were temporarily not required for business, and were parked in banks for earning of interest in order to reduce cost, the same attained nature of business income and not income from other sources.

Hyderabad Metro Rail Limited Vs. Deputy Commissioner of Income Tax (2017) 49 CCH 0112 HydTrib (ITA Nos. 402 & 403/Hyd/2016)

1342. Where the Assessing Officer made an addition u/s 41(1) on the grounds that the assessee had not filed the confirmation from the creditor, the Tribunal after noting that the matter with the creditor was in dispute and sub-judice, deleted the addition by holding that the assessing officer had not brought on record any cogent material to prove that the liability had ceased to exist.
Income Tax Officer vs Alfa Distilleries Pvt Ltd. (2017) 49 CCH 0068 MumTrib (ITA No. 1582/Mum/2015)
1343. The Court dismissed appeal of the Revenue wherein the Revenue contended to value closing stock of sugar of the manufacturer assessee at the rates applied for levy free sugar instead of levy sugar. The Court upheld the valuation made by the assessee which was duly certified by the Tax Auditor and held that the stock of levy sugar could not have been valued at free sale sugar price in view of the fact that there was a legal obligation on the assessee to supply such stock of sugar at controlled levy price through public distribution system.
Principal Commissioner of Income Tax vs. Kishan Sahkari Chini Mills Ltd. (2017) 98 CCH 0090 All HC (ITA No. 35 of 2016)
1344. The assessee was engaged in the business of acquiring properties on ownership or lease or rental basis and then giving it on lease along with various amenities such as electricity, cooling towers, elevators, car parking for the lessees/visitors which were inseparable and from which it earned rental income. The Court upheld the order of CIT(A) and the Tribunal holding that the rental income earned by the assessee was business income considering that the object (as per MoA) and the basic intention of the Assessee was commercial exploitation of its properties by developing them as shopping malls/business centers.
PR. CIT vs. Stellar Developers Pvt. Ltd. (2017) 99 CCH 0196 Mum HC (ITA NO. 690, 691, 692, 698, 699 & 919 OF 2015 dated August 2, 2017)
1345. The Court noting that the assessee, a joint venture between two companies was formed merely for the purposes of submission of tender for the construction of railway tunnels and that i) the contract obtained thereon was executed by the JV members and not the assessee and ii) the income received from the contract was allocated to the JV partners (in the ratio of 97:3), allowed the assessee's appeal. Relying on the decision of the Apex Court in Sitaldas Tirathdas, it held that the railway contract receipts was not income of assessee, but was a diversion of income by overriding title. Accordingly, it held that no income accrued to assessee. Separately, it held that the amendment to Section 40(a)(ia) vide Finance Act, 2012 inserting proviso to Sec. 40(a)(ia) [which states that once tax is paid by payee, deductor cannot be treated as assessee-in-default] was retrospective in nature and therefore the amount allocated / distributed by the assessee to JV partners could not be disallowed u/s. 40(a)(ia).
Soma TRG Joint Venture [TS-405-HC-2017(J & K)] ITA No.34/2013 c/w ITA No.18/2010 ITA No.19/2010 ITA No.52/2013 dated 15.09.2017
1346. The assessee made distress sale of plot of land (which was shown as stock-in-trade in its balance sheet) below the market value. The AO rejected the assessee's stand that the property in question which was sold had been held by it as 'stock in trade'. The AO observed that the assessee had sold plot at the same price at which it was purchased even when the market value of the property was higher. Accordingly, he concluded that the assessee had shown its assets as 'stock in trade' in order to avoid Section 50C of the Act and he treated the plot of land as investment of the assessee and made addition applying Section 50C to arrive at a net short term capital gain. The Court observed that the assessee had failed to place relevant and satisfactory materials before the authorities in support of its claim that the property should have been treated as its stock in trade and not as an investment and mere inclusion of the property as 'stock in trade' in its accounts would not relieve the assessee from satisfying the Income Tax Authorities of the genuineness of the sale of the property. Accordingly, it upheld the order of the AO.
SARAS METALS PVT. LTD. vs. CIT & ANR. (2017) 99 CCH 0087 DelHC ITA 251/2016 dated 04/07/2017

1347. Where the assessee engaged in the development of commercial complexes, had purchased property which was earlier tenanted and earned rentals from the tenants during the course of eviction of the tenants, the Tribunal held that the rent received by the assessee, being inextricably linked to business of development of commercial complexes, was correctly set off against the work in progress and was not taxable as income from other sources as alleged by the AO.

DSL Infrastructure and Space Developers P Ltd v ITO – (2017) 51 CCH 0373 Hyd Trib – ITA No 319 to 322 / Hyd / 2017 dated 17.11.2017

1348. The Tribunal held that amount received by assessee, engaged in manufacturing and trading of automotive products in respect of sublicensing of patented technical know-how was taxable as business income and not capital gains. Pursuant to technical collaboration agreement with its parent company in Germany assessee was granted a non-exclusive, non-transferable rights to use patent and patent application owned and controlled by parent company for manufacture and sale of automobile products, such technical know-how was further sub-licensed by assessee (after taking permissions from the parent) to an Iran based company ('Motogen') for assembling certain type of automotive generators upon payment of lump-sum fees and royalty and by virtue of the sub-licensing, assessee had not extinguished its right to use the patented technology but it had only shared the technology with Motogen; Accordingly, the Tribunal held that there was no transfer of any capital asset giving rise to capital gains since there was no cessation of ownership.

Dy. Commissioner of Income Tax vs M/s. Bosch Limited-TS-513-ITAT-2017(Bang)-ITA No. 750 & 751 / bang 2014 dated 06.11.2017

1349. The Tribunal accepted the assessee's contention that income earned from running a departmental store was taxable as 'income from business' and not income from house property as alleged by the AO. It noted that the assessee entered into separate but similar agreements with the different counter holders, whereby the latter were to bring the goods/products for marketing and sale to the customers at the different counters in assessee's premises for which it received commission from the counter holders. Further noting that the assessee's staff carried out the collection of the sales proceeds as well as packaging and delivery and the commission received by the assessee was based on the actual sales effected and was not a constant amount unlike typical rent it held that the income of the assessee was not taxable as income from house property.

Asiatic Stores & Soda Fountain [TS-456-ITAT-2017(Mum)] ITA NOS. 394, 395 & 398/MUM/2017 dated 27.09.2017

1350. Where the assessee, a NRI, purchased agricultural land, levelled it and sold same at higher price, , the Court dismissing the contention of the assessee that it was a sale of agricultural land exempt from capital gains, held that transaction of sale of land amounted to 'adventure in nature of trade' and, thus, profit arising from said transaction was taxable as 'business income'. It further noted that the assessee had not obtained the permission of the RBI under rule 47 of the Foreign Exchange Management (Acquisition & Transfer of Immovable Property in India) Regulations, 2000, which prohibited acquisition of agricultural land by an NRI, unless specifically permitted and therefore held that it could not be considered as a purchase of capital asset.

VA Jose v DCIT - [2018] 89 taxmann.com 2 (Kerala) - IT APPEAL NO. 88 OF 2015 – dated 07.12.2017

1351. Where the assessee received Rs. 1 crore by way of 'share application money' from its holding company which was subsequently adjusted against goods sold by assessee to its holding company, the Court held that it being a case of discharge of liability and not cessation or remission of liability, provisions of section 41(1) would not apply to the assessee's case. Accordingly, it dismissed Revenue's appeal.

CIT v Indo Widecom International Ltd - [2018] 89 taxmann.com 89 (Allahabad) - IT APPEAL NO. 715 OF 2012 dated 07.12.2017

e. ***Deductions***

Section 32 / 32A

1352. The Court held that if the statute permitting depreciation at a particular rate itself had been amended and such amendment was applicable to disputed period of assessment, it was a substantial question of law and could be raised before the court. Further, since it would involve some factual investigation, the Court remanded the matter to the Tribunal to look into this aspect and pass a fresh order in accordance with law.

Principal Commissioner of Income tax vs U.P. State Bridge Corporation Ltd. [(2017) 98 CCH 0013 ALLHC]

1353. A partnership firm viz. Mother Hospital had constructed a hospital building on land owned by it and for the purpose of operation of the hospital incorporated the assessee company to whom it handed over possession of the building on completion, on the condition that the entire cost of construction of the building was to be borne by the assessee. The said land was given on lease to the company and the assessee company claimed depreciation on the building. The Apex Court upheld the order of the High Court wherein it was held that the depreciation claimed by the assessee could not be allowed as it was not the owner of the property as the title in the said immovable property could not pass when its value was more than Rs.100/- unless it was executed on a proper stamp paper, duly registered with the sub-Registrar, which was not done in the instant case. Further, it dismissed the alternate contention of the assessee that it was the lessee of the property and was entitled to depreciation as per Explanation 1 to Section 32(1) of the Act and held that the construction was actually done by the firm and not by the assessee himself, which was the precondition to avail the benefit of the said Explanation.

Mother Hospital Pvt Ltd vs. Commissioner of Income Tax [2017] 79 taxmann.com 375 (SC)

1354. Relying on Apex court ruling in the case of Shaan Finance (P.) Ltd wherein it was held that where the business of the assessee consisted of hiring out machinery or where the income derived by the assessee from the hiring of any machinery was business income, the assessee must be considered as having used the machinery for the purpose of its business, the Court allowed assessee's claim of investment allowance under section 32A on the value of the plant and machinery leased out. Further, relying on Madras HC ruling in First Leasing Co. of India Ltd, the Court granted additional depreciation under section 32(1)(ia) on assets leased out by the assessee.

Industrial Credit & Investments Corpn. [TS-11-HC-2017(BOM)]

1355. Where the assessee had incurred civil, interior works expenditure, electrical works expenditure & other repair expenses on premises taken on lease for the purpose of running a business centre and the Revenue contended that in terms of Explanation 1 to Sec 32(1)(ia), such expenses were to be considered as a capital expenditure subject to depreciation allowance, the Tribunal rejected the contention of the Revenue and held that Explanation 1 to Section 32(1)(ia) does not intend to lay down that whenever expenditure is incurred on premises not owned by assessee for construction of any structure/renovation or improvement to the building, such expenditure has to be mandatorily treated as capital expenditure. Unless there was a capital expenditure incurred by the assessee the provisions of explanation(1) to section 32(1) would not be attracted. Thus the Tribunal remitted the matter back to the AO with a direction to examine the nature of the expenses incurred and examine the applicability of Explanation 1. Further, it held that the expenses incurred on the consumables which were necessary for the purpose of running of the restaurant could not be termed as capital in nature and therefore deleted the disallowance made by the AO.

DCIT vs. Vatika Hospitality Pvt. Ltd. TS-75-ITAT-2017(DEL) ITA No.2331/Del/2012 dated 13/02/2017

1356. The Tribunal held that the process of generation of electricity through windmill amounted to manufacture or production of article or thing as mentioned u/s 32(1)(ia) and therefore allowed

assessee's additional depreciation claim on windmills for AYs 2011-12 & 2012-13. The third member dissented with the accountant member's view that in light of 'substantive' amendment made by Finance Act 2012 to extend & include activity of 'generation of power' under the ambit of sec 32(1)(iia) with effect from April 1,2013, benefit of initial depreciation/additional depreciation could not be extended to windmills acquired prior to AY 2013-14, and agreed with the view of the judicial member that the amendment brought to Section 32(1)(iia) was clarificatory and not 'substantive' in nature, and therefore had to be given retrospective application.

Giriraj Enterprises vs. DCIT TS-74-ITAT-2017-(PUN) ITA No.s.1469&1470/PUN/2015 dated 23.02.2017

1357. The Court allowed the assessee depreciation on assets forming part of 'block of assets' in respect of its unit which was sold and ceased to exist during relevant AY and rejected Revenue's stand that since the assets pertained to discontinued unit, depreciation u/s 32 could not be allowed as the assessee was neither the owner of assets nor assets were put to use in assessee's business. It held that despite the unit being hived-off, 'block of assets' did not come to an end and assessee was entitled to claim depreciation thereon. It accepted the assessee's reliance on Oswal Agro Mills Ltd.[TS-4-HC-2010(DEL)] and Ansal Properties [TS-267-HC-2012(DEL)] and Infrastructure Ltd. rulings wherein the co-ordinate bench took note of legislative changes brought in Sec 50, special provision for capital gains computation on depreciable assets dealing inter-alia with a situation where any 'block of assets' ceases to exist on account of block being transferred which provided that where an assessee maintains a block of capital assets, the nature and the tax treatment of the same is independent of the existence of the capital asset in whole or in part or whether sold-off or transferred and allowed depreciation on assets of closed unit on the basis that they form part of 'block of assets'.

Sony India Pvt. Ltd. vs. CIT TS-46-HC-2017(DEL) ITA No. 13/2012 ITA 14/2012 dated 24.01.2017

1358. The Court held that in terms of section 32(1)(iia), assessee could claim balance additional depreciation in assessment year which followed the assessment year in which machinery had been bought and used for less than 180 days. It held that the Revenue was incorrect in reading the amendment to Section 32(1) vide Finance Act 2015 (which specifically provides that balance depreciation on assets used for less than 180 days in a relevant assessment year could be claimed in the subsequent assessment year) as a prospective amendment and held that the same was clarificatory in nature. Accordingly, it upheld allowed the assessee's claim of additional depreciation.

Commissioner of Income Tax v T.P. Textiles Private Limited - (2017) 98 CCH 0102 ChenHC (T.C.(A) No. 157 of 2017)

1359. The Court dismissed the Revenue's appeal and upheld order of the Tribunal granting depreciation on 'Jetty' at 100% under the head 'Building Temporary Structure' instead of 25% under the head 'Plant' by holding that the Jetty/loading platform, in this case, was erected by the Assessee, in order to effectuate its business under the contract, entered into with MMTC, which was tenure based and upon completion of the contract, the Assessee was required to dismantle it, and that the jetty therefore, could not have been treated as anything else, but a temporary erection. The fact that the Jetty had other contraptions attached to it, such as, a conveyor belt, to facilitate the process of loading, could not convert such a structure into a plant.

Commissioner of Income Tax vs Anand Transport (2017) 98 CCH 0099 ChenHC (T.C.(A) No. 82 of 2017)

1360. Where assessee had installed plant and equipment at client's premises and had brought the same to the notice of Revenue by filing sample copies of some of the agreements whereby the assessee had agreed that monitoring equipments and pumps would be installed at the clients premises, the Tribunal held that it was clear that the installation of equipments in the client's premises was necessary and part and parcel of nature of business carried on by the assessee and therefore depreciation on the same should be allowed. The fact that the equipments were used in the business premises of the clients could not be the basis to disallow the claim of the assessee for deduction on account of depreciation. The Tribunal, accordingly, upheld order of CIT(A) deleting disallowance on depreciation.

Deputy Commissioner of Income Tax v. Nalco Water India Ltd -(2017) 49 CCH 0145 KolTrib (ITA No. 2111/Kol/2013)

1361. The assessee, who had closed its line of business, claimed write off of the value of capital assets which had no realizable value as loss under section 32(iii) of the Act. Section 32(iii) provides for deduction in case of any building, machinery, plant or furniture in respect of which depreciation was claimed and allowed under sub-clause (i) of the Act and is sold, discarded etc for an amount which was less than the written down value of the assets. The Court upheld the order of the Tribunal and noted that the provisions of Section 32(iii) of the Act were only applicable to assessee's falling under Section 32(i) of the Act i.e. assessee's engaged in the business of generation and / or distribution of power and since the assessee in the instant case was engaged in the business of pharmaceuticals it would not be eligible to claim such loss. Accordingly, it upheld the order of the Tribunal / AO and confirmed the addition.

CIT v Brawn Pharmaceuticals Ltd – (2017) 99 CCH 0004 (Del HC) – ITA 926 / 2015 dated 04.05.2017

1362. The Tribunal rejected assessee's depreciation claim u/s. 32 on intangible asset of 'Government Authorizations/Approvals' which it claimed to have acquired under a business transfer agreement ('BTA') in 2004 wherein it had taken over the business of sale of franking machine on a slump sale basis from a company viz. KOAL. It noted that prior to formation of assessee (a subsidiary of a US company, who manufactures franking machines), KOAL was merely authorized by assessee's US parent to sell / market franking machines to customers in India and observed that the assessee could not produce the Approval granted by the Department of Post or other regulatory authority to KOAL. It held that mere authorization to sell / market franking machines in India could not create any rights in favour of KOAL and that the right to sell the franking machines in India was a result of distribution rights granted by the US parent and not due to Government Approvals granted to KOAL. It held that the rulings of the Apex Court in Techno shares (2010) 327 ITR 323 and of the co-ordinate bench in ONGC Videsh Ltd (2009 – TIOL – 758 – ITAT-DEL) were wrongly relied on by the assessee as in both those cases, the rights of business or commercial nature were possessed by the assessee's, whereas in the instant case, the approval / rights vested with the Parent company and not in KOAL and therefore the same could not have been acquired by the assessee by way of the slump sale.

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

1363. The assessee had claimed depreciation on UPS systems and data drive @ 60%. However, the AO allowed depreciation on these items at the rate of 35% and 17.5% on the premise that these equipments were part of plant and machinery for depreciation purposes. He, therefore, disallowed the excess claim of depreciation on UPS system and Data Drive. The Id. CIT(A), after following the decision of Hon'ble jurisdictional High Court in the case of CIT vs. BSES Yamuna Power Ltd. (2010) TIOL 636 and CIT vs. Orient Ceramics & Industries Ltd. (2011)TIOL 6, wherein it was held that UPS and Data drive were to be treated as part and parcel of computer system and depreciation had to be allowed at higher rate as applicable to computer, allowed the assessee's claim. The Tribunal upheld the order of the CIT(A).

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

1364. The Court dismissed the appeal of the Revenue and held that the activity of mining for the purpose of production of mineral ore fell within the ambit of the word "production" entitling the Assessee (engaged in mining, mineral processing for exports and shipping) to the benefit of additional depreciation u/s 32(iiia)(in case of new machinery or plant acquired and installed by an Assessee engaged in the business of manufacture or production of an article or a thing) on equipment, P&M used in the extraction and processing of ore.

Pr. CIT vs. SESA Resources Ltd. (2017) 99 CCH 0203 Mum HC (Tax Appeal No. 57/2016 dated August 16, 2017)

1365. The Tribunal held that the amount received by the assessee from US Agency for International Development (USAID) was not to be reduced while determining the WDV for the purpose of computing depreciation as USAID was not Central Government/State Government or any person or authority established under any law in India, in terms of Explanation 10 to Section 43(1). It further noted that the grant received by the assessee was conditional and repayable and was thus financial arrangement and not a subsidy grant and also held that even if the grant was treated as a subsidy, since it was not for a specific plant & machinery, such payment/grant would not fall within the expression 'met directly or indirectly' for the asset in terms of Explanation 10 to Sec 43(1).

Spectrum Coal & Power Ltd TS-341-ITAT-2017(Mum)(ITA No 1295/MUM/2012 dated August 3, 2017)

1366. The Tribunal, relying on the decision in the case of DCIT vs ABC Paper Ltd [ITA No.2263 / del / 2012] held that the definition of intangible assets u/s 32(1)(iii) was inclusive which included not only know-how, patents and copyrights, trademarks, licenses, franchises but also other business or commercial rights of similar nature which included 'brand' and accordingly the assessee was entitled to depreciation on paper brand.

DCIT vs Kauntum Paper Ltd – (2017) 51 CCH 0003 Delhi Trib. ITA No 1339 TO 1346/DEL/2017 dated 01.09.2017

1367. Where the Assessee, engaged in the business of loading and unloading of cargo, had erected a Jetty/loading platform to execute its business contract, which was tenure based, the Court noting that it was a temporary erection held that 100% depreciation should be allowed to the Assessee. The Court stated that on completion of the contract assessee was required to dismantle it. The Court further held that merely because Jetty had other contraptions attached to it such as conveyor belt for the process of loading it could not be considered a plant and eligible for only 25% depreciation.

CIT vs. M/s Anand Transport TS-282-HC-2017 (Tax Case (Appeal) No. 82/2017 dated March 7, 2017)

1368. The assessee engaged in the business of trading in securities and shares suffered a loss on account of sale of mutual funds held as stock in trade. The Tribunal, observing that the only income earned by the assessee was interest on securities, upheld the assessee's treatment if the impugned loss as business loss eligible for set off against interest income earned as against AO's treatment of such loss as a capital loss. Further, it noted that in the earlier and subsequent years, the AO had accepted the treadopted by the assessee. Accordingly, the assessee's appeal was allowed.

Cosmos International Ltd vs. Income Tax Officer [I.T.A. No. 6059 (2017) 51 CCH 0015 DelTrib]

Section 35AB

1369. The assessee had expended certain amounts for acquiring technical knowhow for the purpose of setting up new manufacturing unit of soda ash and it claimed 1/6th of such expenditure u/s 35AB (which provides deduction of the lumpsum payment made by the assessee by way of consideration for acquiring knowhow for the purpose of his business over six years from the year of initial expenditure). The AO disallowed the assessee's claim on the ground that the assessee had not yet started soda ash project and accordingly, it was not entitled to deduction u/s 35AB. The CIT(A) upheld the AO's order. The Tribunal held that the fact that the business was not started was of no consequence for claiming the deduction u/s 35AB. It held that the essential requirements for the deduction under the said section were that the assessee should have paid a lumpsum amount for acquiring technical knowhow and that such technical knowhow should be capable of being used for the purpose of business of the assessee. Accordingly, it allowed the assessee's claim of deduction. The Court observed that the assessee was engaged already in business of manufacturing soap and in order to set up soda ash manufacturing plant, assessee acquired technical knowhow by making lumpsum payment. It held that the setting up of manufacturing facility of soda ash was by way of extension of existing business of assessee of manufacturing soap and accordingly, the assessee was eligible for deduction u/s 35AB.

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

1370. The Court allowed the assessee's writ and granted deduction with respect to the capital expenditure incurred by it during AY 2011-12 u/s 35(2ab) on its R&D unit at Rohtak despite the fact that the approval of the Rohtak facility u/s 35(2AB) was received from the prescribed authority u/s 35(2AB) (viz., the Dept of Scientific and Industrial Research) only in 2014. Keeping in mind the object of Section 35(2AB) [i.e. to encourage the establishment of R&D facilities in the country and also to encourage innovation and investment on innovation] and noting that the delay occurred due to an inadvertent error in the application, the Court held that for availing the benefit u/s 35(2AB) what is relevant is not the date of recognition or the cutoff date mentioned in the certificate of the DSIR or even the date of approval but the existence of the recognition. Further observing that the assessee had been candid with the DSIR about its expenses and had given the break-up of the expenditure incurred thereupon along with the Auditor's certificate required for the same, it allowed the deduction to the assessee.

Maruti Suzuki India Ltd. [TS-320-HC-2017(DEL)] W.P. (C) 9306/2015 dated 04/08/2017

Section 35AC

1371. The Court dismissed the appeal of the assessee and held that sub-section (7) to section 35AC withdrawing exception/deduction of expenditure incurred by way of contribution to approved institutions for carrying out eligible project or the scheme or payment made directly on such eligible project or scheme was valid. It held that though the section was introduced for promoting social and economic welfare and upliftment of the public, it was always open for the parliament to withdraw the deduction by framing necessary legislation if the parliament was of the view that such benefit should no longer be granted. It further noted that it was possible that some of the institutions, projects or schemes under the said system may be adversely affected but that itself could not be a ground for annulling the statutory provision.

Prashanti Medical Services & Research Foundation vs UOI [2017] 85 taxmann.com 266 (Gujarat) SCP No. 7558 of 2017 dated 14.09.2017

Section 35D

1372. The Court allowed the assessee's (a public limited company) claim of amortization of expenditure incurred in connection with rights issue of shares u/s 35D(2)(c)(iv) and rejected the Revenue's contention that assessee's claim ought not to be allowed as rights issue was confined only to a section of public (i.e. existing shareholders) and that to qualify for deduction, shares must be issued for public subscription. The Court held, that as per section 67 of Companies Act, a section of public holding shares in a company would also be treated as public.

Nitta Gelatine India Limited [TS-2-HC-2017 (KER)]

Section 36

1373. Where Assessing officer disallowed interest expenses on account of interest free loans advanced by the assessee, the Tribunal held that if the assessee was having its own interest free surplus funds and such funds were utilised as interest free advances even for non-business purpose, there could not be any disallowance of interest paid on interest bearing loans where such loans were used for the purpose of business or profession. Accordingly, the Tribunal upheld CIT(A)'s order deleting the disallowance and dismissed appeal of the Revenue.

Deputy Commissioner of Income Tax v Escort Heart Institute & Research Centre Ltd - (2017) 49 CCH 0175 DelTrib (ITA No. 6674/Del/2013)

1374. The Court set-aside the order of the Special bench of the Tribunal, wherein the Tribunal denied the assessee claim of interest payable on account of disputed arbitration award for AYs 2001-02 & 2002-03 on the ground that the liability to pay interest was not legally enforceable at the end of relevant AYs as the assessee had contested the issue before higher authorities and stay was

granted by the Court. Rejecting the view of the Tribunal, the Court held that once an arbitral award was made by the Court, mere stay of the decree by higher authorities would not relieve assessee of its obligation to pay interest in terms thereof and held that the liability to pay interest under arbitral award commenced in the year in which such decree was passed. It clarified that passing of stay order did not mean that the arbitral award was wiped out from existence. Accordingly, relying on a plethora of Supreme Court rulings including Shree Chamundi Mopeds Ltd., Haji Lal Mohd. Biri Works, Kedarnath Jute Mfg. Co. Ltd, Kanoria Chemicals & Industries Limited, Central India Electric Supply Company, it allowed the claim of the assessee.

National Agricultural Cooperative Marketing Federation of India Ltd. TS-169-HC-2017(DEL) - ITA 161/2016 dated 19.04.2017

1375. Where the Department denied the Assessee deduction of contribution made by it towards LIC Group Gratuity Scheme u/s 36(1)(v) on the ground that the Assessee's application seeking approval for the Gratuity scheme was not granted, the Tribunal noting that the Assessee had filed application seeking approval for the Scheme with the Department way back in 1992 (which was approved by the Department only in 2015) held that the Assessee could not be made to suffer for the inaction of a Revenue official. It also noted that no disallowance with regard to the same was made in any of the previous years and, therefore, deleted the disallowance.

Rajasthan Co-operative Dairy Federation Ltd. vs. ACIT (2017) 50 CCH 0235 Jai. Trib. (ITA No. 352/JP/2017 dated August 10, 2017)

1376. The assessee was engaged in the business of long term housing finance and had claimed deduction u/s 36(1)(viii). The AO observed that the assessee had claimed deduction in respect of interest on certain loan accounts which were transferred to HDFC for which it remained collecting agent and retained part of the interest received by HDFC in respect of which it had claimed deduction. However, the AO rejected the contention of the assessee and disallowed the deduction. The CIT(A) and the Tribunal upheld the order of AO. The Court observed that the assessee had transferred all its rights and liabilities, profits, losses and risks in connection with the housing finance to HDFC and it merely continued to act as a receiving and paying agent for which it retained certain component of interest. Accordingly, it held that after such transfer of loans the assessee would cease to be engaged in the business of long term finance with respect to such loan accounts and the income arising out of such activity would therefore not be the assessee's income from the business of providing long term finance and therefore, the assessee was not justified in claiming deduction u/s 36(1)(viii).

GRUH FINANCE LTD. vs. DCIT (2017) 99 CCH 0120 GujHC TAX APPEAL NO. 383 of 2017 TO 389 of 2017 dated 18/07/2017

1377. The Tribunal dismissed assessee's appeal and held that the effect of brought forward losses u/s. 72 had to be given prior to allowing deduction towards provision for bad and doubtful debts u/s 36(1)(viiia)(c). Accordingly, it upheld the AO's invocation of Section 154 of the Act whereby deduction u/s 36(1)(viiia)(c) was withdrawn by applying set-off provisions u/s. 72 before allowing the impugned deduction, thereby resulting into nil total income, leaving no scope for deduction. It noted that Sec.36(1)(viiia)(c) uses the expression 'total income', and held that carried forward loss had to be deducted in order to arrive at the total income.

Industrial Investment Bank of India Ltd. vs. DCIT TS-265-ITAT-2017 (ITA No. 1416/Kol/2014 dated April 5, 2017)

1378. Where the assessee, a partnership firm, advanced interest free loans to two of its related parties and was paying interest on its partners capital, the Tribunal held that the AO had rightly held that the interest expense claimed by the assessee were not allowable under Section 36(1)(iii) observing that the assessee did not provide the fund flow statement to show that it had sufficient interest free funds and that the interest free advances were not made out of borrowed funds. It dismissed the contention of the assessee that the advances were made out of its profits earned during the year noting that no evidence to that effect was brought on record.

Bombay Sales Corporation v JCIT – (2017) 51 CCH 0054 (Ahd Trib) – ITA No 2748 & 3224 / Ahd / 2014 dated 04.09.2017

1379. The assessee issued redeemable secured premium notes ('SPNs') to raise funds for the purpose of setting up its soda ash plant which were primarily purchased by its promoters. The assessee decided to redeem the SPNs prematurely and prior to the decided date the promoters transferred the SPNs to certain banks and declared long term capital gains on the transfer. The assessee paid a premium on redemption to the banks and claimed deduction under Section 36(1)(iii) on the said premium on redemption. The lower authorities denied the deduction on the ground that i) the borrowing was for capital expenditure ii) it was a contingent liability and iii) the entire transaction was sham. The Court held that i) Section 36(1)(iii) did not specify a pre-condition for usage of borrowed funds only for revenue purposes ii) the liability was not a contingent liability as the interest / premium payable accrued on premature redemption and iii) that all the details of the premature redemption were available in public domain and the bankers purchasing the SPNs were also aware of the date of redemption. Accordingly, it allowed the assessee deduction under Section 36(1)(iii) of the Act.

Nirma Ltd vs ACIT – TS – 478-HC-2017 ITA No. 1219 of 2006 dated 10.10.2017

1380. The assessee-company was a Part IX company formed by conversion of partnership firm into a company. Prior to conversion, the firm had revalued its land increasing its value by Rs. 2.028 crores and had credited the revaluation amount to the partner's capital account subsequent to which the partners were paid Rs. 3.3 crores by overdrawing from bank account. After succession, this amount was brought back by issuing debentures of Rs.3 crores by the company to the directors (erstwhile partners) on which the assessee sought to claim deduction of interest under Section 36(1)(iii) of the Act. The Tribunal upheld the AO disallowance of the interest expenses claimed on the ground that there was no corresponding inflow of capital and the debentures were issued on the basis of a mere revaluation. It further held that the credit of the revaluation of the partner's capital account was inconsistent with the partnership law. Accordingly, it held that the borrowings representing only an increase in the valuation by the firm of its capital asset would not be entitled for interest deduction as the same was not for any business purpose.

Kali BMH Systems Pvt. Ltd.-TS-496-ITAT-2017 /ITA Nos.1186, 1631, 1632 & 1633/Mds/2015 dated 31.10.2017

1381. Where the assessee, a holding company invested in its subsidiary company without charging any interest and had both borrowed funds as well as interest free funds, the Court noting that the assessee, in the capacity of the holding company, had interest in the success of its subsidiary company held that the amounts invested in subsidiary companies were for purposes of business of assessee and further held that since both interest free and interest bearing funds were available with assessee, then a presumption would arise that investment would have been made first out of interest free funds available. Accordingly, it deleted the disallowance made by the AO under Section 36(1)(iii) of the Act.

Pr CIT v Midday Multimedia Ltd - [2018] 89 taxmann.com 184 (Bombay) - IT APPEAL NO. 544 OF 2015 dated 12.12.2017

Section 37

1382. Where the Tribunal upheld disallowance of commission expenditure u/s 37(1) incurred by the assessee, without considering the entire material / facts of the case but merely proceeded on the basis of the fact that the agent receiving the said commission did not appear before the AO in the first instance and that he did not produce documentary evidence to establish nature and value of services rendered to the assessee when he appeared before the AO during remand proceedings, the Court remitted the issue back to the file of the Tribunal noting that the Tribunal decided the issue, as if it were examining the case of that Agent and not of the assessee, since it failed to examine the material evidences in shape of agreements for sale, and failed to appreciate the fact that the payments were made through banking channel, on which TDS was deducted.

Brijbasi Hi-Tech Udyog Ltd Vs. Commissioner of Income Tax- (2017) 98 CCH 0101 All HC (ITA No. 186 of 2013)

1383. The Court upheld order of the Tribunal deleting disallowance of expenditure, claimed by the Assessee qua legal fee and Professional Indemnity Insurance, notwithstanding the fact that the legal fee paid was more than the compensation received by the Assessee and the expense incurred towards Provisional Indemnity Insurance was required to be made by the third party. The Court held that the fact that a particular expense does not result in a profit for the Assessee in the immediate proximity cannot form the basis of its disallowance. Business decisions should be best left to the wisdom of those who run and manage the business and hence, as long as an expense is incurred, wholly and exclusively for the purpose of the business carried on by the Assessee, it ought to be, ordinarily, allowed under Section 37 of the Act.

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

1384. The Court held that whether a particular payment made towards technical know-how fee or royalty to a foreign company in lieu of an agreement would be capital expenditure or revenue expenditure would depend on facts of individual case, and in particular, various terms of agreement involved therein. Accordingly, it held that where on termination of agreement, which was for a period of 5 years, assessee was to return all relevant material related to know-how acquired through the agreement, in such a case, payment towards royalty would be revenue expenditure and not capital.

UPCOM Cables Ltd [(2017) 98 CCH 0024 AIHC]

1385. The Court upheld assessee's claim for deduction of advertisement and promotion expenses incurred towards enhancement of brands owned by its foreign parent-company as business expenditure on the ground that even though all the brands owned by the parent company were not made available in Indian market, the overseas brand owner had not set up any other license (as a rival) at least in the area where the assessee operated. Referring to section 48 of Trademarks Act, it held that as long as the arrangement existed, the assessee who was a licensee of the products, was entitled to claim them as business expenditure though in ultimate analysis they might have enhanced the brand of the overseas owner. It concluded that disallowing a certain proportion on an entirely artificial and notional basis from the expense otherwise deductible, was unjustified.

Seagram Manufacturing Pvt Ltd [TS-695-HC-2016(DEL)]

1386. The Apex court dismissed the assessee's SLP against Karnataka HC ruling denying deduction under section 37 for guarantee commission paid by the assessee to its Chairman cum Managing Director ('MD') Vijay Mallya on the ground that Mr. Mallya's net worth was much lower than the amount of guarantee and the bankers did not obtain details of assets and liabilities of MD in India and outside India. The Court remarked that it was a ploy to divert the income of the companies under his management as a means to pay remuneration to the MD for which he was otherwise not entitled and to overcome the RBI directions and statutory provisions under section 309 of Companies Act which was unlawful.

United Breweries Ltd. [TS-9-SC-2017]

1387. The Tribunal held that where the assessee made payments for offences committed by its employees under Motor Vehicles Act, 1988, which were not compensatory in nature and for which assessee was vicariously liable, deduction in respect of the same was not allowable u/s 37(1) of the Act. Further, where assessee claimed deduction of cash destroyed by fire, the Tribunal held that the Assessing Officer could not disallow said claim without making proper enquiries from persons from whom cash was alleged to have been received. Accordingly, the Assessing officer was directed to allow deduction claimed by the assessee. Hence, appeal made by the assessee was partly allowed.

Aparna Agency Ltd. V. Income Tax Officer, Kolkata [2017] 79 taxmann.com 240 (Kolkata-Trib.) (ITA No. 1010 (Kol.) of 2014)

1388. The Tribunal allowing the deduction under section 37 to the assessee (Pharma Company) in respect of freebies given to doctors held that since the MCI Regulation 2002 provides limitation/curb/prohibition only for medical practitioners and not for pharmaceutical companies, the payments were not made in violation of MCI regulations. Nowhere the regulation or the

notification mentions that such a regulation or code of conduct will cover pharmaceutical companies or health care sector in any manner.

PHL Pharma P Ltd [TS-12-ITAT-2017(Mum)]

1389. The Apex Court dismissed the Revenue's Special SLP against Karnataka HC ruling wherein it was held that payments for domestic customer database and transfer of human skills amounted to revenue expenditure as the payment was made for the use and not for acquisition of the database.

CIT vs. IBM Global Services India Private Ltd. TS-49-SC-2017 SLP 19012/2014 dated 10.02.2017

1390. The Apex Court dismissed the SLP filed by the Revenue against the order of the High Court, wherein the High Court allowed the assessee's claim for expense deduction while computing 'income from business', despite entire project for construction of dam, canal not being complete during relevant years and rejected Revenue's stand that only on completion of work of entire canal, assessee's business can be said to have been set-up and only thereafter assessee qualified for deduction. The Court also held that in a project like the Sardar Sarovar, there were bound to be different stages where different activities which were integral part of the business took place and where the project was phase-wise, the assessee could not be deprived of the benefits of fiscal legislation in disregard of the well settled principles on the issue.

Joint Commissioner Of Income Tax vs. Sardar Saravor Narmada Nigam Limited TS-69-SC-2017 SLP No. 3018/2017 dated 10.02.2017

1391. Where the assessee (partner) had borrowed funds and provided the same as interest free advance to the partnership firm, the Tribunal confirmed the disallowance of interest on borrowed funds in the hands of the assessee-partner to the extent relatable to share of profit derived from firm as the same was exempt u/s 10(2A), however remuneration and interest from firm was taxable as business income in the hands of assessee and therefore, interest in this regard could not be disallowed. Accordingly, it directed the assessing officer to recompute disallowance to the extent relatable to share of profit from firm.

Vineet Maini [TS-140-ITAT-2017(DEL)] (ITA No. 5240/Del/2016)

1392. The Tribunal held that the manufacturing, selling and administrative expenses claimed by the assessee could not be allowed as business expenses as they were not incurred wholly and exclusively for purpose of business of assessee as there was no business carried on by assessee during previous year and there was also no possibility of carrying on business by assessee in near distant visible future keeping in view the severe and serious disability imposed by actions of secured lenders under SARFESI Act. Depreciation claimed by assessee was also not allowable as entire block of asset was not put to use by assessee. However, expenses like auditor fees, ROC fee etc. incurred by the assessee company were to be allowed as the said expenses were incurred for meeting with statutory compliances and obligations as imposed by law. Accordingly, order of the CIT(A) was set aside and the assessment order of the A.O. was confirmed subject to allowability of audit fee, ROC fee and other expenses incurred for undertaking and meeting statutory compliances.

Deputy Commissioner of Income Tax v. Ashik Wollen Mills Ltd - (2017) 49 CCH 0151 MumTrib (ITA No. 03/Mum/2014)

1393. Where the assessee failed to furnish bills and vouchers in support of the expenses claimed on account of oil & fuel and repair & maintenance and most of the expenses were made in cash and assessee also could not bring any material on record to show that how the disallowance was excessive and where CIT(A) held that no credible explanation could be submitted for substantial increase of expenses in the face of drastic fall of turnover, the Tribunal held that the assessee failed to establish the correctness and genuineness of transaction in respect of expenses and thus upheld order of CIT(A) disallowing the said expenses.

Rajendra Kumar Saha v Income Tax Officer - (2017) 49 CCH 0150 Cuttack Trib (ITA No. 161/CTK/2015)

1394. Assessee entered into an agreement for export of groundnuts with one Alimenta. Subsequently a dispute arose between the parties and an Award was passed in favour of Alimenta wherein the Court held that Alimenta would be entitled to interest from date of award till date of payment. The said interest was claimed as deduction by the assessee while claim of damages and interest thereon was also disputed by the assessee in the court of law, the Court held that a statutory liability is said to be incurred on the mere issuance of a notice of demand and the fact that the assessee may have raised a dispute against such a demand "did not ruin the incurring of liability". Also it could not be said that merely because there was a stay granted by the division bench of the court, order of the single judge imposing payment of interest had been wiped out from existence. Accordingly, order of the Tribunal was set aside and appeal of the assessee was allowed.

National Agricultural Cooperative Marketing Federation of India Ltd v. Commissioner of Income Tax [(2017) 98 CCH 0154 DelHC] (ITA No. 161/2016)

1395. Where lease compensation charges claimed by the assessee u/s 37(1) were treated as capital expenditure by the AO, the Court held that while a new asset was acquired, it was for the purpose of the expansion of the existing business of the assessee and not for the development of a new line of business and thus the charges paid were consequently allowable u/s 37 of the Act being wholly revenue in nature. The Court, accordingly, upheld the order of Tribunal in favour of the assessee.

Commissioner of Income Tax v. Alankar Business Corporation Ltd - (2017) 98 CCH 0160 ChenHC (TCA No. 2695 of 2016)

1396. The assessee acquired media rights from BCCI on payment of US \$ 17.5 million, out of which US\$ 10 million was adjusted against two matches played and the balance was kept as deposit (to be adjusted against last series). However, owing to a dispute, the contract was terminated and the deposit was forfeited by BCCI during relevant AY 2008-09, which was claimed as a deduction under section 37. The Tribunal allowed the assessee claim with respect to write-off of advance given to BCCI and rejected the Revenue's stand that it represented a capital loss as it was in relation to acquisition of media rights (which is a capital asset). The Tribunal held that the agreement with BCCI for acquiring the media rights was pursuant to assessee's normal business activity (of broadcasting and distribution of TV programmes) and US\$ 10 million which was adjusted in earlier year was offered to tax by assessee. It further rejected the Revenue's submission that the write-off was premature as the assessee did not fully explore the possibility of its recovery. Accordingly, it deleted the addition made by the AO.

Zee Entertainment Enterprises Ltd – TS-181-ITAT-207 (Mum) - ITA No.3406/Mum/2014 dated 05/05/2017

1397. The Tribunal granted the assessee (a partnership firm engaged in real estate business) deduction with respect to compensation damages (determined under arbitration award in August, 2005) for failure to deliver the property within time-frame stipulated in the JDA even though the same was quantified in the subsequent year. It rejected Revenue's stand that since the time period for delivery of the constructed area was to expire only on March 10, 2006, the liability was not crystallized as on March 31, 2005 and held that the case relates to transfer of constructed area and not sale of goods. It also clarified that even though the event of determining final amount of compensation happened after closing of AY 2005-06, as per Accounting Standard 4 (AS 4) on 'Contingencies and Events Occurring after the Balance Sheet Date' as well as the prudent and conservative accounting principle such contingencies ought to be taken into account. It distinguished Revenue's reliance on Kerala High Court ruling in Asuma Cashew Company wherein the assessee had denied its liability to pay damages and held that in the present case assessee had not denied the liability towards damages in the event of failure to honour its obligation. Thus, the Tribunal concluded that the liability to pay compensation was crystallized when assessee accepted its failure to perform its part under the agreement and thus determination of compensation after the balance sheet date had to be taken into account in view of the principle of prudence and conservatism as well as per AS-4.

Canara Housing Development Company vs. JCIT - TS-185-ITAT-2017(Bang) - I.T. A. No.193/Bang/2014 dated 12.05.2017.

1398. The Tribunal held that where the assessee had incurred expenses on foreign travel of its directors and related persons on which fringe benefit tax had been paid, the AO erred in making an ad hoc disallowance of 50 percent of such foreign travel expenses more so when the assessee earned handsome commission from export.

Empire Industries Ltd v Add CIT - (2017) 50 CCH 0036 MumTrib - ITA No. 4065/Mum/2013 dated May 17, 2017

1399. Assessee acquired certain licenses to use SAP software and made payments towards licensing, installation and testing of software, training expense etc. during the year which were incurred to ensure smooth conduct of business and to improve operational efficiency. The AO / CIT(A) concluded that assessee was entitled for full deduction against the annual expenses incurred and 60% depreciation on balance amount as it being capital in nature. The Tribunal held that even if the software expenses incurred by assessee resulted into an enduring benefit to assessee, the same could not be treated as capital expenditure and real intent and purpose of same had to be looked into. On examination of the details of the expenses, it held that the same were for obtaining license, implementation, set-up fees, AMC Charges which were incurred to ensure smooth conduct of business and to improve operational efficiency and therefore they were revenue in nature and fully allowable as a deduction.

Empire Industries Ltd v Add CIT - (2017) 50 CCH 0036 MumTrib - ITA No. 4065/Mum/2013 dated May 17, 2017

1400. The AO made adhoc disallowance in respect of sales promotion expenses and travelling expenses incurred by the assessee on the ground that such expenses were not related to the business of the assessee. The Tribunal upheld the order of CIT(A) deleting the disallowance of the expenses on the ground that no specific instance or any evidence was brought by the AO on record to support the disallowances.

ITO vs. Vishal Khosla (2017) 50 CCH 0060 DelTrib ITA No. 881/DEL/2013

1401. The assessee provided engineering & design service to its AE and in order to safeguard any foreign exchange fluctuation losses in sales invoices raised, it entered into 9 forward contracts with the Bank of America. It re-measured its forward contract on March 31, 2009 at the prevalent forward market exchange rate and claimed the resultant loss in its profit and loss account under the head 'exchange difference', which was disallowed by the AO on the ground that it was a notional loss and thus not deductible as a business loss for income tax purposes. The Tribunal dismissed the assessee's reliance on the Apex Court decision in Woodward Governor India (P.) Ltd. [TS-40-SC-2009] and held that in that case there was loan liability in balance sheet which increased due to increase in foreign currency rate for which loss was claimed by the assessee and that it was not the case of a forward contract. It held that in the instant case, the assessee had an option of measuring its exports receivables on the balance sheet date and claiming resultant losses, which would have been allowed as a revenue loss in light of the Apex Court decision, but it failed to do so. Noting that the assessee was not trading in forward exchange contracts it held that the loss could not be claimed as a trading liability and accordingly held that the loss claimed by assessee on account of fluctuation in foreign currency in respect of hedging forward contract was not allowable.

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

1402. The AO disallowed 30 percent of the operating expenses incurred by the assessee as being unverified, unreasonable and excessive as the assessee failed to furnish its books of accounts. On appeal the CIT(A) restricted the disallowance to 10% as a result of which both the assessee and the Revenue filed an appeal before the Tribunal. The Tribunal noted that the Revenue was deprived of the opportunity to verify the books of accounts because of the failure of the assessee to produce the same and observed that the assessee failed to furnish the books of accounts even before the CIT(A) or the Tribunal as an additional evidence. Accordingly, it set aside the order of the CIT(A) and restored the matter to the file of the AO for making denovo assessment as per law and directed the AO to provide the opportunity to the assessee to produce books of accounts and comply with the statutory requirements and make further verification/inquiry/investigation, etc. in accordance with law.

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

1403. The assessee, in pursuance of an agreement, with Red Chillies Entertainment Pvt. Ltd. (RCEPL) made payment of 50% of the profits earned from the film 'Kaal' to RCEPL towards (i) grant of unlimited use of cinematographic equipments possessed by RCEPL (ii) creative, technical and marketing inputs provided by RCEPL (iii) RCEPL's contribution in the field of concept, characterization, dialogue, music, theme etc. and also for (iv) the performance by Shahrukh Khan in a song of the film and marketing assistance rendered by him. The AO contended that the assessee did not provide any evidence to substantiate its claim that any of the stated services were provided by RCEPL. Thus, it held that RCEPL had no role to play in the making of the film 'Kaal' and payments made to RCEPL were not for business purposes and accordingly, disallowed the same u/s 37(1). The AO further contended that the services were rendered by Mr. Shahrukh Khan and not by RCEPL. The CIT(A) upheld the AO's order. Noting that there was an agreement between the assessee and RCEPL pursuant to which the payment was made and that the existence of the agreement had not be doubted / disputed by the lower authorities, the Tribunal observed that the assessee had duly established that the payment was made as per agreement between the parties and for services provided by RCEPL and therefore held that it was allowable under Section 37(1) of the Act. Further, vis-à-vis the AO's allegation that services were provided by Mr. Shahrukh Khan and not RCEPL, the Tribunal noted that some of the services were creative in nature and demanded personal expertise and talent and therefore held that such services could be rendered by somebody on behalf of the company. It also noted that no separate payment was made or alleged to have been made to Mr. Shahrukh Khan for the services rendered. The Court upheld the Tribunal's order deleting the addition made by AO u/s 37(1) and held that it had been duly established that the payment made by the assessee was made as per agreement between the parties and against the services provided by RCEPL and hence held that the same was allowable u/s 37(1) of the Act.

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

1404. The assessee had claimed expense on account of provision for doubtful debts u/s 36(1)(vii), which was denied by the AO on the ground that it was mere provision for doubtful advances and the amounts were not actually written off. The CIT(A) confirmed disallowance by the AO. Noting that the assessee had claimed the said expenditure under the head 'Provision for doubtful advances' and this provisions had been reduced from the figures of Advances recoverable in cash or in kind or for value to be received under the head Other current Assets, Loans & Advances in the Balance Sheet for impugned AY, the Tribunal held that the issue under dispute was not at all covered by the provisions of Section 36(i)(vii) as the section dealt with 'bad debts written off' by the assessee qua sundry debtors, which is not the case here as no write off had taken place. Therefore, it held that the admissibility of impugned expenditure was to be examined under the provisions of section 37(1) and further held that the prime condition to claim expenses u/s 37(1) was that the expenditure must have crystallized during impugned AY. Noting that the assessee had not produced any evidence to show that the parties refused to pay outstanding amount or denied their liability in any manner, it concluded that the liability had not crystallized during year and accordingly held that the impugned expenditure was a mere provision, not allowable as a deduction u/s 37(1) of the Act..

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

1405. The assessee had claimed deduction for amount paid towards purchase of sales tax exemption certificates. The AO observed that the assessee had not credited the amount of sales tax exemption availed in its P&L A/c and had debited the amount incurred for purchase of the sales tax exemption certificates. Relying on the Mumbai Tribunal's decision in the case of Reliance Industries Ltd reported in 273 ITR 16(Trib) wherein it was held that subsidy from government for setting up industrial unit in backward area was treated as capital receipt. Accordingly, he treated the amount as capital expenditure and as such added the same to the total income of the assessee. The CIT(A) observed that the assessee had shown sales at the gross value including the exemption availed and had claimed the expenditure incurred for the purchase of certificates.

Further, he observed that decision of Reliance Industries was not applicable to the facts of the assessee as in that case the assessee had received subsidy from government for setting up new industrial unit in the specified backward area whereas in the instant case the assessee did not get sales tax exemption due to setting up of any industrial unit or any investment etc and rather, it was a purely commercial transaction. Accordingly, he held that the expenditure was not a capital expenditure and allowed the claim of the assessee. The Tribunal upheld the order of the CIT(A).

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

1406. The assessee company was non-banking finance company (NBFC) duly registered with RBI and engaged in business of asset financing. At the time of granting of loans, it incurred certain expenses i.e. commission, cost incurred on arranging borrowings and on acquiring loan portfolio, which it amortized over the life of the loan in its books of accounts in accordance with the matching principle. However, for income tax purposes, the assessee claimed the full / upfront amount of expenses (amount amortized in the P&L as well as the balance sheet) incurred claiming that the said expenses accrued during the year. The AO only allowed the amount of expenses claimed in the P&L i.e. the amortized expenses stating that the excess could not be allowed as it violated the matching principle. The CIT(A) confirmed the impugned disallowance of expenses. The Tribunal held that accrual of upfront expenditure could not be disputed as AO himself had allowed part of expenditure that was debited in profit and loss account as a deduction. It observed that the AO had taxed the upfront income earned by the assessee in year of accrual itself thereby contradicting his stand on matching principle. Accordingly, it allowed the claim of the expense by the assessee.

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

1407. The assessee had paid commission to the directors for guarantee given by them for working capital loan obtained by the assessee. The AO disallowed the claim of the assessee on the ground that the assessee failed to submit any loan sanction documents of the Bank in support of its claim of personal guarantee given by the directors. The CIT(A) observed that the bank had insisted upon the personal guarantee of the directors. Accordingly, he allowed the claim of the assessee. The Tribunal however, observed that the CIT(A) had considered the only aspect that the personal guarantee of the directors was given by the assessee company on the instance of the Bank and had not addressed the core issue whether the commission paid to the directors in lieu of their personal guarantee was legally justified or not to qualify for deduction. It observed that as per the RBI Circular, no commission or remuneration was to be paid to the directors for the guarantee given except i) where the company is not performing well ii) where the guarantors are not connected with the management iii) where the personal guarantee of the guarantors is essential to continue iv) where the new management's guarantee is not available. It further observed that the assessee had not been able to provide the original documents of the loan obtained to verify whether the terms and conditions of the loan were in consonance with the guidelines of RBI. Accordingly, it restored the issue to the file of the AO to examine the original bank documentations to ascertain whether the requirement of non-payment of commission to the guarantors was incorporated in the terms and conditions of bank for sanctioning of credit limit in terms of RBI guidelines noted above.

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

1408. The Tribunal allowed the appeal of the Assessee and held that the AO erred in disallowing 25% of the total expenditure incurred towards running the hospital alleging that since the Assessee had engaged a specialist to run the hospital there was no need to incur the aforesaid expenditure more so since copies of agreement in respect of lease rents, management fee and also other expenditure were filed during the course of the assessment proceedings. It noted that the aforesaid expenditures were necessary for the purpose of running the hospital and the liability of the specialist did not extend to meeting the aforesaid expenditure.

Add. Director of Income tax vs. Flt. Lt. Ranjan Dhall Chaitrable Trust & Ors. (2017) 50 CCH 0262 Del Trib (ITA No. 3073/Del/2012 dated August 21, 2017)

1409. The Court held that where the expenditure was incurred by assessee (in the business of mining iron by taking lands on lease from the SG) towards legal fee and other litigation charges to protect its business interests in relation to mining lease and not to acquire mining lease or to get rid of a defect in title, the same did not create any capital asset and expenditure was allowable as revenue expenditure. The Court noted that the grant of the lease was challenged in writ petitions before the Court and the Assessee was made a respondent and in order to sustain the lease and protect its mining rights the Assessee had to incur legal fees and other allied expenditure.

DCIT vs. B. Kumara Gowda (2017) 83 taxmann.com 370 (Kar) (ITA No. 200003-4/2015 dated July 10, 2017)

1410. The Tribunal held that where the assessee-builder paid a compounding fee to the municipal corporation to regularize its building plan and to obtain approval of the project, the said payment could not be disallowed under explanation 1 to section 37 since the assessee did not carry out any illegal business and the payment of compounding fees was not for office or prohibition under any law.

Keerthi Estates (P) Ltd vs DCIT-TS-387-ITAT-2017(HYD)-ITA No. 271 /hyd / 2016 dated 09.08.2017

1411. The Court, held that where the assessee paid liquidated damages to its customers on account of failure in delivery of machinery/late completion of terms and conditions of orders/ execution of contract, the said payment could not be disallowed under section 37 of the act since it was incurred in the ordinary course of business and was not opposed to public policy. Accordingly, it held that since the expenditure was not incurred for any purpose which was an offence or which was prohibited by law the Tribunal was justified in granting a deduction in respect of such expenditure u/s 37(1).

Pr.CIT vs Mazda Ltd (2017) 100 CCH 0019 GujHC ITA no. 647 of 2017 and 949 OF 2013 DATED 12.09.2017

1412. Relying on the decision of the High Court in the case of Graphite India Ltd [221 ITR 420] the Tribunal held that expenditure incurred for acquisition of new facility which was subsequently abandoned at the work-in-progress stage was wholly or exclusively for purpose of assessee's business and therefore allowable as deduction u/s 37(1). It further held that entries in books of accounts claiming only 1/5th of expenditure, could not prevent assessee claiming legitimate business loss or revenue expenditure as deduction in full while computing income from business.

Royal Calcutta Turf Club & Anr vs Deputy CIT [2017] 51 CCH 78 Kol Trib. ITA No. 231/Kol/2013, 204/Kol/2013

1413. Where the assessee, engaged in the export business had entered in forward contracts to hedge itself from foreign exchanges losses and suffered a loss on account of cancellation of such forward contracts, the Tribunal dismissed the contention of the Revenue that the said losses were to be disallowed being speculative in nature and held that since the losses were incidental to the business of the assessee it would be a loss arising out of its business activity. Accordingly, it directed the AO to delete the disallowance of the impugned losses.

Essel Propack Ltd v ACIT – (2017) 50 CCH 0033 (Mum – Trib) – ITA No 4116 / Mum / 2013 dated 11.09.2017

1414. AO made addition on consumption of spares to machinery holding by treating same as capital expenditure which was deleted by the CIT(A) who held that consumption of machinery spares was allowable as revenue expenditure as there was no creation of any new asset which was capable of working independently and that no enduring benefit

had been derived by assessee by such expenditure. The Tribunal upheld the order of the CIT(A) allowing the said expenditure by holding that where expenditure is incurred to preserve and to maintain an already existing asset then expenditure incurred by assessee are in nature of current repair allowable as revenue expenditure.

BANCO ALUMINIUM LTD. & ANR. vs. DEPUTY COMMISSIONER OF INCOME TAX & ANR - ITA No. 276/Ahd/2015, 282/Ahd/2015 dated 29.09.2017

1415. The Tribunal allowed deduction on provision regarding year-end circuit accruals (i.e. infrastructure cost and last mile charges paid to other operators for provision of telecom connectivity services). Taking note of the assessee's accounting procedure under which the assessee accrued expenses incurred in relation to services rendered during the relevant year, it held that the provision was made on scientific basis and in compliance with accounting standards. Further, it held that Revenue's action of disallowing the claim of circuit accrual in the year of creation and allowing it in the next year when such reversals were made was nothing but timing difference. Accordingly, it held that provision should be allowed in the year of creation itself in view of the mercantile system of accounting.

AT& T Global Network Services (India) Pvt Ltd vs. DCIT-TS-407-ITAT-2017(DEL)-ITA No. 2538/Del/2014 dated 18.09.2017

1416. The Court reversed order of the Tribunal and held that loss on account of embezzlement by employees was incidental to Assessee's banking business and should be allowed as deduction in the year under consideration in which embezzlement was discovered by Assessee and not in its detection in an earlier year as held by the AO. The Court on a conjoint reading of SC ruling in Associated Banking Corporation of India Ltd. 36 ITR 1 and CBDT Circular dated 24/11/1965 held that 'discovery' and 'detection' connote different meaning, 'discovery' implies that loss arises only when employer comes to know about it and realizes that the amount would not be recovered and not merely the date of acquiring knowledge about the embezzlement. The Court accepted Assessee's plea that the loss on account of embezzlement come to the knowledge of Assessee in earlier year but the exact amount was ascertained after investigation in a subsequent year i.e. the date of discovery.

J and K Bank Ltd. vs. ACIT TS-370-HC-2017 (ITA No. 17/2007 dated August 29, 2017

1417. Where the assessee and two of its joint venture partners were allotted land by MIDC and the JV partners agreed to surrender their interest in favour of the assessee upon payment of Rs.100.80 crore, the Tribunal dismissing the Revenue's contention that the transaction was sham, held that the purchase of interest in land by the assessee from its Joint Venture partners was allowable as a deduction under Section 37(1) of the Act. It observed that i). the decision to purchase the land was a business decision of the assessee ii) all the parties were unrelated and iii) there was involvement of multiple agencies including Government authorities and escrow agents and therefore held that the transaction could not be treated as sham merely because the Revenue alleged that the other partners did not bring any expertise or funds to the JV.

Gigaplex Estate Pvt Ltd – TS-518-ITAT-2017 (Mum) ITA NO.1132, 1133/Mum/2016 And ITA No.1137/Mum/2016 dated 10.11.2017

1418. The Court denied the assessee deduction of payment of non-compete fee to one of its competitors viz. SML, pursuant to acquisition of one of its units, holding it to be capital in nature. On examination of the agreement, it further held that the amount paid by the assessee was not merely payment towards non-compete but also towards various obligation and covenants imposed upon SML, thus ensuring smooth process of acquisition. Further, it held that since SML had not even commenced manufacturing, there was no need to pay the non-compete fee and accordingly held that the non-compete obligations were illusory in nature.

GKN Driveline India Ltd – TS-553-HC-2017 (Del) ITA 542/2005 dated 27.11.2017

1419. The Tribunal invoking Explanation 1 to Sec. 37(1), disallowed cost of production of goods incurred by assessee (manufacturer of pan masala) (containing magnesium carbonate, a known carcinogenic substance) in excess of permissible limits, noting that in terms of a court order under the Prevention of Food Adulteration Act, the goods had to be destroyed and therefore held that the expenditure for making this product was something "prohibited by law". It held that expenditure on manufacturing such products whether deliberately or inadvertently, could not be allowed as deduction and rejected assessee's contention that no penalty, etc. was imposed on it. It held that as long as the expenditure was incurred for a purpose which is prohibited by law, it was immaterial whether the said act of the assessee constituted an offence or not.
ACIT v M/s. Vishnu Packaging – TS-532-ITAT-2017 (Ahd) - ITA No. 1869/Ahd/2016 dated 15.11.2017
1420. The Tribunal held that the payment of upfront fee by the assessee to the Airport Authority of India for a 30 year period was allowable as a deduction under Section 37(1) of the Act as it was a onetime payment of lease for the entire lease period. It rejected the Revenue's stand that since the assessee got operating charge of the airport under the agreement, the payment was capital in nature as it was made for acquisition of business resulting in enduring benefit of 30 years. Noting that the lease rent was a nominal Rs.100 per annum, it held that the payment of Rs.150 crore was a one time payment so that the annual lease rent was chargeable at a very nominal rate and held that once a recurring payment towards lease rent was classified as revenue, then even the lumpsum payment for the same purpose had to be given the same treatment as it partook the same character.
ACIT v Delhi International Airport P Ltd – (2018) 89 taxmann.com 326 (Delhi - Trib.) - IT APPEAL NOS. 2720 (DELHI) OF 2011 & 4202 (DELHI) OF 2013 dated 14.12.2017
1421. The Court held that the expenditure incurred by the assessee for refurbishing, repairing and making improvements of a leasehold building for purpose of carrying on day-to-day business was allowable as revenue expenditure under Section 37(1) of the Act. Further, relying on the decision of CIT v. Madras Auto Service (P.) Ltd. [1998] 99 Taxman 575/233 ITR 468 (SC), it held that expenditure incurred on construction made on a leased out property was allowable as revenue expenditure under Section 37(1) of the Act.
Indus Motor Co P Ltd v DCIT - [2017] 88 taxmann.com 229 (Kerala) - IT APPEAL NOS. 4, 14, 15, OF 2015 dated 05.12.2017
1422. Where the assessee made a lumpsum payment to the Government for the acquisition of mining rights and debited the proportionate expense to the Profit and loss account claiming it to be a revenue expenditure, the Tribunal relying on the decision of the Apex Court in Aditya Minerals Pvt. Ltd. v. CIT [1999] 239 ITR 817/103 Taxman 464, held that the payment was made for acquiring right to excavate the minerals and not for acquiring minerals and therefore was capital in nature. Accordingly, it upheld the order of the AO disallowing the said expense. Further, it held that since the payment was capital in nature, expenditure could not be allowed on staggered basis either.
ACIT v K.R. Kaviraj - [2018] 89 taxmann.com 133 (Bengaluru – Trib) - IT APPEAL NOS. 362 TO 366 (BANG) OF 2016 dated 26.12.2017
1423. Where the assessee company incurred expenditure on education of its director at abroad, the Tribunal held that in the absence of commitment/bond executed by said Director to serve assessee company post his education so that assessee could reap benefits of his education for com business, expenditure was not allowable as business expenditure under Section 37(1) of the Act.
Hunumesh Realtors (P.) Ltd v Pr CIT - [2017] 88 taxmann.com 185 (Mumbai - Trib.) - IT APPEAL NO. 3475 (MUM.) OF 2017 dated 04.12.2017
1424. The Court held that expenditure incurred by the assessee on software development services which were in nature of maintenance and support services providing essential backup to the assessee, who had procured software for its business purpose, was to be allowed as deduction under Section 37(1) and could not be considered as a capital expenditure.

Pr CIT v Kitchen Express Overseas Ltd - [2018] 89 taxmann.com 407 (Gujarat) - TAX APPEAL NO. 966 OF 2017 dated 06.12.2017

1425. The Assessee entered into an IPL Franchise Agreement with BCCI for franchise rights of IPL team as per which the assessee had to pay to BCCI certain franchise fee on annual basis for securing participation of its team in league. The AO disallowed opined that franchise fee paid by assessee generated benefit of enduring nature and therefore denied the assessee's claim for deduction. The Tribunal held that since the payment of franchise fee facilitated participation in league and operating team was restricted only to year to which payment pertained, it could be concluded that by making such payment there was neither a creation of any asset nor generation of a benefit of an enduring nature in hands of assessee and therefore held that the assessee was to be allowed deduction of the franchise fee paid under Section 37(1).

Further, it held that payment of security expenses by the assessee to Kolkata Police Welfare Fund as per directions of Cricket Association of Bengal for providing security in stadium at time of staging of matches, expenditure incurred by assessee on coaching of its IPL team and website design charges were also to be allowed as deduction under section 37(1).

Knight Riders Sports (P.) Ltd v ACIT - [2018] 89 taxmann.com 32 (Mumbai - Trib.) - IT APPEAL NO. 1307 (MUM.) OF 2013 dated 29.12.2017

Section 40A

1426. The Court reversing the Tribunal's order, deleted disallowance u/s 40A(2) with respect to professional remuneration paid by assessee-company to its Vice President (Marketing) who was a related party u/s 40A(2)(b) of the Act. The Court held that Tribunal failed to consider the reasonableness of the expenditure in relation to the prudent business practice from a fair and reasonable point of view. The Revenue without benchmarking VPs expertise with any other consultant proceeded on the assumption that the VP could not have performed multiple tasks for more than one concern. Such a stereotyped notion could not be justified in today's business world where consultants perform different tasks for several business entities.

Sigma Corporation India Ltd [TS-145-HC-2017(DEL)] (ITA No. 795/2016)

1427. Where the assessee created a fund for providing gratuity to its employees and had made required application to the Commissioner on 2.3.2010 (prior to the end of the relevant assessment year) and made a provision towards such gratuity on 31.03.2010 but the Commissioner approved the fund only on 12.11.2010, the Court held that the AO was not justified in denying the assessee deduction under Section 40A(7) [on the ground that the fund was not approved as on the last date of the relevant year] as the delay took place at the end of the Commissioner for which the assessee could not be denied deduction. Further, it noted that the fund satisfied all the pre-conditions as it had been subsequently approved by the Commissioner.

Pr CIT v English Indian Clays Ltd - [2018] 89 taxmann.com 134 (Kerala) - IT APPEAL NO. 271 OF 2015 dated 12.12.2017

Section 43B

1428. The assessee collected the VAT from the customers but did not deposit the same before the due date of filing ROI. The AO made addition u/s 43B despite the fact that VAT was not routed through P&L account and no deduction had been claimed by the assessee. The CIT(A) and the Tribunal deleted the addition made by the AO since the same was not claimed as deduction in the books of accounts. The Court upheld the Tribunal's order and deleted addition made u/s 43B since the VAT was not routed through P&L A/c and therefore, not claimed by the assessee.

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

1429. The assessee had claimed deduction of interest payable on government loans which were granted for payment to employees who opted to retire under VRS. The AO observed that the assessee had debited interest as payable to government loans, but had not paid the interest to the govt. account. Accordingly, he disallowed the same u/s 43B. The CIT (A) observed that interest payable to govt. was not covered under section 43B and accordingly, deleted the disallowance. The Tribunal upheld the order of the CIT(A).

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

1430. During the assessment proceedings, the AO perused the audit report filed by the assessee wherein a sum of gratuity was shown as payable. The AO contended that only the sums which are actually paid by the assessee were allowable u/s 43B of the Act and since the gratuity was not paid, he disallowed the same. The assessee contended that provision for gratuity had not accrued during the relevant previous year and was opening balance brought forward and therefore, no disallowance could be made. However, the AO rejected the assessee's contention. The CIT(A) confirmed the AO's addition. The Tribunal held that if there was no claim of gratuity for the relevant A.Y, then the disallowance could not have been made. Accordingly, it remitted the matter to the AO to verify whether there was any claim of deduction for the relevant previous year.

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

1431. The Court upheld the Tribunal's order and deleted Sec. 43B addition with regards to unpaid VAT, not claimed as deduction in the books of accounts. The Court noted that while the VAT component collected was not paid before the return filing due-date u/s. 139(1), such VAT was also not charged to the Profit and Loss account and was accounted for separately in the Books of Accounts.

ACIT vs. M/s Ganapati Motors TS-254-HC-2017 (Tax Case (ITA) No. 30 of 2016 dated April 25, 2017)

1432. The Apex Court dismissed Revenue's appeal and held that the assessee was entitled to claim deduction u/s 43B in respect of the excise duty paid in advance in the Personal Ledger Account (PLA). Rejecting the Revenue's stand that since actual payment of excise duty was at the stage of removal of goods, the amount of advance deposit in PLA did not represent the actual payment of duty so as to qualify for deduction u/s 43B, the Apex Court referring to the Central Excise rules, held that deposit of Central Excise Duty in the PLA is a statutory requirement. It further noted that upon deposit in the PLA, the amount stands credited to the Revenue with assessee having no domain over the amount(s) deposited. Considering the object behind the enactment of section 43B, it held that legislative intent would be achieved by giving benefit of deduction to an assessee upon advance deposit of central excise duty notwithstanding the fact that adjustments from such deposit were made on subsequent clearances/removal effected from time to time and concluded that the advance deposit of central excise duty constituted actual payment of duty within the meaning of section 43B and the assessee was entitled to the benefit of deduction.

Modipon Ltd vs CIT-TS-548-SC-2017 CIVIL APPEAL NO.19763 OF 2017 dated 24.11.2017

1433. The Tribunal, allowed the assessee deduction under Section 43B on employees' contribution to Provident Fund (PF) deposited after due date under PF Act, but before last date for filing income-tax return u/s 139(1), noting that as per Provident Fund Act there is no distinction between employees' and employer contribution to PF and held that if the total contribution was deposited on or before the due date of furnishing return of income u/s 139(1) of the Act, then no disallowance could be made towards employees' contribution to provident fund.

Teesta Valley Tea Co. [TS-452-ITAT-2017(Kol)] - ITA No.318/Kol/2015 dated 01-09-2017

1434. The Court refused to grant the assessee deduction u/s 43B for unutilized MODVAT credit as at the end of year representing excise duty paid on raw material/input. Referring to Accounting Standard 2 it noted that MODVAT Credit is to be treated as a separate account and appropriate accounting entries would have to be made to adjust the excise duty paid out of the said account and the debit balance in MODVAT/CENVAT Credit Receivable (Inputs) has to be shown on the

assets side of Balance Sheet under the head 'advances'. It relied on Delhi HC decision in Oswal Agro Mills wherein it was held that provisions of Sec. 43B are applicable only to 'statutory liability' and observed that primary liability of pay excise duty is essentially on the manufacturers of the raw materials and inputs and the liability of assessee to pay the same is only contractual. However, it agreed with the ITAT's acceptance of the Assessee's alternate contention that unutilized MODVAT credit of the earlier year adjusted in the current year was allowable as a deduction to the extent of such adjustment / write off.

Maruti Udyog v CIT - TS-577-HC-2017(DEL) - ITA No.31/2005 dated 07.12.2017

Section 14A

1435. Considering that the investments made by the assessee were from common pool of funds but was less than available interest free fund, the Tribunal, relying on the High Court ruling in the case of UTI Bank Ltd and Bombay High Court ruling in Reliance Utilities, on the presumption even though assessee had raised a loan at the same time, investments were made from interest free funds, deleted the disallowance under section 14A read with rule 8D.

Shreno Limited [TS-696-ITAT-2016 (Ahd)]

1436. The Court applying the provisions of section 14A read with rule 8D upheld the disallowance under section 14A despite non-recording of requisite satisfaction by Assessing officer, since, section 14A read with Rule 8D(i) mandated a particular methodology and hence should be followed. However, the interest disallowance under section 14A was restricted to calculations submitted by assessee in appeal.

Delhi Towers Ltd. [TS-14-ITAT-2017(Del)]

1437. The Court rejecting the claim of the Assessee that no expense has been incurred for the purpose of earning exempt income upheld the disallowance made u/s 14A and held that the AO had recorded sufficient satisfaction (that it would be reasonable to presume that huge investment portfolio would require the deployment of the Assessee's intellectual, physical and financial resources) before invoking Rule 8D for ascertaining disallowance u/s 14A.

Punjab Tractors Ltd. vs. CIT (2017) 78 taxmann.com 65 (P&H) (ITA No. 458 of 2015 dated 03.02.2017)

1438. The Tribunal prelying on the decision of the Court in Cheminvest Ltd. held that since the assessee had not made any claim of exempt income in its return of income i.e. where no exempt income was claimed by the assessee, there was no justification for making disallowance u/s 14A of the Act.

Bharat Serums and Vaccines Ltd. vs. ACIT TS-72-ITAT-2017(Mum) ITA NO.3091/Mum/2012 dated 15/02/2017

1439. The Tribunal upheld section 14A disallowance made in respect of the strategic investments made by assessee company in its subsidiary companies for business purpose on the ground that the holding of the asset/property either as an investment or as stock-in-trade was an irrelevant consideration as the disallowance was independent of the head of income or the nature of the income and that the only thing relevant consideration was if the income was tax-exempt. Accordingly it rejected the assessee's contention that investment in subsidiary companies being held for the purpose of its business would not be subject to Sec 14A. It also rejected the contention of the assessee that no expenditure was increased for making strategic investments and held that since the investments had business implication, it would definitely entail cost.

Voltech Engineers Pvt. Ltd. vs. DCIT TS-73-ITAT-2017(CHNY) ITA No.s.1801&1765/Mds/2016 dated 20.02.2017

1440. Where the assessee was dealing in shares and bonds as trader and earned business income from purchase & sale of securities, the Court held that Sec.14A would only apply to shares held as investments and not as stock-in-trade. Since the assessee did not retain shares with the

intention of earning dividend income and the dividend income was incidental to the business of sale of shares it would not be covered u/s 14A. It further clarified that the expenditure incurred in acquiring the shares could not be apportioned to the extent of dividend income and disallowed u/s 14A. Further it held that the word used u/s 14A was investment and not stock in trade and therefore the charging section could not be read to include stock.

CIT vs. State Bank Of Patiala TS-50-HC-2017(P&H) ITA No.244 of 2016(O&M) dated 30.01.2017

1441. The Court held that Rule 8D of the Income-tax Rules would not apply to shares that were held as stock in trade and not as investments and accordingly deleted the addition made by the AO under Rule 8D(ii) and 8D(iii). Further, it noted that the AO had assessed the gain on sale of shares as income from business and had accepted the treatment of the shares as stock in trade of the assessee and therefore dismissed the appeal of the Revenue holding that no substantial question of law arose.

CIT v GKK Capital Markets P Ltd – (2017) 98 CCH 0059 Kol HC – GA No 1150 of 2015 and ITA No 52 of 2015

1442. Where for AY 2006-07, the assessee had made a suo moto disallowance of expenses incurred for the purpose of earning exempt income at the rate of 1 percent of exempt income under Section 14A of the Act, the Court, considering the fact that Rule 8D introduced with effect from AY 2008-09 could not apply retrospectively, upheld the order of the Tribunal wherein 1 percent had been accepted as a reasonable disallowance, in accordance with the standard procedure adopted in various similar cases viz. Himtaj Consultants v ITO (ITA No 721/Kol/ 2007), CHNHS Association v ACIT (ITA No 74 / Kol / 2008), ITO v SPS Securities P Ltd (ITA No 12 / Kol / 2010), CIT v National Insurance Company (ITA 77 of 2014) and CIT v Greenfield Hotels and Estates Pvt Ltd (2016) 389 ITR 68 (Bom). Accordingly, it dismissed the appeal of the Revenue.

Pr CIT v National Insurance Company LTd - (2017) 98 CCH 0071 Kol HC – GA 3331 of 2016 and ITA 406 of 2016

1443. Where during the relevant year, the assessee earned exempt dividend income and long term capital gains and suo moto disallowed Rs. 1.09 crores relating to interest expenditure and Rs. one lakh for dividend collection charges and AO while accepting the interest disallowance made by the assessee, opined that Rs. one lakh, incurred as dividend collection charges were disproportionate to the dividend income of Rs. 14.76 crores and therefore proceeded to make disallowance under rule 8D(2)(iii) of 1962 Rules including disallowance of administrative expenses, the Tribunal held that the application of Rule 8D was not automatic, and it was only when Assessing Officer recorded his satisfaction under sec. 14A(2) that the disallowance offered by assessee was unsatisfactory, could the procedure for computing disallowance under Rule 8D be initiated. It followed the decision of the Tribunal in the assessee's own case for a prior AY where on similar facts it had restricted the disallowance under section 14A of the Act to Rs. 10 lakh and held that the same was to be followed for the relevant year as well.

Shapoorji Pallonji & Co. Ltd. Vs. Deputy Commissioner of Income Tax- [2017] 79 taxmann.com 39 (Mumbai – Trib.) dated 03/03/2017

1444. Where the assessee-company engaged in the business of share trading earned dividend income and offered the same for tax without disallowing expenses u/s 14A of the Act, the Tribunal held that provisions of Sec 14A could be invoked to make a disallowance on account of expenditure incurred in relation to exempt income in form of dividend even on shares held as stock in trade as the dividend earned on shares held as stock in trade was an incidental income of the assessee and was very much exempt from tax u/s 10(34) of the Act. It further observed that it was the duty of the revenue to exclude those items of income from taxable income which are not chargeable to tax in spite of the fact that the assessee had offered the same to tax.

Kalyani Barter (P.) Ltd v. Income-tax Officer [2017] 79 taaxmann.com 457 (Kolkata – Trib.) (ITA Nos 681 & 824 (Kol.) of 2015)

1445. The Tribunal upheld deletion of Sec 14A disallowance in case of assessee (engaged in providing investment research advisory support, consultancy services to group companies).

Noting that during relevant AYs assessee made strategic investments in group companies and no exempt income was earned on such investment and investments were made out of owned funds and there was no borrowing by assessee, the Tribunal held that as the assessee did not earn any tax free income, Sec. 14A was not applicable. Further, it noted that no administrative expenses were claimed as deduction in computation of total income and moreover the administrative and support expenses incurred on behalf of the group companies were recovered from them at cost and thus there was no question of any disallowance u/s 14A of the Act. Appeal of the Revenue was, accordingly, dismissed.

Morgan Stanley India Securities Pvt Ltd [TS-153-ITAT-2017(Mum)] - (ITA No. 114/Mum/2013)

1446. The Tribunal held that investments in debentures could not be included in 'investments' for the purpose of calculating disallowance under section 14A of the Act as the assessee had earned taxable interest income from such debentures. Further, it directed the AO to verify the claim of the assessee that no interest bearing funds had been used to invest in the shares which earned exempt income and that the investment made was actually out of advances received by the assessee for booking of flats (normal course of business).

Capricorn Reality Ltd v DCIT – (2017) 50 CCH 0033 (Mum Trib) – ITA no 6448 / Mum / 2014 dated 17.05.2017

1447. The Apex Court held that the phrase "income which does not form part of total income under this Act" appearing in section 14A included within its scope dividend income on shares in respect of which tax was payable under section 115O of the Act and income on units of mutual funds on which tax was payable under section 115R.

Further, it held that Sub-sections (2) and (3) of Section 14A of the Act read with Rule 8D of the Rules merely prescribe a formula for determination of expenditure incurred in relation to income which does not form part of the total income under the Act in a situation where the Assessing Officer is not satisfied with the claim of the assessee. It held that the AO could resort to the computation mechanism in Rule 8D only when he records satisfaction that having regard to the accounts of the assessee, as placed before him, it is not possible to generate the requisite satisfaction with regard to the correctness of the claim of the assessee. Therefore, it held that the AO was unjustified in rejecting the claim of the assessee that no expenses had been incurred towards the earning of exempt income as the AO failed to disclose any basis establishing a reasonable nexus between the expenditure disallowed and the dividend income received.

Godrej & Boyce Manufacturing Company Ltd v DCIT - [2017] 81 taxmann.com 111 (SC) - CIVIL APPEAL NO. 7020 OF 2011 dated 08.05.2017

1448. The Tribunal held that no disallowance under section 14A of the Act could be made in the absence of exempt income. It dismissed the contention of the AO that disallowance under section 14A could be made in accordance with CBDT Circular No 5 of 2014 which provides for disallowance even if no exempt income is earned.

Karvy Stock Broking Ltd v DCIT – (2017) 50 CCH 0017 (Hyd Trib) – ITA No 1397 / Hyd / 2016 dated 09.05.2017

1449. The assessee company was eligible for deduction u/s 10A and had earned dividend income exempt from tax u/s 10(34) of the Act. The assessee contended before AO that it had made investment from its own funds and it had not incurred any expenditure for earning the dividend income. The AO not satisfied with the explanation of the assessee, made disallowance of expenditure u/s 14A r.w.Rule 8D(2)(iii) and also denied deduction u/s 10A on the enhanced income after making disallowance u/s 14A. The CIT(A) upheld the order of AO. The Tribunal noted that the assessee could not prove the nexus between the interest free funds and the investment that yielded exempt income. Accordingly, it held that the AO was left with no option but to adopt the methodology provided in Rule 8D r.w.s 14A after recording dissatisfaction regarding the claim of nil expenditure by the assessee. Accordingly, it upheld AO's disallowance of the expenditure u/s 14A r.w.Rule 8D(iii). However, it allowed the assessee's claim of deduction u/s 10A on the enhanced business income due to disallowance u/s 10A.

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

1450. The assessee earned dividend income which was exempt from tax and claimed that he did not incur expenditure to earn exempt dividend income. The AO disallowed part of expenditure u/s 14A applying rule 8D(iii). On appeal, the CIT(A) upheld such addition. The Tribunal rejected the assessee's contention that since no expenditure was incurred to earn exempt income disallowance u/s 14A r.w.Rule 8D(iii) was not warranted. Referring to Sec. 14A read with Rule 8D(iii), it held that even in a case where the assessee claims that no expenditure was incurred, the section provides for the disallowance of the expenditure. Accordingly, it upheld the order of CIT(A).

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

1451. The Court dismissed the appeal of the Revenue and held that no disallowance u/s 14A r.w. Rule 8D could be made in the absence of exempt income. It rejected the Revenue's reliance on CBDT Circular No. 5/2014 (which provides that Section 14A would apply even when exempt income was not earned in a particular AY) and held that the Circular could not override the provisions of Section 14A.

Pr CIT vs. IL & FS Energy Development Company Ltd. (2017) 99 CCH 0190 DelHC (ITA No. 520/2017 dated August 16, 2017)

1452. The Tribunal taking note of the significant change and movement in the Assessee's portfolio upheld the disallowance under Rule 8D(2)(iii) by holding that decision of making fresh investment or selling the existing investments is taken at a very high level of management and therefore the plea of the assessee that it had not incurred any administrative expenditure for earning dividend income could not be accepted.

M/s Tavant Technologies India Pvt. Ltd. vs. DCIT TS-264-ITAT-2017 (ITA No. 292/Bang/2014 dated May 31, 2017)

1453. Where the assessee had provided detailed reply/explanation so as to justify its stand for not disallowing any expenses u/s 14A but the AO without recording satisfaction with regard to the assessee's books of accounts as to why the assessee's claim was to be rejected, proceeded to invoke rule 8D citing it to be mandatorily applied w.e.f 08-09 onwards, the Tribunal held that such recourse to Rule 8D was not justified. However, it held that a reasonable disallowance of admin and other expenses (Rs. 2.50 lakhs) would be made attributing it to the exempt income and earned (Rs. 4.50 cr)

Bombay Real Estate Development Co. Pvt. Ltd. vs. Assistant Commissioner of Income Tax

[I.T.A. No.6561(2017) 51 CCH 0018 MumTrib]

1454. The Court deleted the disallowance u/s 14A by holding that in order to disallow this expense the AO had to first record, on examining the accounts, that he was not satisfied with the correctness of the assessee's claim of Rs. 3 lakhs being the administrative expenses. This was mandatorily necessitated by section 14A(2) of the Act read with Rule 8D(1)(a) of the Rules. Since there was a failure by the AO to comply with the mandatory requirement of section 14A(2) of the Act read with rule 8D(1)(a) of the Rules and record his satisfaction as required thereunder, the question of applying rule 8D(2)(iii) of the rules did not arise.

H.T Media Limited vs Pr.CIT published on 18.08.2017

1455. Where the assessee earned dividend income on investments made in foreign companies and offered it to tax under the head income from other sources, the Tribunal held that no disallowances of expenses under Section 14A could be made as the impugned income had already suffered tax. Further, since the investments in domestic companies did not yield any income during the year, the Tribunal, relying on the decision of the High Court in Cheminvest v CIT 378 ITR 33 (Del) held that no disallowance could be made under Section 14A in respect of the said investments.

Essel Propack Ltd v ACIT – (2017) 50 CCH 0033 (Mum – Trib) – ITA No 4116 / Mum / 2013 dated 11.09.2017

1456. Where the assessee claimed that he had not incurred any expenditure to earn exempt income but the AO, without examining the claim of the assessee, invoked Section 14A read with Rule 8D presuming that the assessee had incurred expenditure, the Tribunal, relying on the decision of the Court in Maxopp Investment v CIT 203 Taxman 364 (Del) held that Section 14A could be invoked only where actual expenditure had been incurred towards earning exempt income. Accordingly, it directed the AO to delete the addition made as it was on the basis of mere presumption.
Justice Mohan Lal Verma v ACIT – (2017) 51 CCH 0049 (Del Trib) – ITA No 6067 / Del / 2015 dated 13.09.2017
1457. The Tribunal held that where assessee had not earned any dividend income forming part of total income during year under assessment, section 14A read with Rule 8D was not attracted.
ASSISTANT COMMISSIONER OF INCOME TAX vs.FEEDBACK INFRA PVT. LTD. - (2017) 51 CCH 0069 DelTrib - ITA No.5980/Del./2015 dated 18.09.2017
1458. The Tribunal, relying on the decision of the Court in Cheminvest vs CIT (2015) 378 ITR 33 (DEL) held that no disallowance u/s 14A could be made in the absence of any exempt income.
Cosmos International Ltd vs. Income Tax Officer [I.T.A. No. 6059 (2017) 51 CCH 0015 DelTrib]
1459. The Tribunal, relying on the decision of the Court in Cheminvest Ltd v CIT (2015) 387 ITR 33 (Del) held that in the absence of exempt income, the provisions of Section 14A would not be attracted. Accordingly, it held that the AO was unjustified in making addition under Section 14A read with Rule 8D(2) and (3).
DCIT v Cox & Kings I Ltd – (2017) 51 CCH 0161 (Mum Trib) – ITA No 5583 / Mum / 2015 – dated 06.10.2017
1460. Where the assessee had earned dividend income and claimed the same as exempt u/s 10(34) of the act, and in the tax audit report filed along with return, the tax auditors had quantified the disallowance u/s 14A which was rejected by the AO who computed the disallowance as per provisions of section 14A of the Act read with rule 8D(ii) and (iii) and the CIT(A) deleted the 8D(ii) on the ground that the own funds of the assessee were more than double the investments [following the decision of the Hon'ble Jurisdictional High Court in the case of CIT V/s Reliance Utilities and Power Ltd reported in 313 ITR 340(Bom)] but sustained disallowance under 8D(iii), observing that some expenses ought to have been disallowed, the Tribunal relying on the coordinate bench's ruling in assessee's own case held that the disallowance at the rate of 2% of the dividend income would be reasonable.
Rallis India Ltd & ANR vs Additional Commissioner of Income Tax & Anr. (2017) 51 CCH 0303 MumTrib (ITA No. 4234/Mum/2014, 4316/Mum/2014 dated Nov 8, 2017)
1461. Where the assessee earned certain tax-free dividend income and income from mutual funds but claimed that no expenditure had been incurred for purpose of earning of exempt income and therefore no disallowance could not be made under section 14A, the Tribunal held that the AO was unjustified in invoking provisions of Rule 8D(2)(iii) without examining the assessee's claim and had failed to satisfy himself about correctness of assessee's claim. Accordingly, the impugned disallowance was to be deleted.
Associated Law Advisers v ITO - [2017] 87 taxmann.com 148 (Delhi - Trib.) - IT APPEAL NOS. 5336 & 5846 (DELHI) OF 2014 dated 08.11.2017
1462. Where the Assessing Officer had made disallowance u/s 14A read with Rule 8D(iii) by including stock-in-trade, the Tribunal, relying on the decision in the case of State Bank of Patiala (2017) 78 taxmann.com 3 (P&H HC) held that Rule 8D refers only to investment and not stock-in-trade, and therefore could not be included for the purpose of disallowance u/s 14A as the same were held as business assets for trading purpose. Accordingly, it upheld the order of the CIT(A) and dismissed the Revenue's appeal.

ACIT vs Af-Taab Investment Company Limited & Ors (2017) 51 CCH 0358 MumTrib. – ITA No. 1807 / mum / 2011 and 1812 / mum / 2014 dated 16.11.2017

1463. The Tribunal following the decision of the Delhi High Court in the case of Cheminvest, held that where the assessee's investment in the shares of its subsidiary companies did not yield income exempt under the Act, no disallowance under Section 14A read with Rule 8D of the Act could be made

DCIT v RKW DEVELOPERS PVT. LTD - 2017) 51 CCH 0580 MumTrib ITA No. 6267/Mum/2016 dated Dec 19, 2017

1464. Where the surplus funds of the assessee far exceeded the investments yielding tax exempt income, the Tribunal held that it should be presumed that the investments are made out of surplus funds of the assessee and therefore the question of disallowance on account of interest does not arise.

Bicon Research Ltd – v Add CIT - TS-601-ITAT-2017(Bang) - ITA Nos.1229 & 1329/Bang/2016 dated 18/12/2017

1465. Where the assessee had made strategic investment in its subsidiary company to control interest in company and not with object to earn dividend income and the dividend income earned on such investments was merely incidental, the Tribunal held that no disallowance could be made against such dividend income if it arose from strategic investment. It held that strategic investments needed to be excluded for purpose of disallowance u/s 14A r.w. rule 8D of Income Tax Rules and that only investments made in non-subsiary company which had yielded dividend income could only be considered for purpose of disallowance u/s 14A r.w.r. 8D(2)(iii).

DCIT v DEVELOPMENT CONSULTANT PVT. LTD - (2017) 51 CCH 0501 KolTrib - ITA No. 213/Kol/2016 dated 06.12.2017

1466. The Tribunal held that under Section 14A of the Act it is Assessing Officer who has to record his satisfaction with regard to correctness of assessee's claim before proceeding to disallow expenditure under section 14A and satisfaction to be recorded by Assessing Officer under section 14A(2) could not be substituted by satisfaction recorded by first appellate authority, even accepting fact that his power is co-terminus with that of Assessing Officer. Accordingly, it deleted the disallowance made by the AO.

Arnav Gruh Ltd v DCIT – [2018] 89 taxmann.com 189 (Mumbai - Trib.) – ITA NOS. 3840 & 3841 (MUM.) OF 2015 dated 15.12.2017

Section 10A / 10B / Chapter VIA

Section 10A / 10B

1467. The Court dismissed Revenue's appeal and granted deduction under section 10B to the assessee (EOU) on exports made through its sister concern, on the ground that the condition spelt out in section 10B(3), could not be limited or restricted to only actual receipts by the assessee. Further, it dismissed revenue's objection that the sister concern not being a status holder/ an exporter in terms of the Exim Policy, the benefit of deduction under section 10B could not be extended to the assessee.

Earth Stone Group [TS-692-HC-2016(DEL)]

1468. The Apex Court ruled in favour of the revenue and granted Special Leave Petition against order of the High Court wherein the Court held that where assessee-company provided recruitment services to its foreign client using information technology, it would be entitled to benefit under section 10A.

Commissioner of Income Tax-6, New Delhi v. M.L.Outsourcing Services (P.) Ltd - [2017] 79 taxmann.com 255 (SC)

1469. The Tribunal allowed the assessee, (a SEZ unit engaged in research and development of drugs) deduction under Sec. 10AA and rejected Revenue's cryptic reasoning whereby the

deduction was denied on the ground that assessee-company had neither provided any service nor produced/manufactured any article or thing. It noted that the assessee had entered into a development and commercialization agreement with Mylan Ltd. (A US based company) and provided R&D services and had made development on platform technologies and had also submitted annual performance report as required under the SEZ Act and therefore held that the assessee company had in fact rendered services. Vis-à-vis the Revenue's contention that the assessee had acquired platform technology from its parent company, the Tribunal noted that this platform was never used by the assessee earlier in its business and therefore held that condition laid down in Sec. 10AA(4)(iii) (i.e. SEZ units should not be formed by splitting up or reconstruction of the existing business or should not be formed by transfer to a new business of Plant & Machinery previously used for any purpose) was not violated.

Bicon Research Ltd – v Add CIT - TS-601-ITAT-2017(Bang) - ITA Nos.1229 & 1329/Bang/2016 dated 18/12/2017

1470. The Tribunal allowed the assessee benefit u/s. 10A for AY 2010-11, being the last year of the 10-year tax holiday period. It noted that the assessee (incorporated in AY 2000-01) had issued token invoice in the same year for trial verification, but claimed relief u/s. 10A from AY 2001-02 onwards (i.e. the year when production for global market was commenced) and therefore rejected Revenue's stand that the year in which assessee first issued invoice should be considered as the year of commencement of manufacture or production and that the assessee was eligible for exemption only upto AY 2009-10. It held that when the assessee company itself had not claimed exemption for AY 2000-01, the said year could not be considered as the first year of deduction merely on the basis of token invoice issued for trial verification of its cost.

North Shore Technologies v ITO - TS-593-ITAT-2017(DEL) – ITA No.5554/Del./2014 dated 07.12.2017

1471. The Court held that in order to claim benefit of section 10B, there was no requirement that the export-oriented unit should be newly established. It held that the benefit of section 10B would commence only from the certification of a unit as 100 percent export oriented and further clarified that if there was no manufacture at time of certification, the benefit would commence from time of commencement of manufacture. Noting that in the case of the assessee, the eligible manufacturing activity (i.e. development of software products) coincided with its certification, it held that the AO was not justified in denying the assessee deduction under Section 10B merely because it was not a newly established unit.

CIT v All Koshys All Spices - [2018] 89 taxmann.com 335 (Kerala) - IT APPEAL NO. 81 OF 2015 dated 11.12.2017

1472. The Tribunal, relying on the decision of the Madras High Court in Elgi Ultra Industries Limited [\[TS-658-HC-2012\(MAD\)\]](#) granted the assessee exemption under Section 10A of the Act with respect to software exported by assessee. It rejected Revenue's stand that assessee was not the manufacturer / developer of the software and that it merely exported the software that was purchased from a third party. The Tribunal noted that the assessee engaged a third party for coding or writing program under its instruction, control and supervision of and accepted the assessee's stand that the mere fact that it outsourced the development of software, would not dis-entitle assessee from claiming Section 10A exemption. It held that the software was developed under the direct supervision of the assessee by investing its own funds and therefore, it could be concluded that the assessee itself was developing the software.

DCIT vs. Mahati Infotech Pvt. Ltd - TS-188-ITAT-2017(CHNY) - /ITA No. 1943 & 1944/Mds/2016 dated 31.01.2017

1473. The Court upheld the order of the Tribunal allowing Sec. 10A deduction to the assessee, a 100% EOU engaged in rendering ITeS data processing services to Amadeus Spain. It noted that the assessee's sole activity was to provide software connectivity for providing access to Amadeus Computer Reservation System ('CRS') facility to travel agents for which it received income from Amadeus Spain and rejected Revenue's contention no real export of services took

place since the beneficiaries of assessee's activities were located in India. It took note of the Tribunal's categorical finding based on STPI and Export Promotion Council's ('ESC') reports that assessee 'manufactured, produced and exported software' and that it could claim exemption under any of the three provisions viz., Sec. 80HHE / 10A / 10B of the Act.

PCIT vs. Amadeus India Pvt. Ltd - TS-197-HC-2017(DEL) - ITA 154/2017 dated 22.05.2017

1474. The Tribunal held that the intention of legislature in Section 10B was to provide benefit of deduction to enterprises which are not simply engaged in manufacture or produce any article or thing, but even to those assesses whose end product is any customized electronics data. Therefore, it held that the benefit of deduction u/s 10B of the Act, was also available on rendering of any of the services as notified by the Board like the item (ii) in the notification (supra) wherein even call centers, animation, etc. which are brought in the sweep of any product or services stated in clause (b) of item (i) Explanation 2 to Section 10B". Accordingly, it held that assessee's whose end product was customized electronics data would also be entitled for exemption u/s. 10A.

ITO v WNS Mortgage Service P Ltd – (2017) 50 CCH 0056 Del Trib - ITA No. 2571/Del/2012, 2716/Del/2012 dated 26.05.2017

1475. The Tribunal, relying on CBDT Circular No. 37/2016 issued in the context of Sec.40(a)(ia) held that increase in business profits as a result of disallowance u/s 40(a)(i) would be eligible for exemption under Section 10A. It rejected Revenue's stand that the CBDT circular could not extend to a disallowance under Sec.40(a)(i) and would only apply to Section 40(a)(i) disallowances and held that the reference to Section 40(a)(ia) was merely illustrative in nature and what holds good for disallowance u/s. 40(a)(ia) would equally apply in principle to disallowances u/s. 40(a)(i) as well.

DCIT vs Ascendum Solutions India Pvt Ltd [TS-442-ITAT-2017(Ahd)]- I.T.A. No.429/Ahd/14 dated 25.10.2017

1476. The Court, applying the purposive interpretation of tax holiday provisions held that the incidental activity of parking of surplus funds with the Banks or advancing of staff loans by such special category of assessee covered under Section 10-A or 10-B of the Act was an integral part of their export business activity and a business decision taken in view of the commercial expediency and therefore the interest income earned incidentally could not be de-linked from its profits and gains derived by the Undertaking. Accordingly, it held that the income by way of interest on bank deposits or staff loans earned by 100% export oriented unit was eligible for tax holiday u/s 10A or 10B for AY 2001-02.

CIT vs Hewlett Packard Global Soft Ltd-TS-482-HC-2017(KAR)- ITA No.812/2007 dated 30.10.2017

1477. The Tribunal allowed the claim of the assessee made u/s 10A and held that the AO/CIT(A) erred in denying the benefit on the alleged ground that the assessee did not carry out any manufacturing and was merely engaged in trading. On the basis of documentary evidence submitted by the assessee i.e. purchase & sale invoices, it observed that the assessee purchased unmounted, unpolished jewellery, mounted it in the semiprecious and precious stones in the silver and gold jewellery, polished it, made it marketable and then exported the same from its SEZ unit which amounted to manufacture.

Kamal Kishore Gupta vs. Ass. CIT (2017) 50 CCH 0233 JaipurTrib (ITA No. 469/JP/2015 dated August 1, 2017)

1478. The Tribunal allowed deduction u/s 10B to the assessee in respect of duty drawback receipts forming part of EOU's profits and held that the manner of computing profits u/s 10B(4) did not require direct nexus with the business unlike section 80(IB). On a conjoint reading of section 10B(1) and 10B(4), it held that once an income formed part of business of eligible undertaking, there was no further mandate to exclude it from the quantum of profits eligible for deductions u/s 10B. Rejecting Revenue's reliance on Opera Clothings [TS-63-SC-2009] wherein it was held DEPB and duty drawback benefit was not available as a deduction for the purpose of computing

relief u/s 80IB, it held that the condition for deduction u/s 80IB was that profits and gains were to be derived from eligible business and there was no such formula for computing the profit as provided in section 10B.

ITO vs Ambika Sath-TS-408-ITAT-2017(Del)-ITA no. 6252 & 6253 / del / 2015 dated 28.08.2017

1479. Where the assessee earned interest income from fixed deposits which were kept as security to obtain bank guarantee and the AO had disallowed the assessee's claim of deduction vis a vis the said interest income, the Tribunal upheld the order of the CIT(A) and held that the disallowance of deduction u/s 10A vis a vis interest income was to be restricted to net interest income (after setting off interest cost incurred to earn the income) as opposed to total interest income as done by the AO.

Balaji Export Co. vs. assistant Commissioner of Income Tax [ITA NO.7547 6691 (2017) 51 CCH 0017]

Section VIA

1480. The Court allowed the assessee deduction under Section 80HHE (which provides for deduction in respect of profits from export of computer software) holding that television news software exported by assessee was within the definition of 'customized electronic data' occurring in clause (b) of the Explanation to Sec. 80HHE of the Act (defining computer software to mean any computer programme recorded on any disc, tape, perforated media or other information storage device and includes any such programme or any customized electronic data which is transmitted from India to a place outside India by any means). It noted that as per the agreement between the assessee and NTVI, it was agreed that assessee would be responsible for the production of the entire software (programming) for a 24-hour Indian news channel which would be supplied to NTVI who would in turn broadcast the said channel through STAR TV. The Court observed that the assessee was able to demonstrate that the television news software produced by it was indeed 'customized electronic data' which was exported from India and that the entire process of making the programmes was to meet the requirement of STAR TV. It held that in the definition of computer software the term 'any customized electronic data' is preceded by 'or' which clearly indicates that any customized electronic data would also be considered to be 'computer software' under the inclusive part of the definition and held that the expression 'any customized electronic data' was to be construed liberally. It rejected the Revenues contention that 'any customized electronic data' necessarily had to be a computer software.

New Delhi Television Ltd-TS-365-HC-2017(DEL) ITA No. 40 of 2005 dated August 31, 2017

1481. Where the Assessee, engaged in the manufacture of voice and fax encryptions, imported necessary hardware as well as corresponding software and thereafter customised and modified the software before loading it to hardware, the Court dismissing the Revenue's appeal, held that the said activity amounted to "manufacture" of an article or a thing and, thus the Assessee was eligible for deduction u/s 80-IB.

CIT vs. Shoghi Communication Ltd. (2017) 84 taxmann.com 198 (HP) (IT Appeal No. 5/2007 dated August 3, 2017)

1482. Rejecting the contention of the Revenue that for the purpose of claiming deduction under Section 80-IC of the Act, eligible assessee's could only have one 'initial assessment year', the Court reversed the order of the Tribunal and held that the assessee (who had been claiming exemption under Section 80-IC from AY 2006-07 onwards) had claimed a fresh deduction @ 100 percent on account of completion of substantial expansion in AY 2010-11 (treating AY 2010-11 as the initial assessment year qua its expansion) was eligible to do so. It held that the definition of 'initial assessment year' is disjunctive and not conjunctive and that the moment "substantial expansion" was completed as per Sec. 80-IC (8)(ix), the statutory definition of "initial assessment year" [Section 80-IC(8)(v)] comes into play and consequently, Section 80-IC(3)(ii) entitles the unit

to 100% deduction commencing from the year in which substantial expansion had been completed.

Stovecraft India v CIT - ITA Nos.20 to 24, 31 to 37 of 2015; 1,6,7, 9,10,14,15,20,23,24,25,27,35,44,45,50, 61, 62,69, 70 of 2016; and 2,3,5,7,8,17, 19, 20,21,22,25 & 26 of 2017 dated 28.11.2017

1483. The Apex Court reversed the decision of the High Court and denied the assessee benefit under Section 80IB of the Act as the assessee ceased to be a small scale industrial undertaking during the relevant assessment year as its investment in plant and machinery exceeded Rs.1 crore. It held that the benefit specifically meant for the small scale industries could not be granted to industrial undertakings which do not continue as SSIs during the period. It further held that the scheme of the Act did not in any manner indicate that the incentive period had to continue for 10 consecutive years irrespective of continuation of eligibility conditions.

DCIT v ACE Multi Axes Systems Ltd – TS-571-SC-2017 -CIVIL APPEAL NO. 20854 OF 2017 dated 5.12.2017

1484. The Court dismissed the appeal of the Revenue and held that the Assessee (Supporting Manufacturer) would be eligible for deduction u/s 80HHC(1A) irrespective of the Principal Exporter obtaining Trading House Certificate (“THC”) from DGFT. The Court rejected the contention of the Revenue that as the Principal Exporter had not been able to obtain THC from DGFT which was an essential condition for obtaining deduction by the Assessee. It held that mere nongrant of the renewal of the THC by the DGFT to Principal Exporter would not disentitle the Assessee from claiming deduction especially when Principal Exporter had duly made the application and the same was pending at the end of DGT and the Principal Exporter had issued a certificate stating that he had not claimed any deduction u/s 80HHC on the Exports made out of the Purchases from the Assessee.

CIT vs. Arya Exports & Industries (2017) 99 CCH 0194 Del HC (ITA No. 206/2005 dated August 18, 2017)

1485. The Tribunal dismissed the appeal of the Revenue and held that for the purpose of determination of quantum of profit eligible for deduction u/s 80-IA the absorbed losses or depreciation from eligible business incurred prior to the initial year were not to be considered for determination of eligible profits earned during the year. It observed that the brought forward losses and depreciation being absorbed already could not be notionally brought forward for adjustment again.

DCIT vs. Sankalp International (2017) 50 CCH 0245 Jai. Trib (ITA No. 504/JP/2017)

1486. The Tribunal dismissed the appeal of the Revenue as well as the Assessee (treating the grounds of appeal challenging addition u/s 68 as not pressed) and held that the Assessee (a credit cooperative society) would be eligible for deduction u/s. 80P in respect of additions made u/s. 68. The Tribunal held that although the credit against FDRs could not be explained and the addition was made u/s 68 but it could not be held that the Assessee had not generated the same from its business of banking or providing facilities to its members. Accordingly, it held Assessee would be entitled to deduction u/s.80P.

Aman Chote Vyapari Sahakari Pat Sanstha Ltd. vs. DCIT TS-374-ITAT-2017 (ITA No. 1183 to 1190/Pun/2012 dated August 11, 2017)

1487. The Court dismissed the appeal of the Revenue and held that the programme produced by the Assessee (engaged in production of news software television programme) by collecting news by receiving input in audio and video footages, editing / processing the same and, thereafter, converting into machine signal fell within description of ‘computer software’ under clause (b) to Explan. to sec 80HHE (deduction in respect of profits from export of computer software) and the Assessee was eligible to claim deduction u/s 80HHE in respect of the television news software produced and exported.

CIT vs. NDTV (2017) 85 taxmann.com 3 (Del HC) (ITA No. 40/2005 dated August 31, 2017)

1488. Where the claim of the assessee (engaged in bottling LPG into cylinder) u/s 80HH, 80I and 80-IA was disallowed by the Revenue on the ground that it was not an industrial undertaking as it was not engaged in production/manufacturing as there was no change in the chemical composition of the Gas, the Apex Court held that since the LPG obtained from the refinery underwent a complex technical process in the assessee's plants and was clearly distinguishable from the LPG bottled in cylinders and the process carried out by the assessee made LPG suitable for domestic use by customers, it was an industrial undertaking eligible to deduction u/s 80HH, 80I and 80-IA. It held that the activity carried out by the assessee amounted to production.
Hindustan Petroleum Corporation Ltd TS-314-SC-2017(CIVIL APPEAL NO. 9295 OF 2017 dated August 3, 2017)
1489. Where the assessee, a co-operative society carried on the business of banking for the public at large i.e. its operation was not confined exclusively to its members but also extended to outsiders as well without adequate approval from the Registrar of Societies, the Apex Court denied the assessee deduction u/s 80P(2)(a)(i) of the Act as the activity of the appellant was in contravention of the Co-operative Societies Act.
The citizen co-operative society TS-326-SC-2017(CIVIL APPEAL NO. 10245 OF 2017 dated August 8, 2017)
1490. Where deduction u/s 80IC of the Act was omitted to be claimed by the assessee in its original/revised income tax return filed electronically and the AO had not brought anything on record showing any infirmity in amount of deduction claimed by assessee by way of filing separate letter during the course of assessment proceedings, relying on the decision in the case of Jute Corporation of India Ltd [187 ITR 688 (SC)], the Court held that the assessee was entitled to deduction u/s 80 IC of the Act.
DyCIT vs India Glycols Ltd (2017) 51 CCH 0089 KolTrib. ITA No. 1628 / kol / 2014 dated 15.09.2017
1491. The AO in the case of the assessee claiming deduction u/s 80-IC observed that the unit (eligible for deduction u/s 80-IC) in Himachal Pradesh which was selling the products to related concerns had earned abnormally higher profits compared to Delhi Unit of the assessee and accordingly, rejected the GP declared by the assessee and adopted a lower GP as per the provisions of section 80-IA(8) r.w.s. 80-IC. The CIT(A) deleted the addition made by the AO on the ground that the AO had without pointing out any mistake in the audited accounts of the assessee and merely on the basis of the comparison with Delhi unit had adopted lower GP which was not justified. The Tribunal upheld the order of CIT(A) and held that AO's invocation of section 80-IA(8) r.w.s 80-IC was not valid since the AO had not brought any valid material on record to show that there was some arrangement between the 2 units of the assessee for inter-unit transfer of goods. The Court observed upheld the order of the Tribunal.
PCIT & ANR. Vs. HARPREET KAUR & ANR. (2017) 99 CCH 0140 DeIHC ITA 141/2017, 142/2017 dated 24/07/2017
1492. The assessee had earned interest income from fixed deposits kept with bank in order to avail credit facility for export and claimed deduction of 90% of the interest earned on fixed deposits as per explanation (baa) to section (4C) of section 80HHC (which provides that export business profits would be computed after deducting 90% of interest included in such profits and such business profits would be then allowed as deduction u/s 80HHC). The AO disallowed the deduction contending that the interest income was not business income and was income from other sources. The CIT(A) and the Tribunal upheld the order of AO. The Court held that interest earned on deposits with bank which were kept for export business would be in the nature of business income and allowed the deduction under Section 80HHC as claimed by the assessee.
LAXMINARAIN KHETAN vs. ITO (2017) 99 CCH 0137 AIHC ITA No. 321 of 2007 dated 28/07/2017
1493. The Tribunal rejected the claim of the Assessee that no addition u/s 41(1) (remission / cessation of trading liability the deduction of which has been allowed in the previous years) could be made during the year under consideration since the income of the Assessee was exempt u/s

80P(2) in the previous years. It held that if the contention of the Assessee was to be accepted it would render provisions of 41(1) infructuous where the Assessee was eligible for deduction under Chapter VIA. The Tribunal further observed that as per sec 80AB the deduction u/s 80P has to be computed in accordance with the provisions of the Act which includes sec. 41(1) and, therefore, the income has to be first computed taking into consideration the provision of sec 41(1) and, thereafter, deduction u/s 80P has to be determined. The provisions of the Act, therefore, have to be read harmoniously and in such a manner that none of the provisions are rendered infructuous.

M/s Rajasthan State Co-operative Bank Ltd. vs. ACIT TS-270-ITAT-2017 (ITA No. 266/Jp/2013 dated April 17, 2017)

1494. The Tribunal upheld assessee's action of treating the price at which Gujarat Electricity Board ('GEB') supplied electricity to assessee as the 'market price' for transfer by captive unit for the purposes of deduction u/sec. 80IA(8) in respect of its power generation undertaking by following co-ordinate bench ruling in assessee's own case for earlier AY. The Tribunal distinguished Revenue's reliance on Calcutta HC ruling in ITC Ltd. (64 taxman.com 214) to contend that the rate at which electricity was purchased from Electricity Board could not be treated as market price, which assessee's captive generation plant could fetch in the open market. The Tribunal noted that Calcutta HC ruling related to period prior to introduction of the Electricity Act, 2003 and under the said Act there was no regulation in respect of market price when the Captive Generation plant notionally sells electricity to itself. Moreover, the Tribunal noted that except Calcutta HC in ITC Ltd, there were four judgements of other High Court in assessee's favour and six judgements of Tribunal in assessee favour which have taken a view consistent with a view taken by coordinate bench in assessee's own case for earlier year.

Add. CIT vs. Reliance Industries Ltd. TS-259-ITAT-2017 (ITA No. 4361/Mum/2012 dated April 12, 2017)

1495. The Court reversed Tribunal's order and granted deduction u/s 80IB to new unit i.e. Unit II, of a manufacturer assessee. The Court rejected the stand of the Revenue that the new unit was formed by reconstruction or splitting up of existing unit [80IB(2)(ii)] The Court took note of the fact that the assessee made substantial investment in the form of capital and loan, the new unit has separate premises, separate labour force, separate license and electricity connection. The Court observed that that lower authorities ignored the fact that the condition stipulated in Section 80IB (2)(ii) to disentitle the Assessee from claiming a deduction applies, only if the formation of the new business took place via transfer of machinery and/or plant, previously used for any purpose. Therefore, it is not a mere transfer of plant and machinery, which is used previously for some purpose, but the fact that transfer is of such nature that it enables the formation of the undertaking qua which deduction is sought by an Assessee. The Court noted that it was not the Revenue's case that the transferred machinery enabled the formation of Unit II. Substantial expansion of existing business cannot disentitle assessee to claim Sec. 80IB benefit. The Court, also accepted assessee's contention regarding computation of Sec. 80IA deduction that once only losses of years beginning from initial AY can be brought forward for set off and Revenue cannot notionally bring forward losses of earlier years, which were already set off against other income of Assessee.

ACIT vs. Leo Fasteners TS-284-HC-2017 (Tax Case (Appeal) 533-538/2010 dated July 10, 2017)

1496. The Court upheld Tribunal's order allowing Sec. 80-IA benefit to assessee-company [which was initially a small scale industrial undertaking ('SSI'), subsequently converted to medium scale undertaking]. The Court held that eligibility condition with respect to investment in plant and machinery ('P&M') was to be fulfilled only in initial AY (i.e AY 1997-98) and not in all ten consecutive AYs eligible for deduction. The Court rejected Revenue's stand that since assessee's investment in P&M exceeded the prescribed limit in relevant AYs, it was no more SSI unit to qualify for Sec. 80-IA deduction. It also further rejected Revenue's stand that the words 'previous year' occurring in Sec. 80-IA(12)(f) in the definition of SSI refers to the previous year of each of the AYs spoken of in Sec. 80-IA(6) by holding that the purpose of introducing Sec. 80-IA was to encourage industrial expansion and to incentivise investment in industries and if the eligibility for deduction under Section 80-IA were to be linked to such changing criteria beyond the initial AY, then the section itself would become non-workable. The Court further remarked

that it is not expected that the investment for P&M in the initial AYs would remain static for the next ten years. It cannot be expected that if an industry is successful it would not expand.

CIT vs. International Tractors Ltd. TS-298-HC-2017 (ITA No. 1082/2005 dated July 20, 2017)

1497. The Apex Court denied the benefit of section 80P to the assessee by holding that an assessee cannot be treated as a cooperative society meant only for its members and providing credit facilities to its members if it has carved out a category called nominal members. These are those members who are making deposits with the assessee for the purpose of obtaining loans, etc. and, in fact, they are not members in the real sense. Most of the business of the assessee was with this category of persons who have been giving deposits which are kept in Fixed Deposits with a motive to earn maximum returns. A portion of these deposits is utilised to advance gold loans, etc. to the members of the first category. It is found that the depositors and borrowers are quite distinct. In reality, such activity of the appellant is that of finance business and cannot be termed as co-operative society

The Citizens Cooperative Society Ltd vs ACIT- CIVIL APPEAL NO. 10245 OF 2017 dated 08.08.2017

1498. The Court upheld Tribunal's order allowing section 80IA(4) deduction to the assessee company (entrusted with the road project by Government on BOT basis), despite assessee assigning the task of maintenance and toll collection of the road to third party ('RTIL') after completion of construction work. Referring to the provisions of section 80IA(4), it held that the provision itself envisages that in a given project the developer and the person who maintains and operates the facility may be different. Merely because the person maintaining and operating the infrastructure facility is different from the one who developed it, would not deprive the developer the deduction under the said section on the income arising out of such development. Accordingly, it dismissed Revenue's appeal and held that the proviso to Section 80-IA(4) would not deprive the developer of the benefit of the deduction even after the facility is transferred for the purpose of maintenance and operation but would merely split the profit element into one derived from the development of the infrastructure and that derived from the activity of maintenance and operation thereof.

Pr.CIT vs Nila Baurat Engineering Ltd – TS-479-HC-2017 Tax appeal no. 807 of 2017 dated 11.10.2017

1499. The Tribunal granted SSI (Small Scale Industry) status linked deduction u/s.80IB(3)(ii) to the assessee despite the fact that the assessee-company ceased to be a SSI undertaking in relevant assessment year. It noted that the assessee was incorporated as an SSI unit in AY 2003-04, but grew beyond the SSI definition in relevant AY and relying on the decision of the Karnataka HC ruling in Ace Multi Axes Systems Ltd. held that if an SSI stabilizes early, makes profits, makes further investments in the business, the said growth would not come in the way of claiming benefit u/s.80IB(3)(ii) for 10 consecutive years from the initial AY.

Advik Hi-Tech Pvt. Ltd. vs DCIT [TS-467-ITAT-2017(PUN)] - ITA No.83/PUN/2015 dated 22.09.2017

1500. Where the assessee engaged in business of manufacture of master batches and compounds had claimed deduction u/s 80-IA in respect of two undertakings without claiming depreciation which was rejected by the Assessing Officer who allowed deduction by reducing the eligible income by the amount of depreciation, the Apex Court upheld the order of the High Court which held that depreciation had to be reduced for computing the profits eligible for deduction under section 80-IA, as it was a complete code in itself. It held that if assessee's action of claiming section 80IA deduction without reducing depreciation was accepted, it would lead to inflation of profits linked incentives provided u/s 80IA which could not be permitted.

Plastiblends India Ltd vs Additional Commissioner of Income Tax [2017] 86 taxmann.com 137 (SC) [Civil Appeal No 238 and 528 to 551 of 2012, 12755, 12757, 12758, 12762, 12828 AND 12980 OF 2017 dated 09.10.2017

1501. The Court, relying on the decision in the case of Ganesh Housing Corporation Ltd [TS-5024-HC-2012(Guj)-O] (wherein it was held that once the minimum number of units, namely 30 have

been located, the Park becomes eligible to opt for the benefit under Sec. 80IA), held that the assessee-company (involved in setting up an industrial park) would be entitled to deduction u/s 80-IA once the minimum number of units in accordance with the Industrial Park Scheme, 2008 i.e. 30 units were located in the Industrial Park (i.e. from AY 2010-11 onwards). Noting that Revenue granted deduction to assessee only in AY 2011-12 as the CBDT (vide notification dated December 26, 2016) notified petitioner's undertaking as eligible for the benefit of deduction u/s. 80IA(4)(iii) during that year, the Court held that since the condition under Section 80-IA was fulfilled in AY 2010-11, there was no merit in delaying the grant of deduction on the ground that the CBDT had notified the assessee as eligible in a later year.

Devraj Infrastructure Ltd vs Chairman/Member (Industrial Park)-TS-503-HC-2017(GUJ)-SCA No. 7098 of 2017 dated 03.11.2017

1502. The Tribunal allowed the assessee deduction on interest on debtors and gain on account of foreign exchange fluctuation under Section 80IC as these incomes were derived by the assessee from the business of the eligible undertaking. However, it rejected assessee's claim of deduction on interest of subsidy and held that the CBDT Circular No 39 / 2016 relied on by the assessee was not applicable as the said circular allowed deduction on subsidies towards reimbursement of cost of production whereas in the instant case, the subsidy received by the assessee was for interest on loan taken for purchase of plant.

Quadrant EPP Surlon vs ITO – TS-539-ITAT-2017 (Del)- ITA No.442/Del/2014 dated 15.11.2017

1503. Where the assessee had taken over the power distribution network set up by Tata tea Ltd and had substantially improved and increased the network by spending huge amounts (more than 50% of the then existing establishment value), the Court held that the assessee was entitled to deduction under Section 80-IA and dismissed the revenues contention that the conditions laid down under Section 80-IA(4)(iv) [i.e. undertaking in India may (a) generate or generate and distribute power at any time between 1.4.1993 and 31.3.2010; (b) transmit and distribute by laying a network of new transmission or distribution lines between the above-mentioned period; (c) substantially renovate or modernize the existing network of transmission or distribution lines between the same period] were cumulative conditions and since all three were not satisfied by the assessee no deduction would be permitted. It held that the sub-clauses (a), (b) and (c) were disjointed as laying down a new network under clause (b) and substantially renovating the same as per clause (c) would lead to incongruity.

Kanan Devan Hills Plantations Company Pvt Ltd - (2017) 100 CCH 0087 KerHC - ITA No. 48 of 2015 dated 16.11.2017

1504. The Court denied the assessee deduction under Section 80IC with respect to interest earned by it on fixed deposits and held that the benefit of Section 80IC is only available on profits and gains derived from carrying on eligible business. It held that the word 'derived' used in the Section was not the same as 'attributable to' as the scope of the word 'attributable' is much wider than 'derived'. It rejected the assessee's contention that the fixed deposit had intrinsic and inseparable nexus with the work undertaken and held that the FD interest had nothing to do with carrying on the business on manufacture and sale of articles.

Conventional Fastners – TS-551-HC-2017 (UTT)- INCOME TAX APPEAL NO. 24 OF 2015 dated 15.11.2017

1505. The court held that the assessee had fulfilled all the conditions laid down in clauses (i) to (v) of sub 80G and therefore was entitled to exemption under section 11. It observed that there was no violation of provisions contained in section 13, as there was no material change from facts of the earlier years in order to come to the conclusion that the assessee was not carrying out activity of charitable nature. It was clear that the word education utilized in the section stands independently on its own and to suggest that word might be confined either to rich or poor or any other strata of society was not acceptable.

CIT v Dr.Virendra Swaroop Educational Foundation (2017) 98 CCH 0003 AIHC

1506. The Tribunal denying section 80JJAA deduction to the assessee company (engaged in manufacture & export of computer software) for AY 2001-02 & 2002-03, as the new workmen employed by the assessee failed the regular workmen test as envisaged on the explanation (ii)

(c) to section 80JJAA. The assessee had argued that in view of the Memorandum explaining provisions of Finance No.2 Bill 1998, the condition of 300 days of employment during the previous year should be read as 300 days in a year and hence the year must be counted from the date of employment and not in the previous year. The court noted the ambiguity involved in the language used in the explanation and in the memorandum and held that, though the language used in the provision appeared to militate with the intention of the legislature as expressed in the memorandum as well as against the very object and scheme of the provision of providing incentive for generating more employment. However, this may be an omission in the provision which can be supplied only by an act of legislature through proper amendment.

Texas Instruments (India) P. Ltd [TS-703-ITAT-2016(Bang)]

1507. The Tribunal denied the assessee deduction u/s 80IB(10) of Act and held that the assessee was engaged in construction business as a work contractor and not as a developer which was a sine qua non for claiming Sec. 80IB(10) deduction. Noting that the assessee's work as a contractor did not include designing and selling of the project, it held that the role of a developer was much wider than that of a contractor. It held that the assessee was engaged in the construction work of the buildings as a contractor and only included controlling and directing the work of building construction as per plan and design provided by the landlord post which it handed over the constructed flats on behalf of the landlord to the eligible flat owners who had registered undivided rights in the property.

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

1508. Where, as per Section 80IB(7)(c) an Assessee would be eligible for deduction u/s 80IB(7)(a) (50 percent of eligible income) if the Assessee had obtained approval from Director General, Income Tax (Exemptions), who has to act upon with concurrence of Director General in the Directorate of Tourism, Government of India and the Assessee who had set up a hotel after getting approval of project of Hotel from Department of Tourism, had submitted application to claim deduction under section 80-IB(7)(a) before Director, General, Income tax (Exemptions) which was pending before the said authority and during such pendency the Assessee filed a return claiming deduction under section 80-IB, which was rejected by the AO on the ground that the Assessee was not granted approval by Director, General, Income tax (Exemptions) which was affirmed by the CIT(A) who allowed a lower deduction under section 80IB(7)(b) [30 percent of eligible income] [which required approval only from Director General in the Directorate of Tourism, Government of India], the Court held that for lethargy or inaction on the part of an officer of Income-tax Department, a deduction which otherwise may be available to the Assessee, could not be denied since it was not a case where Assessee was disqualified being ineligible for such deduction but only on the ground that approval was pending before Competent Authority.

As regards the contention of the Revenue that no that exemption could have been allowed under section 80IB(7)(b) since the Assessee had claimed deduction under section 80IB(7)(a) in its return of income and that as per Section 80A no claim of deduction could be allowed unless claimed in the return of income, the Court held that deduction under section 80-IB(7) to a hotel was common and a difference in clauses (a) and (b) was with regard to percentage, which is 50 per cent and 30 per cent respectively and therefore it could not be held that the Assessee did not claim deduction under section 80-IB(7). Even otherwise, it held that section 80-IB(7)(a) provided a deduction of higher amount and therefore would cover deduction under clause (b) as well if existing facts justify that Assessee would be entitled for same. Accordingly, it allowed the appeal of the Assessee and held that if approval was granted, the Assessee would be eligible to deduction under section 80IB(7)(a) and if not, the Assessee would be entitled to the 80IB(7)(b) deduction provided by the CIT(A).

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

1509. The Court, relying on the decision of the Madras High Court Madras Motors Ltd 257 ITR 60 (Mad) allowed the appeal of the assessee and held that for the purpose of computing the deduction under section 80HHC of the Act the term 'total turnover' used therein would mean the total turnover arising out of export of goods covered under the section and not on the total

turnover of the entire business of the assessee. It held that the term total turnover of the business meant the business relating to the goods to which the section applied. As regards the attribution of indirect costs while computing the profits eligible for deduction under section 80HHC, it held that the term 'indirect costs' used in the section had to be read in conjunction with sub-section 3(c)(ii) of the said section which provides that the profits would be reduced by direct and indirect costs attributable to the export of trading goods and therefore held that the indirect costs had to have nexus with the export turnover of the assessee. Accordingly, it reversed the order of the Tribunal wherein the Tribunal had considered the indirect costs of the entire business of the assessee while computing the profits. Further, where the assessee had written back its liabilities but had not established the nexus between the write back of liabilities and the export income earned by it, the Court held that the Revenue was justified in excluding the same while computing the income eligible for deduction under section 80HHC of the Act

Rollatiners Ltd v CIT – (2017) 98 CCH 0062 Del HC – ITA 166 / 2014

1510. The Apex court dismissed Revenue's Special Leave Petition against Allahabad High Court ruling wherein the Court allowed Sec 80-IB benefit on additional income declared in return filed u/s 153A pursuant to search, despite assessee's failure to file audit report along with the return. It opined that the requirement of furnishing audit report u/s 80-IA(7) along with the return of income is only directory and since the audit report for the enhanced claim was furnished during the course of assessment proceedings, provisions of Sec. 80-IA(7) stood complied.

Surya Merchants Ltd [TS-94-SC-2017] (CC No. 4760/2017) dated 10/03/2017

1511. Where assessee challenged the validity of Section 80A(5) and the fourth Proviso to Sec 10B(1) as violative of Article 14 of the Constitution, the Court held that Article 14 permits reasonable classification on fulfilment of two factors: (a) that the classification must be found on intelligible differentia which distinguishes persons grouped together from others who are left out of the group, and (b) that differentia must have a reasonable connection with the object sought to be achieved. The objective behind insertion of the impugned provisions was to defeat multiple claims of deductions and to ensure better tax compliance. It acknowledged the existence of persons owning 100% EOUs and sought to limit their time to claim deductions under the Act. Further the parliament acted within its power to differentiate between a return of income filed under Section 139(1) and a belated return filed under Section 139(4) for the purposes of deductions claimed Section 10B(1). Thus there was no violation of Article 14 of the Constitution and accordingly, order of CIT(A) was upheld and writ petition of the assessee was dismissed.

Nath Brothers Exim International Ltd v Union of India - [2017] 80 taxmann.com 327 (Delhi) (WP(C) 12073 of 2015)

1512. The Tribunal denied the assessee builder deduction under section 80IB(10) for AY 2011-12 on account of violation of condition under clause (f) i.e. allotment of more than one residential unit to same individuals/family members. It noted that clause (f) was inserted vide Finance (No.2) Act, 2009 with effect from 19/08/2009 and therefore would be applicable to all allotment of residential units occurring after the said date. It held that the object behind insertion of clause (f) was to build affordable housing for low middle income groups and noted that since the assessee could not prove that allotments were made prior to the insertion, the deduction could not be allowed. It also noted that the assessee had violated clause (c) of Section 80IB(10) (which provides a limit on the area of residential units limiting it to 1500 sq ft) by constructing duplex flats exceeding prescribed limit of 1500 sq.ft.

Shri Syed Aleemullah [TS-187-ITAT-2017(Bang)] - ITA No.389/Bang/2016 dated 04/04/2017

1513. The Court upheld the order of the Tribunal and held that while computing 'eligible profit' for allowing deduction u/s 80HHD(1) available to companies running hotels, losses from ineligible units/hotels could not be deducted. It rejected the Revenue's stand that the expressions 'business profits' and 'total receipts' used in Section 80HHD(3) [prescribing formula for computing 'eligible profits' - (Deduction = Business Profits x Eligible receipts / Total Receipts)], should take into account the gains/losses of ineligible entities as well. Observing that Section 80HHD is a 'beneficial provision', it held that full benefit of the provision was to be extended to an eligible assessee without there being an attempt to whittle down the same. It held that sub-section (3) which provides for the mechanism of computation of deduction was to be read along with sub-section (1) and on a joint reading it was evident that the formula should relate solely to

the receipts/profits/income of the eligible unit alone and none other. It also relied on the decision of the Karnataka HC ruling in ITC Hotels Ltd [\[TS-5737-HC-2009\(KARNATAKA\)-O\]](#), wherein it was held that the deduction was to be granted qua eligible unit/units only.

Adyar Gate Hotel Ltd – TS-191-HC-2017 (Mad) - TAX CASE (APPEAL) No.770 of 2007 dated 21.04.2017

1514. The assessee, engaged in the sale of fertilisers to its members, deposited a portion of its income derived in Nationalised Banks and treated the same as income attributable to the profits and gains of business, eligible for deduction u/s 80P(2)(a). However, the AO treated the interest income as income from other sources not eligible for deduction. The Court affirmed assessee's contention that the expression "attributable to" contained in the said section was wider in scope than the expression "derived from". It noted that the investments made by the assessee was out of its own monies and noted that if the assessee had invested those amounts in fixed deposits in other Co-operative Societies or in the construction of godowns and warehouses, the respondents would have granted the benefit of deduction under Clause (d) or (e), as the case may be. Therefore, it allowed the assessee deduction under section 80P(2)(a) and further held that the original source of the investments made by the assessee in nationalised Banks was admittedly the income that the petitioners derived from the activities listed in sub Clauses (i) to (vii) of Clause (a) of Section 80P(2) (which lists down the activities eligible for deduction under section 80P) and therefore observed that the character of such income i.e. business income, would not be lost, especially when the statute uses the expression "attributable to" and not anyone of the two expressions, namely, "derived from" or "directly attributable to".

Vavveru Co-Operative Rural Bank Ltd. [TS-202-HC-2017(AP)] - W.P.Nos.12727 and 12767 of 2016 & W.P.Nos.2518, 2571, 2576 and 2581 of 2017

1515. The Court ruled in favour of Revenue and denied deduction under section 80P(2)(d) [which permits deduction for whole of the income by way of interest or dividends derived by a cooperative society from its investments with any other co-operative society] to the assessee, co-operative society (engaged in agro-marketing) with respect to interest income earned on investments made in co-operative 'bank' for AYs 2007-2008 to 2011-2012. It denied the benefit to the assessee on the ground that interest income from co-operative 'bank' was not covered by Sec. 80P(2)(d) which covered interest from co-operative 'society'. It highlighted that words 'Co-operative Banks' are missing in clause (d) of Sec. 80P(2) and holds that a co-operative bank is distinct from co-operative society for the purposes of Sec 80P(2)(d). Further, it held that the assessee was not even eligible to claim benefit under section 80P(2)(a) [which provides 100% deduction to a co-operative society where the income is earned by the co-operative society by carrying on the business of banking or providing credit facilities to its members or a cottage industry or the marketing of the agricultural produces grown by its members] as the interest income was taxable as 'income from other sources' and not 'business' income.

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

1516. The assessee had not made claim for deduction u/s 80IB(10) in its original return. However, during the course of assessment, the assessee filed details of project executed by it, based on which, it claimed deduction u/s 80IB (10). The AO denied the claim made by the assessee since the claim did not form part of original return filed by the assessee company. CIT(A) upheld the AO's order. The Tribunal observed that the relevant material for the claim was placed on record by the assessee during the assessment proceedings and therefore, it remitted the matter to the AO for fresh consideration. The Court held that the power of entertaining a new claim vests with the appellate authorities based on facts and circumstances of case and the failure to advert the claim in the original return or revised return could not denude the appellate authorities of their power to consider a new claim, if, relevant material was available on record and was otherwise tenable in law. Accordingly, it held that the Tribunal was correct in remitting the matter to the AO.

CIT vs. ABHINITHA FOUNDATION PVT. LTD (2017) 99 CCH 0037 ChenHC T.C. (A) No.811 of 2016 dated 06.06.2017

f. **Income from Capital Gains**

1517. The Court rejecting the assessing officer's contention, held that since the assessee's major income consisted of income from sports endorsement, the entire investment in shares was made out of his own funds and investment in shares with Portfolio Managers was a meagre percentage of assessee's total investments, income on sale of shares and mutual funds was taxable under the head capital gains and not business income.

Sachin R Tendulkar [2017] 77 taxmann.com 305 (Mumbai Tri.)

1518. The Court held that the property in question being an ancestral agricultural land could not be treated as 'capital asset' u/s 2(14)(iii) of the Act and accordingly the gains on sale of such land was exempt from capital gains tax. The Court observed that the assessee carried out agricultural activities and used the agricultural produce for his personal and family consumption and thus the said land could not be treated as a non-agricultural land merely because it was located near the sea or that the assessee was not doing any regular agricultural activity or that the assessee did not show any agricultural income.

Shankar Dalal & Ors vs. Commissioner of Income Tax & Ors - (2017) 98 CCH 0117 MumHC (Tax Appeal Nos : 1,2,10,12,16 of 2015 and 80,81,82,83,84,85,86 of 2014)

1519. The Tribunal held that the assessee who had entered into an agreement for sale of his flat was not subjected to capital gains tax during the year under review despite the fact that he received an advance of the sale consideration and the agreement was registered during the year, since the possession of the flat was not handed over during the year and was only handed over in the subsequent year in which the assessee had offered the capital gains to tax. It held that the flat came into full and exclusive control of new purchaser only after possession of the same was handed over by the assessee.

Ashok M Seth v DCIT – (2017) 49 CCH 046 Mum Trib – ITA No 187 & 188 / Mum / 2015

1520. The Court reversed the decision of the Tribunal which held that life interest held by the assessee in Neville Wadia Trust received on account of relinquishment by his father would come within the purview of gift as stipulated by section 49(1)(ii) and, therefore, cost to the previous owner would be deemed to be the cost of the Assessee and accordingly capital gains upon sale of life interest should be calculated in the hands of the Assessee. The Court held that relinquishment of life interest in Neville Wadia Trust by the Father of the Assessee would not tantamount to a gift to the Assessee as Gift under the Transfer Property Act as well as the Gift Tax Act presupposes a transfer from one person to another person which was not so in the instant case viz. relinquishment. The Court following the decision of the division bench in the case of CIT vs. Neville N. Wadia (90 ITR 155) (Father of the Assessee) (in which it was held that surrendering of life interest in the Trust would not amount to transfer as stipulated by section 16(3)(iv) of IT Act, 1922) held that unilateral act of relinquishment by Father of the Assessee of Life Interest in the Trust would not tantamount to a transfer and, therefore, the same could not be treated as a Gift in the hands of the Assessee and COA could not be deemed as Cost to the previous owner.

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

1521. Where the assessee sold its office unit, which was claimed to be a long term capital asset, and offered to tax the applicable gain as long term capital gain, but the AO contending that the assessee had merely received the allotment letter for the office 36 months prior to the date of transfer and had actually registered the agreement (for purchase of the office) within the 36-month period, treated the asset as a short term capital asset and taxed the gain as short term capital gain, the Tribunal held that the holding period should be computed from the date of issue of allotment letter and that since the allotment letter was issued more than 36 months prior to the date of sale of the office unit, the office unit was a long term capital asset and the gains on sale were rightly offered to tax as long term capital gains by the assessee.

Anita D Kanjani v ACIT – (2017) 49 CCH 0043 Mum Trib – ITA No 2291 / Mum / 2015

1522. The Court dismissed appeal of the Revenue against order of the Tribunal wherein the Tribunal accepted the indexed cost of acquisition calculated by the assessee (for computing capital gains) by adopting the fair market value of the land & building as on 01/04/1981. The Court held that while calculating the indexed cost of acquisition, the assessing officer wrongly substituted the fair market value of the said property with the guideline value provided to him by the Sub-Registrar since the guideline value was only one of the indicators to arrive and not the only indicator to arrive at fair market value, especially when the assessee had provided relevant material in the form of agreement for sale qua similar and comparable properties.
Commissioner of Income Tax vs. K.A.Fathima (2017) 98 CCH 0107 Chen HC (TCA No. 171 of 2017)

1523. The Court dismissed the appeal of the Revenue and held that the fair market value of the property cannot be substituted for the full value consideration u/s 48 for the purpose of computing capital gains arising on transfer of land/building the assessee to its group concern, thereby rejecting the stand of the revenue to adopt market value. It held that the expression full value of consideration u/s 48 could not be construed as the market value but was to be taken as the price bargained for by the parties to the sale. Accordingly, it held that there was no occasion for the AO to make references to the DVO u/s 55A of the Act as there was no requirement to determine FMV & therefore the reference made was without jurisdiction. Further, it rejected the Revenue's invocation of Section 50C to have the FMV determined and clarified that even if Section 50C was invoked, the stamp duty valuation would prevail and not the market value. Thus, it ruled in favour of the assessee.
Pr.CIT vs. M/s Quark Media House India Pvt. Ltd. TS-38-HC-2017(P&H) ITA No.110/2016 dated 24.01.2017

1524. Where the assessee sold shares in Scorpio Beverages Pvt Ltd ('SBPL') to a Mauritius based company for a consideration of Rs.63.69 per share (as per the agreement), the Tribunal held that the AO erred in invoking section 50D of the Act and substituting the actual sale consideration with the fair market value observing that i) Section 50D would apply only when the consideration of the asset was not determinable (which was not so in the instant case and that ii) full value of consideration could not be reckoned as FMV unless the Act specifically provided so and that Section 50CA was introduced vide Finance Act 2017 and was not applicable to the assessee's transaction. It further held that the fair market value as determined by the AO did not accrue to the assessee.

However, it noted that as per an arrangement between the assessee and the Hutch Group, the assessee along with his wife, held 100% of equity shares of SBPL which in turn, through its step down subsidiaries held equity shares in Hutchison Essar Ltd. (HEL) [which was subsequently taken over by Vodafone International Holdings BV and was renamed as Vodafone India Pvt. Ltd ('VIL')]. It noted that as per the arrangement, Vodafone International Holdings Pvt. Ltd, as and when permitted by Government of India by way of relaxation of the limits imposed on foreign investment in the telecommunication sector, had the option to acquire the shares of SBPL from the assessee. Therefore, it held that the sale consideration of shares in SBPL was linked with the FMV of VIL and held that the consideration had to be determined by taking into consideration the value per share of VIL as well. Accordingly, resorting to Rule 11UA, it computed the per value share of SBPL at Rs. 131.86 after taking into consideration the value per of VIL and directed the AO to re-compute the capital gains in accordance with the mechanism adopted by it.

Shri Analjit Singh [TS-572-ITAT-2017(DEL)] -I.T.A .No.-4737/Del/2017 dated 1.12.2017

1525. The Court upheld the Tribunal's order and held that the date of handing over of physical possession of property by assessee-individual (i.e. March 1, 2008), and not the date of execution of Development Agreement (i.e. September 13, 2007) was to be considered as the date of transfer. Accordingly, it allowed the assessee's capital gains exemption claim u/s. 54EC by holding that the investments made by assessee in August 2008 was within the 6 months deadline prescribed u/s. 54EC which was denied by the Revenue on the ground that the 'transfer' of asset was effected on the date of execution of Development Agreement (i.e. September 2007) and not the date of handing over of physical possession of property. The Court further observed that on the date of execution of the development agreement, the entire consideration was not received by assessee and that the entire consideration was received only

when the possession was handed over by assessee to the developer on March, 1, 2008 when the complete control over the property was passed on to the developer.

CIT v Dr. Arvind S. Phake - TS-603-HC-2017 - INCOME TAX APPEAL NO.139 OF 2015 dated 20.11.2017

1526. Where the assessee transferred its shareholding in 2 companies in which he was director viz. ABL and ACDL in lieu of shares of another group company AIPL and returned long term capital gains adopting the valuation of shares of AIPL as on the date of accepting the exchange (i.e. Rs.32.42 – arrived at by an independent valuer) as the sale consideration, the Tribunal held that the AO was unjustified in disregarding the valuation of the independent valuer and computing the sale consideration @ Rs.65 per share on the basis of a solitary sale transaction undertaken by the assessee on the record date of the exchange as opposed to the rate considered by the assessee as on the date of acceptance of exchange and accordingly deleted the capital gains addition made by the AO. The Tribunal noted that AIPL (the company whose shares the assessee was acquiring) had extended the exchange offer on the basis of swap ratio and valuation under the offer letter which was arrived at on the basis of the independent valuer.

Mukesh Ramanlal Gandhi v Add CIT - TS-588-ITAT-2017(Mum) - ITA No.2712/Mum/2015 dated 06.12.2017

1527. Where assessee, an individual, deposited un-utilized sale consideration in capital gain account scheme within due date of filing belated tax return under section 139(4), the Court held that relief under section 54B and section 54F would be allowable. It held that it was not necessary that investment should have been made within original due date of filing return under section 139(1) noting that Section 54 refers to Section 139 for the time limit to acquire eligible new asset, which included return u/s 139(4) also i.e. time limit of one year from the end of assessment year.

Pr CIT v Shankar Lal Saini - [2018] 89 taxmann.com 235 (Rajasthan) - INCOME TAX APPEAL NO. 153 OF 2017 dated 19.12.2017

1528. Where i) land sold by assessee was entered as agricultural land in revenue records and assessed under the Land Revenue Code and moreso, the Assessing Officer had accepted agricultural income declared from land in question, the Court held that capital gain arising from sale of it could not be brought to tax in the hands of the assessee. Accordingly, it upheld the Tribunal's order and dismissed the Revenue's appeal.

CIT v Ashok Kumar Rathi - [2018] 89 taxmann.com 406 (Madras) - T.C.A. NO. 590 OF 2017 dated 07.12.2017

1529. The Tribunal held that acquisition of new flat in an apartment under construction was to be considered as a case of "Construction" and not "Purchase". Further, it held that the date of commencement of construction was not relevant for purpose of s. 54 and therefore the deduction could not be denied merely because the construction may have commenced prior to the date of transfer of the old asset. Therefore, since the construction was completed within 3 years from the date of transfer, the assessee could not be denied of the exemption.

Mr. Mustansir I Tehsildar v ITO - I.T.A. NO. 6108/MUM/2017 dated 18.12.2017

1530. Where assessee was not an agriculturist and land sold by him was never put to any agricultural use, the Court held that mere categorization of land as 'Nilam' in revenue records was not suffice to raise a presumption that it was a case of sale of agricultural land and accordingly denied the assessee's claim that the land being agricultural land was not a 'capital asset' under Section 2(14).

Sreedhar Ashok Kumar v CIT - [2018] 89 taxmann.com 145 (Kerala) - IT APPEAL NO. 251 OF 2015 dated 11.12.2017

1531. The Tribunal held that consideration received by the assessee company on assignment of developed patent of a medicine would be taxable as capital gains and would be subject to applicability of Sec.55(2) which states that cost of acquisition for self-generated goodwill, right to manufacture etc. shall be taken 'nil' and did not accept the contention of the assessee that the amount was non taxable capital receipt as no cost was incurred for developing of the patent. It

held that for developing a patent of medicine, the assessee had to carry out research analysis and experimentation, and conduct clinical tests and administering drugs to the patients and therefore the claim that no cost was incurred was not acceptable. It held that the assessee's case fell under the ambit of 'right to manufacture/produce/process any article or thing' as envisaged u/s 55(2)(a). Accordingly it held that the CIT(A) had rightly invoked Section 55 and taxed proceeds as income from capital gains.

Bharat Serums and Vaccines Ltd. vs. ACIT TS-72-ITAT-2017(Mum) ITA NO.3091/Mum/2012 dated 15.02.2017

1532. The Court held that where it was not case of Assessing Officer that assessee received a consideration more than what was mentioned in sale deed, there was no necessity for computing fair market value and accordingly Assessing Officer could not have referred matter to D.V.O. under section 55A. The Assessing Officer was only concerned with amounts actually received by the assessee. The amount received was admittedly the amount mentioned in the sale agreement.

Quark Media House India (P) Ltd [2017] 77 taxmann.com 301 (Punjab & Haryana)

1533. The Tribunal observing that the consideration received by the assessee on sale of plot was not assessed by a stamp valuation authority as no sale deed or agreement was registered, rejected the Revenue's application of Sec 50C on an unregistered document & allowed assessee's claim of long term capital loss by treating the sales consideration @ Rs. 26 lakhs as opposed to Section 50C value of 81lacs on transfer of plot to his nephews during 2009-10, holding that the provisions of 50C of the Act would not be applicable. It further held that the amendment in Sec 50C inserting the word 'assessable' w.e.f. October 1, 2009 was prospective in nature and hence was not applicable to subject AY.

Shri Ramesh Verma vs. DCIT TS-59-ITAT-2017(Chandi) ITA No. 394/CHD/2015 dated 05.01.2017

1534. The Tribunal held that the benefit under section 54F was available to HUF despite the fact that the property was purchased in the name of individual co-parcener even though HUF was an independent assessable unit under Act, as, under common law, HUF cannot be considered as a legal entity and has to be represented by any one of the coparceners. It held that when the nucleus of the HUF fund was used for purchase of property in the name of any one coparcener, the property belonged to the HUF. It further rejected Revenue's contention that since the assessee used borrowed funds and did not utilize the sale proceeds on transfer of a capital asset to invest in new property, deduction should be denied and held that "where the assessee borrowed funds and utilized it in purchasing the capital asset and thereafter used the sale proceeds or capital gain for repaying the loan borrowed, it would amount to sufficient compliance of the requirement of Section 54F of the Act.

Shri Puranchand & Family vs. Income Tax Officer TS-52-ITAT-2017(CHNY) ITA No.2974/Mds/2016 dated 31.01.2017

1535. Where the assessee had sold its erstwhile flat and shares and claimed deduction under section 54 and 54F of the Act by making investments in residential property, but the AO contending that the assessee had made investment in two flats by registering two separate sale agreements, allowed deduction only with respect to one flat, the Tribunal upheld the order of the CIT(A) and held that when the assessee acquired a flat, with the intention to use it as one residential unit, it would not make any distinction whether the flats were constructed as such by builder or same was altered or combined into one at instance of assessee. It also held that in case of beneficial provisions it was a well-accepted rule of interpretation that a liberal view had to be accepted and therefore where the assessee had made compliance of the provisions of sections in substance then, the benefit could not be denied on irrelevant considerations or for the reasons which were not material to the issue involved.

Assistant Commissioner of Income Tax [(2017) 49 CCH 007 MumTrib]

1536. The Tribunal upheld Sec 54F (capital gains exemption) benefit to assessee-individual for AY 2009-10. Noting that the assessee entered into a joint development agreement with a builder and leased the building so constructed to an educational society (which used the premises for the purpose of accommodation of students) , the Tribunal held that the flats were constructed for residential purpose and had to be considered as residential house for the purpose of exemption u/s 54F as the assessee furnished copy of plan sanctioned by municipal authorities which clearly showed that apartments constructed by builder were residential houses and merely because the house was leased out to an educational society, it could not be said that the property in question was a commercial property, which was not entitled for exemption u/s 54F. The appeal of the revenue was, accordingly, dismissed.

Income Tax Officer & Ors vs. Ravuri Sai Chaitanya & Ors. (2017) 49 CCH 0128 Vishakapatnam Trib. (ITA No. 498,499,500/Vizag/2013)

1537. The Court noting the finding of the Tribunal that the Assessee had not even started construction during the period specified u/s 54F, denied the benefit u/s 54F claimed by the Assessee by purchasing a plot of land for construction of residential flat from sale proceeds arising from transfer of his share in ancestral land and held that mere payment of development charges to the builder by the Assessee would not mean that the Assessee has satisfied the primary ingredients / condition of section 54F (construction of residential house or purchase of residential house within specified period).

Ajay Kumar vs. ITO (2017) 98 CCH 0041 All HC (ITA No. 161 of 2011 dated 02.02.2017)

1538. The Court ruled in favour of taxpayer and upheld Sec 54F (capital gains exemption) benefit to assessee-individual for AY 2012-13. Noting that the assessee alongwith his sons (in the capacity of land-owners) entered into joint development agreement ('JDA') with a builder for construction of flats for which assessee received 15 flats as consideration, it rejected the Revenue's stand that 15 flats did not qualify as 'a residential house' under in Sec 54F as the flats were in different blocks and not in the same block. Relying on the decision of the coordinate bench in V.R.Karpagam ([\[TS-529-HC-2014\(MAD\)-O\]](#)), it followed the interpretation of the phrase 'a residential house' provided therein i.e. as covering more than one flat/apartment as long as the same was in the same location/address and dismissed the appeal of the Revenue. Further, it clarified that the amendment to Section 54F vide Finance (No.2) Act, 2014 substituting 'a residential house' with 'one residential house', was prospective in nature, and hence not applicable to subject AY

Shri Gumanmal Jain [TS-102-HC-2017 (MAD)] (TCA No. 33 OF 2017) dated 03/03/2017.

1539. Where Assessee converted the stock-in-trade of shares into investments and sold the same at a later stage, the Court held that profit arising from such sale of shares was deemed to be capital gains and not business income, and since the shares were held as long term capital asset, profit arising from such sale had to be exempt from tax u/s 10(38) of the Act. The appeal was, accordingly, disposed of in favour of the assessee.

Deeplok Financial Services Ltd. V. Commissioner of Income Tax [2017] 80 taxmann.com 51 (Calcutta) (ITA No. 1 of 2017)

1540. The Apex Court held that where assessee-company had sold its entire running business with all assets and liabilities in one go, it was a slump sale of a 'long term capital asset' and should be taxed accordingly. It rejected the revenue's stand of treating the gains as short term capital gain on transfer of depreciable assets u/s 50(2) and clarified that sec 50(2) would apply to a case where the assessee transfers one or more block of assets which he was using in running of his business and not when the assessee sold his entire business as a running concern. The appeal of the revenue was, accordingly, dismissed.

Commissioner of Income Tax v. Equinox Solution (P.) Ltd - [2017] 80 taxmann.com 277 (SC) (CA No. 4399 of 2010)

1541. The Court confirmed Tribunal's order holding that value of broken bottles should not be reduced from written down value while computing short term capital gains u/s 50 of the Act (relating to depreciable assets) arising from sale of bottles, pursuant to transfer of assessee's

entire soft drinks and beverage undertaking as the assessee had accounted for breakages and though the realization from the sale of broken bottles was offered to tax, loss from breakages were not claimed in computation of income.

Commissioner of Income Tax v. Alankar Business Corporation Ltd - (2017) 98 CCH 0160 ChenHC (TCA No. 2695 of 2016)

1542. The Tribunal held that the gains arising on sale of land by the assessee was exigible to capital gains tax for AY 2012-13. It characterized the assessee-individual's land (inherited from his father) as non-agricultural, despite the fact that it was purchased by his father as 'agricultural land' falling beyond 8 kms of the municipal limit and classified as agricultural lands in revenue records. Relying on the decision of the Gujarat High Court in Sarifabibi Mohamed Ibrahim [TS-5290-HC-1981(GUJARAT)-O], it held that classification of land as agricultural in revenue records is not conclusively proof of the nature of land sold by the assessee. The mere fact that the land in question was used for the purpose of agriculture in the past was not the deciding factor as to its characterization. It noted that no agricultural activities were carried out on the land in the recent past because of urbanization and real estate development that took place in that area. It also rejected the assessee's stand that at the time of sale, it had been carrying agricultural operation by way of growing Eucalyptus trees and observed that the said trees were not grown by any integrated activity involving human skill and labour. It held that there was no economic utilization of the land for earning income by carrying on agricultural operations. Accordingly, it held that the capital gains arising out of transfer of the said land was subject to capital gains taxation.

ITO vs. Shri Vijay Shah - TS-182-ITAT-2017(CHNY) - /ITA No. 2496/Mds/2016 dated 26.04.2017

1543. The Assessee HUF filed its return of income (which was processed under section 143(1) of the Act) admitting loss which included short term capital loss on account of demolition of its capital assets. The AO was of view that since demolition of asset did not constitute transfer of capital asset, prima facie loss was not allowable and income chargeable to tax had escaped assessment within meaning of section 147 of the Act and therefore reopened assessment and disallowed short term capital loss. The Tribunal, noting that the impugned asset formed part of a block of assets held that once an asset was a depreciable asset and formed a part of a Block and such block of assets had ceased to exist at end of previous year, provisions of section 50 would apply and therefore where the block of assets ceased to exist, the difference between written down value and salvage money received ought to have been treated as short term capital gain or short term capital loss, as the case may be. Accordingly, it held that the action of AO in adding back short term capital loss of amount to income of assessee was erroneous and was not in accordance with law and therefore deleted the addition made

Sidamshetty Ramesh v ITO – (2017) 50 CCH 0029 (Hyd Trib) – ITA 1421 / Hyd / 2016 dated 12.05.2017

1544. The assessee computed LTCG by treating the actual consideration received on the transfer of property as the FMV instead of adopting the stamp duty value (SDV) of the property since it was a distressed sale and the SDV was not reflective of the real FMV of the property. The assessee requested the AO to make the reference to the valuation officer u/s 50C(2) for determining the FMV of the property. However, rejecting the assessee's request, the AO adopted the SDV of the property u/s 50C(1) as the FMV since it was higher than the consideration actually received on transfer of property. The CIT(A) held that the assessment was bad in law and annulled the assessment. On Revenue's appeal, the Tribunal held that where the SDV of the property exceeded the FMV, the AO ought to have referred to the valuation officer u/s 50C(2) and the non-compliance of the provisions prescribed u/s 50C(2) was not justified. Accordingly, it upheld CIT(A)'s annulment of the assessment. It rejected the Revenue's contention that the matter should be set aside to the file of the AO for making reference to the valuation officer and held that setting aside could not be exercised so as to allow AO to cover up the deficiency in the case.

Aditya Narain Verma (HUF) [TS-220-ITAT-2017(DEL)] ITA No. 4166/DEL/2013 dated 07.06.2017

1545. The assessee had acquired the property from his ancestors which was subject to mortgage. He had paid expenditure for cancellation of lease rights and taking possession of mortgaged property and claimed it as part of cost of acquisition of the property. The AO disallowed the same contending that the property was mortgaged by the previous owner and the impugned expenditure could not be allowed to be taken as part of cost of acquisition. The CIT(A) upheld the order of the AO. The Tribunal held that when the mortgage was created by the previous owner during his life time, the assessee obtained only mortgagor's interest in the property and by discharging the mortgage debt, he acquired mortgagee's interest in property. Therefore, it held that the amount paid to clear off mortgage was cost of acquisition of mortgagee's interest in property which was deductible as cost of acquisition u/s 48.

MANIZA JUMBAHOY vs.ACIT (2017) 50 CCH 0123 HydTrib ITA No. 998/Hyd/2012 dated 02.06.2017

1546. The assessee owned plots of agricultural land which it converted to non-agricultural land and sold during the year. It offered to tax the LTCG arising on sale of land. The land was shown as investment in the books and was subjected to wealth tax. The AO observed that the assessee had converted the agricultural land into non-agricultural land prior to its sale with the intention to fetch the competitive price and that the land was sold to real estate developer which shows that the same was in the nature of stock-in-trade and not capital asset. Accordingly, it treated the sale of land as adventure in the nature of trade taxable under the head 'business income'. On appeal, CIT (A) upheld the AO's order. The Tribunal noted that the assessee sold only few plots during the relevant AY and there was considerable time lag between the purchase and sale and that the land was shown as investment in the books of accounts of the assessee. With respect to conversion of land into non-agricultural prior to sale, the Tribunal held that such an act was to maximize the gain on sale of property. Further, it held that the intention at the time of acquisition of asset and not at the time of sale was to be seen to determine whether it was a business or a capital asset. Accordingly, it allowed the assessee's claim of treating profit on sale on plot/land as capital gains.

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

1547. The shares of the assessee company were held by 3 families. The assessee company owned shares of M/s.R.S.Rekhchand Mohta Spinning and Weaving Mills Ltd. (RMSWML) and M/s. Vaibhav Textiles Mills Ltd. (VTML) Pursuant to family settlement between the shareholders family, the assessee company was required to transfer the shares of RMSWML and VTML to 2 shareholder families. The assessee contended that no capital gains was chargeable to tax since the transfer was in pursuance of family settlement which was not a transfer. The AO contended that the same was chargeable to tax as the family settlement was between the shareholders and the company being a separate legal entity could not have entered into family settlement. The CIT(A) held that family arrangement/settlement would only be applied to members of the family who were parties to the settlement and not to the assessee company even though it was under control and management of the members of the family. The Tribunal upheld the order of AO and the CIT(A). The Court held that share-transfer by the assessee-company pursuant to the family arrangement among the shareholders of the assessee-company was not exempt as the assessee-company was a separate legal entity and was not a party to the family settlement. Further, it rejected the assessee's contention to lift the corporate veil on the ground that it would deny the separate existence of the company.

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

1548. The assessee-individual invested substantial amount of capital gains on sale of residential house in a flat (i.e under-construction property) before the due date of filing ROI and claimed deduction u/s 54. However, the possession was not handed over by the builder to the assessee. The AO denied the deduction u/s 54 on the ground that builder was not able to handover the possession of the flat to the assessee within the stipulated period of 3 years from the date of transfer of original asset. The CIT(A) upheld the order of the AO. The Tribunal observed that substantial amount of capital-gains was invested in new flat before the return filing due-date and

the flat was also allotted to assessee, and held that the exemption could not be denied even if construction was not completed within specified period.

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

1549. The Tribunal dismissed the assessee-company's plea that since shares were deposited in Escrow account in terms of the Arbitration Award (pursuant to a family settlement), there was no transfer of shares as contemplated u/s. 2(47) and upheld the capital gains taxability on transfer of shares for AY 1996-97. It dismissed the argument of the assessee that there was no 'transfer' as the shares were deposited in an escrow account, noting that the issue was not raised by assessee in the original assessment proceedings and clarified that the same could not be raised for the first time in remand proceedings. It held that that the scope of assessment proceedings could not be widened in the remand proceedings.

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

Mangala Investments Ltd. vs DCIT-TS-245-ITAT-2017(Bang)-ITA No. 1322/1323/1324/bang/2012 dated 01.05.2017

1550. The Court set aside the Tribunal's order and denied the assessee capital-gains exemption benefit u/s. 47(xiv) upon take-over of assessee's proprietary concern by a company during AY 2001-02, as sub-clause (c) condition (of receiving consideration only by way of share allotment) was not met. It noted that the assessee-proprietor was allotted shares only to the tune of Rs. 1.52 cr out of the net assets worth Rs. 5.17 cr taken over by the company. Noting that there was clear deficit, which was never paid or satisfied in the form of shares as envisaged under Section 47(xiv)(c) of the Act, it rejected the Tribunal's reasoning that the 'deficit' was to be treated as 'loan' given by the proprietorship concern thereby reducing the net assets of the company for which shares were to be issued. Clarifying that "under no circumstances could a person borrow from himself", it emphasized that the 'proprietor' and 'proprietorship concern' are not two different entities. It held that whatever was pumped in by the 'proprietor' to his proprietorship, was nothing other than investment which formed part of the assets, which, when taken over by the Company, would have to be compensated [after deducting the liabilities] and that to claim benefit under section 47(xiv)(c), such compensation was to be discharged by the company only by allotting shares and in no other manner.

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

1551. The Tribunal, relying on the decision of the High Court in Sri. Ved Prakash Rakhra (2015) 370 ITR 762 (Kar), held that for the purpose of determining the consideration arising from transfer of land by the assessee to a developer under a Joint-Development Agreement, the fair market value of the proposed construction as on the date of the agreement was to be adopted. Accordingly, it held that the AO had erred in considering the cost of construction as consideration accruing to the assessee on account of transfer.

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

1552. The assessee-company declared short term capital gain and long term capital gains. The AO treated the capital gains as business income considering the frequency of transactions of purchase and sale of shares (in light of the circular no 4/2007), and held that the main business of assessee was trading in shares. The CIT(A) held that profit on sale and purchase of shares was to be treated as capital gains as the assessee had been consistently showing capital gains and the same was accepted by the Revenue in the earlier years. The Tribunal held that there was nothing on record to demonstrate any change in facts and circumstances during year under consideration and there was no justification to support the findings of the AO that capital gain claimed by assessee was in nature of business income or that main business of assessee was that of share trading. Accordingly, it dismissed the appeal of the Revenue.

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

1553. The Tribunal allowed deduction u/s 48 to the assessee-individual with respect to expenses incurred for clearing the encumbrances on the shares while computing capital gains on sale of shares of Navbharat Power (NPPL) [held by him in individual capacity as well as shares held by a company -MEVPL in which he was an MD]. Assessee had entered into an agreement with ESSAR power Ltd for sale of NPPL' shares as per which the shares were required to be free of all encumbrances and hence to safeguard the transaction, the assessee (in his individual capacity and also as MD of MEVPL) agreed to pay financial compensation to settle the dispute with PVP group (with whom the shares of MEVPL group were pledged).

Y. Harish Chandra Prasad [TS-385-ITAT-2017(HYD)] ITA No. 1592/Hyd/2014

1554. The Tribunal upheld the order of the CIT(A) and held that where there were 2 valuation reports for the purpose of determining stamp duty value u/s 50C (viz. the Registered Valuer's Report and the DVO's Report), and the DVO's report had not taken into account certain vital facts, the CIT(A) was justified in rejecting the report of the DVO and accepting the Registered Valuer's report. Accordingly, it rejected the contention of the Revenue that it was not open to the appellate authority to reject the DVO's report and held that since determination of "fair market value" is a factual determination, if the DVO's report was proved wrong on facts then the appellate authority could adopt other methods of valuation.

DCIT vs. Bajaj Chemcials (2017) 50 CCH 0265 Kol Trib (ITA No. 640/Kol/2015 dated August 23, 2017)

1555. The assessee had invested sale proceeds from transfer of residential house property in another residential house property and had claimed deduction u/s 54, the AO based on spot enquiries during regular assessment denied deduction u/s 54 as he was informed that the assessee had entered into a development agreement and demolished the impugned property in the subsequent year. Restricting itself to the claim for the relevant AY, the Tribunal held that the AO was unjustified in denying the deduction u/s 54 on the basis of an event which happened in a subsequent year. It held that since no such demolition occurred in the year in which claim was made, the AO could not travel back to the impugned AY and deny exemption.

Vikas Kumar TS-328-ITAT-2017(HYD)(ITA No. 758/Hyd/2017 dated July 26, 2017)

1556. Where the AO sought to tax the gains arising on sale of assessee's land alleging that it was non-agricultural income in the past 5 AYs but the CIT(A) and the Tribunal post examining the relevant details (viz., copy of sale deed, revenue records, survey report, positive income/loss from cultivation of trees and vegetables reflected in the capital account) held that the land was in fact agricultural and deleted the addition of the AO, the Court held that the question before it was not a substantial question of law. It held that it was not for the Court to re-analyse evidence or determine whether evidence on record was sufficient to justify the finding and accordingly dismissed the Revenue's appeal.

CIT vs. Dr. N. Rangabashyam (2017) 99 CCH 0185 ChenHC T.C.A. No. 429 of 2017 dated 02/08/2017

1557. During AY 1995-96, the assessee had entered in to an agreement for selling rights in an industrial plot in Mumbai and had simultaneously shifted its industrial undertaking to Nashik (in a non-urban area) but the agreement could not materialize and land was finally sold in 2004 to a new developer and immediately after receiving the sale proceeds the assessee had invested the money in purchasing plant and machinery for the factory at Nashik (which was already operational in 1995) and deposited part of it in capital gains account scheme. The Tribunal allowed the assessee company's claim of exemption u/s 54G with respect to capital gains arising on sale of land and rejected Revenue's denial on the ground that the investment was made in plant and machinery after 9 years of shifting of industrial undertaking. It further clarified that there was no precondition in the section that new machinery should be purchased at the time of shifting of industrial undertaking and that the assessee could purchase machinery even after shifting and commissioning of business from the new premises.

Everest Industries Ltd. vs. ACIT-TS-410-ITAT-2017(Mum)-ITA no. 815/mum/2007 dated 15.09.2017

1558. The Tribunal, allowed the assessee individual section 54F exemption for AY 2010-11 with respect to long term capital gains (LTCG) arising to assessee-individual upon flat sold on November 18, 2009 and rejected Revenue's action of treating the gains as short term. It rejected Revenue's contention that the date of registration i.e October 6, 2007 should be considered as acquisition date, and relying on the Delhi HC decision in Gulshan Malik held that the date of execution of agreement to sale executed by builder in favour of assessee (i.e 16 november 2006) was to be treated as date of acquisition. It also rejected Revenue's contention that assessee had intentionally waited for mechanical lapse of 36 months and had deliberately put the date on agreement as November 18, 2009 to avoid the payment of tax, despite stamp duty paid earlier on November 6, 2009 and held that every individual had a right to deal his assets as per his own choice and convenience and the Revenue would not dictate any particular way unless otherwise the transaction was prohibited by law.

Michael Jude Fernandes vs ITO-TS-399-ITAT-2017(Mum)-ITA no. 3557/mum/2014 dated 18.08.2017

1559. The Tribunal, applying the provisions of section 55A(2)(a) held that no reference could be made by the AO to the DVO if in the opinion of the AO value shown was very high i.e more than the fair market value of the property as on 1st April, 1981. Accordingly, it held that the estimation of the fair market value of the property as on 1st April 1981 as made by the assessee had to be accepted.

Royal Calcutta Turf Club & Anr vs Deputy CIT [2017] 51 CCH 78 Kol Trib. ITA No. 231/Kol/2013, 204/Kol/2013

1560. The Apex Court, relying on the decision in the case of Ghanshyam (HUF) [TS-5026-SC-2009-O], set aside High Court order and held that as per the provisions of the amended section 45(5) in the Income Tax Act, enhanced compensation and interest thereon received by the assessee by an interim order in respect of land acquisition was taxable in the year of receipt.

Chet Ram (HUF) vs CIT-TS-423-SC-2017 Civil appeal No. 13053 / 2017 dated 12.09.2017

1561. The Tribunal held that the signature bonus received by the assessee for demitting 60% of rights in the oil fields was a non- taxable capital receipt. It noted that the amount was received by assessee under the joint operation agreement ('JOA') pursuant to surrendering 60% of rights to other companies and rejected revenue's stand that since the JOA was entered in respect of a business already yielding revenue, the amounts were revenue in nature. It held that when revenue yielding ongoing concern was transferred there would only be capital gain or capital loss. Further it noted that the transaction did not result in any capital gain considering that for transfer of 60% share in oil fields (having book value of Rs. 882.86 crores), assessee received only sum of Rs. 219.76 crores.

Oil & Natural Gas Corporation Ltd-TS-428-ITAT-2017(DEL) ITA No.1967/Del/2014 dated 14.09.2017

1562. The Tribunal upheld assessee's right to claim capital gains exemption u/s 54F in a belated return of income filed in compliance to a notice issued u/s 148 and held that section 54F did not cast any statutory obligation on part of the assessee to file its return of income within the stipulated time period contemplated u/s 139 or 148 of the Act as a precondition for claim of exemption. Further it rejected Revenue's contention that return was invalid since it was filed beyond the specified 30 days period from the date of service of notice and held that the same would not cease to be a return of income filed pursuant to the notice u/s 148, though involving some delay.

Amina Ismil Rangari vs ITO-TS-424-ITAT-2017(Mum) I.T.A. No. 6261/Mum/2013 dated 15.09.2017

1563. The Tribunal relying on Karnataka HC ruling in C.N. Anantharaman (ITA No. 1012/2008 dated 10/12/2014) allowed the assessee deduction u/s 54 against capital gains on sale of land appurtenant to the residential house owned by assessee held that for claiming deduction u/s 54 it was not necessary that the whole of the residential house should be sold, as the legislature has used the words residential house 'or' land appurtenant thereto which is distinctive in nature. The

Tribunal rejected Revenue's stand that since the capital asset sold by assessee was the 'land appurtenant to the house' but not the 'residential house' itself, deduction could not be allowed. With respect to 'cost of acquisition of property sold' u/s. 49(1) for the purposes of computing capital gains, Tribunal noted that the land sold during the year was part of the portion of the property inherited by assessee from his mother in 1994 (who had acquired the property in 1985 under a will). The Tribunal held that as far as assessee was concerned, the cost to immediate previous owner should be taken for the purposes of Sec. 49 and accordingly FMV of land as on 1985 was to be considered. The Tribunal rejected the AO's stand to consider circle rate of property as on April 1, 1981 as against market value determined by registered valuer. The Tribunal relied upon Allahabad HC ruling in Dinesh Kumar Mittal (193 ITR 170) wherein it was held that there is no rule to the effect that stamp duty valuation was to be taken as market value.

Sh. Adarsh Kumar Swarup vs. DCIT TS-285-ITAT-2017 (ITA No. 1228/Del/2016 dated March 23, 2017)

1564. The Tribunal held that the AO is not entitled to make an addition to the sale consideration declared by the assessee if the difference between the valuation adopted by the Stamp Valuation Authority and that declared by the assessee is less than 10%.

John Fowler (India) Pvt Ltd vs DCIT-ITA No. 7545/Mum/2014 dated 25.01.2017

1565. Where as per a Joint-Development Agreement between the assessee and a developer, the assessee was to transfer possession of 21.2 acres of land to the developer for development but the agreement fell through after payment two installments (on which the assessee had already paid tax) for want of permission from the authorities, the Apex Court dismissed the Revenue's appeal and held that the assessee was not liable to capital gains on the transfer of possession of the balance part of the land in the absence of registration of the JDA which was pre-condition laid down by way of Amendments to Section 53-A of the Transfer of Property Act and the Indian Registration Act. It noted that as per the agreement, the third installment was payable only after the developer had obtained requisite approvals and that as per the termination clause contained in the agreement in the event of the JDA being terminated, whatever parcels of land which had already been conveyed, would stand conveyed, but that no other conveyances of the remaining land would take place. Accordingly, it held that the High Court was justified in holding that the transfer of possession would not amount to a transfer under Section 2(47)(v) of the Act.

Balbir Singh Maini [TS-444-SC-2017] - CIVIL APPEAL NOS. 15619 TO 156677 OF 2017 dated 04.10.2017

1566. The Tribunal, relying on the decision in the case of Shyam Sunder Mukhija vs ITO [1991 38 ITD 125] wherein it was held that a farm house could also be treated as a residential house eligible for exemption u/s 54F, held that where the assessee established the existence of a residential structure in the property purchased by way of evidence relating to facilities of water, electricity and other sanitation, the assessee was entitled to claim exemption u/s 54 of the Act. It held that whether or not other facilities befitting the lifestyle of the assessee were available or whether the assessee was residing there or not was irrelevant for grant of exemption.

Manoj Kumar Sabharwal vs ITO (2017) 51 CCH 188 DelTrib. ITA No. 3930/del/2017 dated 16.10.2017

1567. The Tribunal accepted the assessee's treatment of amount received for transfer of its customers and business leads to its sister concern pursuant to the collapse of its business as 'business receipts' and rejected the Revenue's stand of the transaction as slump sale u/s. 50B. Referring to the definition of 'slump sale' u/s. 2(42C) which presupposes the transfer of one or more undertakings for a lump sum consideration without assigning of values to individual assets and liabilities and the definition of an undertaking as per Explanation 1 to Sec. 2(19AA), it held that the assessee had neither transferred an undertaking nor a unit / business activity and had in fact received itemized consideration for the customer list and business leads which under no circumstance would attract the provisions of Section 50B. It held that lower authorities failed to appreciate that the very business of the assessee had collapsed, and therefore, it would be beyond comprehension to conclude that the assessee would be in a position to have transferred a business activity.

L&T Finance Ltd vs DCIT-TS-498-ITAT-2017-ITA No. 2577/Mum/2010 dated 25.10.2017

1568. The assessee, a resultant amalgamated company filed a revised return reducing the short term capital gains declared by one of the amalgamating companies on sale of depreciable assets prior to amalgamation, contending that prior to amalgamation the block of assets ceased to exist in the hands of the amalgamating company but post amalgamation since the accounts of both companies were merged the block of depreciable assets did not cease to exist as there were additions to the said block and therefore the provisions of Section 50 would not apply. The CIT(A) disagreeing with the assessee enhanced its income by the said short term capital gains. The Tribunal reversed the order of the CIT(A), observing that even though the sale of assets of the one of amalgamating company took place, there were purchases made by the other amalgamating company as a result of which the block continued to exist and therefore held that the pre-conditions of Section 50(1) i.e. extinguishment of block of assets were not fulfilled and therefore no short term capital gains could arise.

Makino India Private Limited vs ITO-TS-448-ITAT-2017(bang)-TP LT.(T.P)A. No.1015/Bang/2014 dated 13.09.2017

1569. Where assessee sold his agricultural land and claimed deduction u/s 54B by investing sale proceeds in agricultural lands which was disallowed by the AO on the ground that purchase was made by way of an 'agreement to sell' and not through registered deed, the Tribunal allowed deduction u/s 54B against capital gains earned on sale of agricultural land to assessee and held that since the assessee had obtained possession of new agricultural property with full rights by way of agreement to sell, the registration of sale deed was not necessary. It relied on SC ruling in Sanjeev Lal wherein considering Sec.2(47), it was held that, capital asset could be deemed to have been transferred if a right in a property was extinguished by executing an agreement to sell.

Anil Bishnoi vs ACIT [TS-459-ITAT-2017(CHANDI)] ITA No. 1459/Chd/2016 dated 27.09.2017

1570. The Tribunal granted concessional rate of tax of 10% u/s 115E on long term capital earned on sale of bonus shares as well as shares acquired from foreign investors without any consideration, to non-resident assessee. The assessee had purchased certain shares of a company promoted by him with his father, using convertible foreign exchange, on which he was subsequently allotted bonus shares, further certain shares purchased by foreign investors using convertible foreign exchange, were transferred to him (due to non-fulfillment of certain conditions by such shareholders) on which also he was allotted bonus shares. Noting that the assessee could not have acquired bonus shares unless he owned the original shares and fulfilled conditions for allotment of bonus shares, the Tribunal relying on Apex court ruling in Dalmiya Investment Co Ltd, held that the bonus shares acquire the nature of the original shares, though the cost of acquisition shall be 'nil' u/s 55(2)(aa). Further, regarding shares acquired from foreign investor without any cost of acquisition, the Tribunal noting that such investors acquired those shares in convertible foreign exchange and AO had accepted the gains on them as LTCG, after considering holding period in the hands of foreign shareholders held that as the assessee received shares without any cost, it was to be treated as gift and cost of acquisition of the previous owner shall be the cost of acquisition to the assessee and therefore, such shares were also foreign exchange assets u/s 115E.

Shashi Parvatha Reddy vs DyCIT-TS-486-ITAT-2017(HYD)-ITA No.392/Hyd/2017 dated 31.10.2017

1571. The Tribunal deleted capital gains addition under Section 45(4) of the Act made by the AO on the payment made by the firm to the retiring partners on account of settlement of their accounts. The assessee had acquired land in 2005 for Rs.4.67 crore which was revalued at Rs.67.92 crore in 2008 upon admission of a new partner. Subsequently, during the impugned AY, 3 partners retired from the firm and took the amount standing to their credit including the amounts on revaluation of land. The AO alleging that the entire arrangement was a scam to transfer the land from the retiring partners to the newly admitted partner (as pursuant to the admission of one partner and subsequent retirement of three partners, the new partner gained a larger share in the firm and in the land) added the entire revalued amount i.e. Rs.67.92 crore as income of the

assessee under Section 45(4). The Tribunal noting that there was no distribution of assets of the firm to the partners, held that the provisions of Section 45(4) of the Act were not attracted. It held that in the instant case, it was the firm and the continuing partners that had acquired the rights in the assets of the firm from the retiring partners, which was a taxable transaction in the hands of the retiring partners and not in the hands of the firm.

Mahul Construction Corporation v ITO – TS-550-ITAT-2017(Mum) - ITA No. 2784/Mum/2017 dated 24.11.2017

1572. The assessee while computing the capital gains in respect of sale of development rights of salt pan, excluded the amount of 50 crores which was to be received in the event that a part of the land was developed under the CRZ notification on the ground that it was a contingent sum which could not be considered as income. The Tribunal, noting that no permission for development work had been given till date, held that assessment had to be made on the basis of real income and since there was no certainty that the assessee would receive the amount in the future, it could not be included in the sale consideration. It further held that expression “full value of consideration received or accruing” u/s 45 would mean the amount actually received by the assessee or consideration which had accrued to the assessee. Accordingly, it held that the Revenue could not assess any hypothetical or notional income to tax and deleted the addition of 50 crores in respect of sale of land.

Late Shri Gordhandas S Garodia vs DCIT – ITA No. 5097 / mum / 2015 dated 1.11.2017

1573. Where wholly owned subsidiary of assessee, namely 'Apex', a Mauritius based company, sold shares held by it of another company namely 'IDEA' to an unrelated Indian company, since there was absence of transfer of assets by resident to a non-resident, transaction in question would not fall within ambit of section 93 and, therefore, capital gain arising out of sale of shares of 'IDEA' by 'Apex' was not taxable in hands of assessee.

Tata Industries Ltd v ACIT - [2017] 87 taxmann.com 240 (Mumbai - Trib.) dated 10.11.2017

g. *Income from Other Sources*

1574. The Tribunal dismissed Revenue's appeal for AY 2008-09 & held that pre-operative expenses towards audit fees, salaries, legal and professional charges, financial and bank charges were allowable u/s 57(iii) since such expenditure was essential for retaining assessee's corporate entity status. It noted that the AO had not questioned genuineness of expenses, but disallowed them on the ground that the assessee had only acquired land and manufacturing facilities during the subject year and thus its business was not set up and accepted assessee's reliance on plethora of judicial precedents wherein it was held that where a “company had to file various statements and returns and perform various functions to retain its status as a company for which it had to incur certain expenditure , such expenditure was allowable as deduction under section 57(iii) of the Act.

ACIT vs. L.S.Cable India Pvt Ltd. TS-58-ITAT-2017(DEL) ITA No.1257/Del/2012 dated 09.02.2017

1575. Where the assessee had leased premises which was fully furnished, centrally air conditioned and with adequately power backed generator and offered the rental income under the head 'income from house property', after claiming deduction u/s 24(a), the Court upheld the AO's order and held that the rental income of the assessee was composite rent i.e. both for building as well as he machinery and furniture which was taxable u/s 56(2)(iii). It further held that the assessee was entitled for claim of depreciation u/s 57(iii) and directed the AO to give effect for the same.

JAY METAL INDUSTRIES PVT. LTD. vs. CIT (2017) 99 CCH 0101 DeIHC ITA 308/2016 dated 13/07/2017

1576. The Tribunal dismissed the Revenue's appeal and held that Signature villa at Dubai received as 'gift' by assessee from Dubai's leading private limited construction company ('donor company') was not taxable in the hands of the Assessee. It rejected Revenue's stand that the gift transaction was mere camouflage for payment of consideration for brand endorsements performed by the Assessee for donor company, noting that Assessee was not under any

obligation to undertake any sort of brand endorsements. The Tribunal further noted that Assessee's presence at the donor company's annual day celebration and further addressing its employees was a mere goodwill gesture and did not mean that Assessee was involved in brand endorsement for donor. Further, the Tribunal observed that amended Sec 56(2)(vii) (which now includes gift of immovable property under its ambit w.e.f October 1, 2009) was not applicable for relevant AY (2008-09) and therefore would not apply in the instant case.

ACIT vs. Sharukh Khan TS-354-ITAT-2017 (ITA No. 8555/Mum/2011 dated August 18, 2017)

1577. Where the assessee had taken loans in foreign exchange for construction of plant and realized a foreign exchange gain on revaluation of loan liability for capital expenditure. The Tribunal relying on the Delhi HC ruling in the case of CIT vs. Jagajit Industries Limited [TS-5787-HC-2009(DELHI)-O] held that the entire gain due to the fluctuation in foreign exchange when the source of funds was for capital expenditure was a capital receipt. Accordingly, it upheld the order of the CIT(A) whereas such addition was deleted.

ACIT vs. L.S.Cable India Pvt Ltd. TS-58-ITAT-2017(DEL) ITA No.1257/Del/2012 dated 09.02.2017.

1578. The Tribunal deleted addition u/s. 56(2)(viib) in case of assessee-company (engaged in investment and financing) with respect to issuance of 0.1% redeemable non-cumulative preference shares ('RNCPS', of face value Rs.10 per share) at a premium of Rs.1,990 per share during AY 2013-14. It upheld the the fair market value ('FMV') determined by the valuer and rejects valuation arrived at by AO. It noted that the AO determined the FMV of the preference shares at Rs.1285.41/- per share (adopting 15% discount factor) as against the FMV of Rs.2,000/- determined by the valuer (adopting 10% discounting factor) and made addition u/s. 56(2)(viib) of Rs.14. 64 cr and held that the method followed by the valuer who arrived at 10 percent based on the rate of return on preference shares issued by other companies for the relevant period. However, it rejected the assessee's contentions that AO could not disregard valuation report from an independent accountant and that in case the AO was not satisfied with the value determined by the expert valuer, then the only option was to get it done by another expert valuer and held that the AO not only has a right but he is also duty bound to examine the valuation report, evaluate it and record his findings on the same.

Microfirm Capital Pvt. Ltd v DCIT - TS-587-ITAT-2017(Kol) - I.T.A. No. 513/Kol/2017 dated 30.11.2017

1579. Where assessee received amount on time of her retirement from partnership firm after surrendering her right, title and interest, the Tribunal held that the same was said to be received for consideration (i.e. the surrender of her right, title, interest in the firm on her retirement) and, thus, same could not be taxable in hands of assessee under section 56(2)(vi) of the Act and that the same was taxable as income from capital gains.

Smt. Vasumati Prafullachand Sanghavi – DCIT - [2018] 89 taxmann.com 95 (Pune - Trib.) - IT APPEAL NO. 161 (PUN.) OF 2015 dated 13.12.2017

1580. Where the assessee entered into an agreement with Shapoorji Pallonji & CO Ltd ('the company') pursuant to which the company provided the assessee a business advance which was to be used by the assessee for purchase of the land for the company, the Tribunal held that the AO erred in taxing the receipt business advances u/s 56(2)(vi) merely on conjecture / surmises contending that the receipt of money was for no consideration, without appreciating the assessee furnished a copy of the board resolution passed by the company approving the advance to the assessee and the company also confirmed that it had provided advance to the assessee in pursuance of the agreement. It held that the AO failed to establish how the business advance represented the assessee's income and accordingly deleted the addition made by the AO.

Shri Nilesh Janardan Thakur v ITO - I.T.A No.3738/Mum/2013

1581. Where the assessee's brother was swept away in a river due to flood a month before date of filing return i.e. 31-10-2007 and the assessee had repeatedly visit the site of the accident from

time to time with a hope of tracing his brother as a result of which the audit of books as prescribed under section 44AB was delayed and was ultimately completed only on 20-2-2008 pursuant to which return was filed by assessee, the Court held that the Board was not justified in refusing to condone the delay in filing of return of income. It held that state of mind of assessee due to tragic event had to be appreciated by Board and mere fact that Revenue had found that business income of assessee grew during relevant year was no ground at all to deny relief to assessee. Considering that the circumstances were beyond control of assessee, it set aside the previous order of the Board and held that the application made by assessee seeking relief under sub-section (2) of section 119 for condonation of delay in filing return of income was to be reconsidered.

Babulal Mohanraj Jain v CBDT - [2018] 89 taxmann.com 158 (Bombay) - WRIT PETITION NO. 8022 OF 2012 dated 08.12.2017

h. Assessment / Re-assessment / Revision / Search

Assessment

1582. The Court rejecting the assessee's claim that CIT, being a mere adjudicating authority under the act could not challenge the order passed by Settlement Commission, being a statutory authority under the Act set aside the order of Settlement Commission's final order passed under section 245D. The finality of settlement commission order cannot oust the jurisdiction of a High Court under Articles 226/227 of the Constitution.

The Settlement Commission [TS-17-HC-2017(KER)]

1583. The Apex court granted immunity to the assessee from prosecution under section 245H despite tax & interest payments made beyond the time specified by settlement commission vide its final order under section 245D(4) since he had made all payments before filing the SLP

Sandeep Singh [TS-26-SC-2017]

1584. The Court, following the decision of division bench in the case of Andrew Communications India Ltd. (W.P. No. 1021 of 2016), quashed the notices issued by the Revenue u/s 226(3) and held that Revenue was not justified in attaching the bank accounts of the Assessee since, admittedly, 15% of the disputed demand had been already recovered.

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

1585. The Court dismissed the appeal of the Revenue on the ground that the Counsel for the Revenue could not dispute that questions raised before the Court in connection to whether Tribunal erred in facts in restoring the turnover recorded in the BOA of Assessee instead of turnover estimated by the AO were merely questions of facts and not of law. The Court clarified that ordinarily in two situations only inference on the basis of facts is possible viz a) when material which has not been considered would have led to opposite conclusion than the one already taken and b) a finding of fact has been given by a lower authority by placing reliance on an inadmissible evidence, exclusion of which would have led to an opposite conclusion.

ITO vs. Shri. Ram Lallan Shukla (2017) 98 CCH 0043 All HC (ITA No. 78 of 2015 dated 03.02.2017)

1586. Where the assessee had filed its return of income on November 20, 2006 mentioning its address as Mittal Court, Nariman Point and subsequently on November 23, 2006 informed the AO vide a letter that its address had been changed to Ruby House, Dadar and the AO on November 28, 2007 issued a notice under section 143(2) of the Act to the Nariman Point address of the assessee, which remained unserved and then subsequently issued a notice on December 12, 2007 to the correct address of the assessee, the Court upheld the order of the Tribunal wherein it was held that the notice issued under section 143(2) was invalid as it was time barred since the last date for issuance of such notice for the relevant AY was November 30, 2007 and the consequent order passed under section 143(3) read with Section 144C(13) was also invalid. The Court noted that the assessee had objected to the proceedings at the very first instance and

therefore the assessment proceedings were not curable under section 292BB of the Act. Further, it placed reliance on Section 27 of the General Clauses Act where the expression "serve", "given" or sent would be deemed to be effected by proper addressing, prepaying and posting which was not satisfied in the instant case.

CIT v Abacus Distribution Systems (India) Pvt Ltd – (2017) 98 CCH 0058 Mum HC ITA No 1382 of 2014

1587. The Court upholding order of the Tribunal held, that period of limitation u/s 154(7) would commence from March 31, 2006 being the date of passing of Assessment order u/s 143(3) and not from the date of passing of order pursuant to remand by Tribunal being December 31, 2009 or from the date of suo moto rectification order passed by the AO of such order being January 25, 2011 and, therefore, the application made by the Assessee dated May 9, 2011 u/s 154 was beyond period of limitation. The Court noted that the issue on which application u/s 154 was filed, being set off of brought forward capital loss, was not agitated by the Assessee before any of the lower authorities and, therefore, the same attained finality as on the date of the assessment order being March 31, 2006 and that the same did not merge with the order of the CIT(A) which subsequently merged with the order of the Tribunal. The Court further noted that the IT Act has recognised 'Doctrine of Partial Merger' u/s 263(1) which states that the power of Commissioner shall extend to only such matters which has not been considered and decided in an appeal.

The Court further differed from the decision of the Delhi High Court in the case of CIT vs. Tony Electronics Ltd (320 ITR 378), relied upon by the Assessee, (which held that period of limitation should commence from the date of rectification order as from the said date the original order ceased to operate) by holding that the decision of the Hon'ble Supreme Court in the case of Hind Wire Industries Ltd. vs. CIT (212 ITR 639), relied on by the Delhi High Court, stated that order u/s 154 can be any order including amended and rectified order and, therefore, the observations made by the Delhi High Court that it includes only rectified or amended order are much more than what has been actually said in the order of the Hon'ble Supreme Court.

Shree New Durga Bansal Cold Storage & Ice Factory vs. CIT (2017) 98 CCH 0114 – All HC (ITA No. 14 of 2014 dated March 7, 2017)

1588. The Larger bench of the Court held that words 'the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner' occurring in Sec 260A(2)(a) (relating to limitation period for filing appeal before HC) is not limited only to 'jurisdictional' Principal or Chief Commissioner of Income-tax ('CIT') and it would include any CIT including the CIT (Judicial). The Court rejected Revenue's stand that unless the concerned CIT having jurisdiction over Assessee receives a certified copy of ITAT order, the limitation of 120 days within which an appeal has to be filed does not commence and held that in absence of a qualifying prefix 'concerned', the receipt of ITAT order copy by any of the officers (designated as CIT), including the CIT (Judicial) will trigger the period of limitation.

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

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

1589. The Court dismissed Petitioner-Director's writ petition and upheld order u/s 179 lifting the corporate veil and holding Petitioner in default for income-tax dues of the public company in which he was a director. The Court rejected Petitioner's contention that Sec 179 is applicable only to a private company by observing that the company partook the character of a private company as public was not invited to subscribe the share capital and there was no remote public involvement and that for the purpose of sec 179 the company could be treated as a 'de facto' private company. The Court noted that substantial accommodation entries were made during the petitioner's tenure and after his resignation the company was left with huge liabilities and the activities carried out by the company were ultra-vires the memorandum. The court further held that a director with a sizable amount of holding in the company could not be allowed to keep himself away from his responsibilities and that lifting of the corporate veil was necessary.

Ajay Surendra Patel Vs. DCIT [TS-79-HC-2017 (GUJ)] (C/SCA/6580/2016) dated 02/03/2017

1590. Where deposit of unutilised capital gains was made by the assessee in the Capital gains Account scheme within time limit provided for filing return u/s 139(5) and not u/s 139(1), the Tribunal held that section 139(5) was a part of section 139(1) and hence deposit made within time limit u/s 139(5) would also be entitled for exemption u/s 54G of the Act. The appeal of the Revenue was, accordingly, dismissed.

Deputy Commissioner of Income Tax v. Kilburn Engineering Ltd [2017] 79 taxmann.com 250 (Kolkata- Trib.) (ITA No 1987 (Kol.) of 2013)

1591. Though Notice u/s 142(1) was issued and sent to the assessee, upon no reply being received, the Assessing officer completed the assessment proceedings ex parte without sending notice u/s 143(2) of the Act to the assessee either on the address mentioned in the return of income or the address mentioned on the assessment order. The Tribunal held that the AO failed to issue notice u/s 143(2) which was mandatory and failed to comply with procedure laid down in section 143(2), during the entire assessment proceedings and consequently the assessment order in dispute was invalid, void ab initio, against the provisions of the law and not sustainable in the eyes of law. Accordingly, the Tribunal canceled the same by accepting the cross objection filed by the assessee and dismissed the appeal of the Revenue.

Assistant Commissioner of Income Tax & Anr vs. Ravnet Solutions Pvt Ltd & Anr - (2017) 49 CCH 0156 DelTrib (ITA No. 4889/Del/2011)

1592. Where Assessee objected that A.O had not stated that accounts were being rejected u/s 145(2) of the Act, and that consequently the Tribunal was not justified in holding rejection u/s 145(2), the Court held that it was not mere mention of the provision but existence of substance of the intention deducible from reading the order which would determine the position of the accounts. Since there was a clear observation by the AO that showed that he was not satisfied that the accounts were complete and correct, assessee's appeal was rejected. Further, where assessee claimed exemption u/s 80HH & 80I of the Act, the Court held that in view of admission on part of assessee that it could not quantify actual amount of expenditure attributable to the new unit, wrong computation of profit of new unit was also evident, hence assessee could not have claimed deduction for the amount it had not correctly computed. Further, where assessee claimed deduction on account of commission paid to OECC, the Court held that it was an admitted position that such deduction was neither claimed by OECC nor paid by assessee and hence the AO was correct in finding the amount as genuine, fictitious and inflated. Accordingly, appeal of the assessee was dismissed on all grounds.

Ema India Limited v. Deputy Commissioner of Income Tax & Ors - (2017) 98 CCH 0164 AIHC (ITA Nos. 481&482 of 2005, 694 of 2017, 258 of 2016)

1593. The AO, vide order dated 17.2.2006, directed the assessee to get its accounts audited under section 142(2A), which was to be completed within 35 days but was extended to 07.07.2006 on applications made by the assessee. Subsequently, the AO suo moto extended the time limit to 17.07.2016. Accordingly, the AO passed the final assessment order on 14.09.2006 as opposed to 06.09.2006. The Court dismissed the appeal of the Revenue and held that the Tribunal had rightly concluded that the assessment made by the AO was time barred and was to be quashed since the period covering the suo moto extension of time limit by AO to complete audit could not be excluded for the purpose of determining the time limit for completion of assessment under section 153 of the Act. It held that it was only after 2008 that the said period could be excluded by virtue of Proviso to Section 142 (2C) and since the instant case pertained to AY 2003-04 the same would not apply.

Pr CIT v Jindal Dyechem Industries Pvt Ltd – (2017) 99 CCH 0007 (Del HC) – ITA 668 / 2016 dated 05.05.2017

1594. During search proceedings, the AO held that the assessee had failed to furnish necessary books of accounts at the time of survey operation which was also admitted to by the assessee by way of a statement under section 133A. Accordingly, the AO rejected the books of accounts of the assessee and made an estimation of professional income and added the same in the hands of the assessee. Subsequently, the assessee retracted his statement and contended that the AO was incorrect in rejecting the books of accounts and making such addition. The Tribunal noted that Section 133A empowered the authority to merely record the statement of a person but

did not permit the authority to take a sworn statement on oath which was only provided for in section 132(4) of the Act. Accordingly, it held that no addition could be made on the basis of a statement subsequently retracted and moreso when the lower authorities had not pointed out any specific defect in the books of accounts which were duly audited.

Dr. Subrata Kundu v ACIT – (2017) 50 CCH 0026 (Kol Trib) – ITA No 815 / Kol / 2014 dated 12.05.2017

1595. The assessee had long-term capital gain on sale of land against which it set off the brought forward long term capital loss in its return of income. The AO enhanced the long term capital gain without setting off the long term capital loss of the assessee and passed the order on 31.02.2006. The AO's order was approved by the CIT(A). However, the Tribunal remanded the matter to AO to refer the matter to the valuation officer for determining the FMV of the property. The AO thereafter re-computed LTCG and passed the order on January 25, 2011. Thereafter the assessee filed the application u/s 154 stating that the AO had failed to setoff the brought forward capital loss against the long term capital gain. The AO however rejected the assessee's application on the ground that application was made after 4 years from the date of the original order and accordingly, was time barred. The CIT(A) and the Tribunal dismissed the assessee's appeal that the time limit of 4 years would be from the AO's order dated 25.01.2011 and not original order. The Court observed that the AO had failed to consider the brought forward loss in the original order and the assessee had neither filed the rectification application u/s 154 at that time nor appealed before the CIT(A) and the Tribunal. It held that the remand by the Tribunal was only on the issue of determination of FMV and accordingly, the AO's order dated 25.01.2011 was only on that issue and issue of setoff was not subject matter of that order and therefore, the issue of setoff had attained finality. Therefore, it held that the period of 4 years would be considered from the date of original order and accordingly, the application was time barred.

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

1596. The assessee had computed book profits u/s 115JB. Explanation to Section 115JB provides that lower of brought forward business loss or unabsorbed depreciation as per the books of accounts can be reduced from the book profits u/s 115JB. Accordingly, the assessee reduced unabsorbed depreciation as per books of accounts (being lower than brought forward business loss) from book profits and paid Nil tax. The AO accepted the computation of the assessee and completed the assessment u/s 143(3). Later the AO observed that the assessee should have set off business loss as per Income-tax Act (being lower than unabsorbed depreciation as per the Act) from book profits u/s 115JB. Accordingly, it held that there was mistake apparent from record and rectified its order u/s 154. The CIT(A) upheld the order of the AO. The Tribunal observed that the AO did not dispute computation under section 115JB at the original assessment stage. Accordingly, it held that the when the AO had considered the issue at the time of original assessment, he was not allowed to review the entire assessment order u/s 154.

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

1597. Where the assessee trust, engaged in running various educational institutions obtained a new PAN for one of its colleges for the purpose of opening a bank account, the Court held that the AO was unjustified in initiating reassessment proceedings in the case of the assessee on the allegation that the college having obtained a separate PAN having substantial bank balance ought to have filed a return of income, moreso when the receipt in the bank account had already been offered to tax by the assessee. Since the AO had not disposed of all the objections filed by the assessee, the Court directed the assessee to file supplementary objections and also directed AO to re-examine the peculiar facts, assessee's original and additional objections and granted the assessee interim relief till the AO passed a fresh order

Sardar Vallabhbhai Patel Education Society vs ITO-TS-404-HC-2017(Guj) SCA No. 17878 of 2016 dated 11.09.2017

1598. The Court quashed assessment order passed pursuant to Tribunal's remand on the ground that order was barred by limitation u/s 153(2A) [which prescribes time limit for framing assessment pursuant to Tribunal order setting aside or cancelling assessment]. It rejected Revenue's stand that section 153(2A) limitation applied only where there was complete setting aside of assessment and not when the proceedings were remanded to the AO with directions from Tribunal. Noting that in the present case, the assessment in respect of five issues (out of total seven issues) was set aside and remanded back for a fresh determination, the Court referred to the intention of legislature behind inserting section 153(2A) and highlighted the distinction between Sec. 153(3)(ii) [which provides that orders passed pursuant to any direction or finding of appellate authorities are not subject to any time limit] and Sec. 153(2A). Accordingly, it held when the assessment on an issue is set aside and the matter remanded with a direction that the issue has to be determined afresh, section 153(2A) of the Act would get attracted.

Nokia India Pvt Ltd vs Dy.CIT-TS-425-HC-2017(DEL)-W.P. (C) No. 1773/2016 dated 21.09.2017

1599. The Court held that action of the DRP in granting time to the assessee till 24th July 2017 to submit documents and then passing the order on the same day itself and that too without taking on record the documents produced by the assessee was clearly unreasonable and in violation of the principle of natural justice. Accordingly, the Court set aside the impugned order and remanded the matter to the file of DRP for fresh adjudication.

Systra SA Project Office vs DRP -W.P.(C) 7114/2017 dated 18.08.2017

1600. The Tribunal held that where the requisite notice u/s 143(2) was not served on the assessee within the time prescribed by law, the assessment framed by AO was time barred. It held that though service of the notice was not a condition precedent to conferment of jurisdiction upon the AO to deal with the matter, it was a condition precedent to making of the order of assessment. Accordingly, it held that the s. 143(2) notice had to be issued not only before the expiry of the limitation period but had also to be served upon the assessee before the expiry of the limitation period.

Cameron (Singapore) Pte Ltd vs ADIT-IT(TP)A no 2/JP/2014 dated 27.07.2017

1601. The Tribunal held that when books of account were rejected and income was computed by applying net profit rate, same books of accounts could not be made basis for making disallowance of specific expenses and claim of various expenses including depreciation was to be allowed.

SUPERIOR ROADLINES & ANR. vs. INCOME TAX OFFICER & ANR. - (2017) 51 CCH 0137 DelTrib - ITA Nos. 2827 & 2828/Del/2011, 3021 & 3022/Del/2011 dated 28.09.2017

1602. The Court dismissed writ petitions filed by several Assesseees, challenging constitutional validity of retrospective amendment to Section 142(2A) by the Finance Act, 2013. expanding the scope of special audit to cover 4 new grounds viz. (i) volume of accounts, (ii) doubts about the correctness of accounts, (iii) multiplicity of transactions in the accounts and (iv) specialized nature of business activity of the assessee. It held that the Retrospective amendment to section 142(2A) was constitutionally valid as in fiscal matters the Legislature has the ability to amend the law retrospectively. It also noted that section 142(2A) does not confer any vested right on the assessee, which could not be taken away by retrospective amendment as it was enacted to confer an important power on the revenue to curb tax evasion and facilitate investigation into the accounts of an assessee for the proper determination of tax liability. Therefore, even if the amendments to section 142(2A) were given retrospective effect, the same would be within the powers of the Legislature.

Sahara India Financial Corporan. Ltd. & others vs. CIT TS-352-HC-2017 (WPC 3222/2008 & others dated August 23, 2017)

1603. The Court, held that where the Department, by passing an ex-parte order, transferred assessee's case without supplying the assessee with necessary reasons, information and documents, the transfer of assessment was wholly irrelevant and arbitrary and the order of transfer was liable to be quashed

Genus Electrotech Ltd vs UOI (2017) 100 CCH 0014 GujHC SCA No. 10328 of 2017 dated 13.09.2017

1604. The SB of the Tribunal deleted addition in hands of Assessee (a cigarette manufacturing company) on account of alleged premium generated through sale of cigarettes at a price over and above the MRP using dubious method of twin branding of the product by holding that the evidences and material only indicated that in some clandestine manner the wholesale buyers had sent the money to fictitious bank accounts standing in benami names and the same was for discharging the liability of the Assessee was sans any material and there was no live link nexus to implicate Assessee . The SB observed that AO did not ascertain that the Assessee or its employees had actual control of the said benami bank accounts or the amount deposited in said bank accounts had gone to the coffers of the assessee; Further, SB quashed AO's action in rejecting books of account and estimating assessee's income u/s. 145(2) by holding that once it was held that there was no material to implicate the Assessee then the presumption that Assessee was maintaining cash in bank account outside the books also failed.

M/s GTC Industries Ltd. vs. ACIT TS-324-ITAT-2017 (ITA No. 5996/Mum/1993 dated March 7, 2017)

1605. Where the Madhya Pradesh High Court had quashed the transfer of jurisdiction from MP to Nagpur and had directed the CIT to pass a reasoned order, the Court held that the assessment proceedings initiated u/s 158BC by DCIT Nagpur and assessment order passed pursuant to the said proceedings were invalid being in contravention of the decision of the Court. It held that the assessee's participation in the proceedings u/s 158BC would not be hit by section 124(3) [which provides that a person is not entitled to question the jurisdiction of a AO after the expiry of 1 month from the date on which he was served with a notice u/s 142(1)/115WE(2)/143(2) or completion of the assessment where he has filed return u/s 139(1)/115WD(1)] since the return was filed in response to notice u/s 158BC and not u/s 142(1). It accordingly, dismissed Revenue's contention that the AO's order was valid as the assessee had participated in the proceedings.

Lalitkumar Bardia [TS-313-HC-2017(BOM)] ITA No. 127 of 2006 dated 11/07/2017

1606. The Court admitted the Writ petition filed by an individual-Petitioner on linkage of Aadhaar-PAN required before filing return of income and issued interim direction to Income-Tax officer to allow the Petitioner to manually file Income tax return without insisting for Aadhaar/Enrolment number since the hearing was pending before the Apex Court on the challenge to constitutional validity of Aadhaar on grounds of privacy.

Prasanth Sugathan [TS-319-HC-2017(KER)] W.P. (C). No. 26033/2017 (D) dated 04/08/2017

1607. In the assessment order, the AO mentioned that the assessment order was passed u/s 143(3)/153A. The CIT(A) allowed appeal of assessee on ground that assessment order was wrongly passed u/s 153A though it should have been u/s 143(3). Tribunal observed that no notice was issued u/s 143(2) and held that though notice u/s 143(2) did not give any jurisdiction to AO to make assessment u/s 143(3) but it was obligatory to issue notice u/s 143(2) before making assessment under Section 143(3) or Section 144. Since assessment was claimed to have been completed u/s 143(3), notice u/s 143(2) was mandatory and noncompliance thereof vitiated assessment. The Court upheld the order of the Tribunal.

CIT vs. MOINS IQBAL & ANR. (2017) 99 CCH 0143 AllHC ITA No. 168 of 2009, 169 of 2009 dated 28.07.2017

1608. The assessee had failed to claim deduction u/s 80-G in the ROI and before the AO and had claimed the same before CIT(A). However, CIT(A) following the decision of the Hon'ble Supreme Court in the case of Goetze (India) Ltd. Vs. CIT 284 ITR 323 did not allow the claim of the assessee since it was not claimed in the ROI or before the AO. Tribunal following the decision of the Hon'ble Supreme Court in the case of Goetze (India) Ltd held that the Tribunal had the powers to direct the AO to accept the claim of assessee, though the same had not been claimed in the ROI, directed the AO to allow the claim of deduction to the assessee. The Court upheld the order of the Tribunal

CIT vs. BRITANNIA INDUSTRIES LTD. (2017) 99 CCH 0104 KoIHC ITA No. 03 of 2013 & ITAT No. 260 of 2012 dated 13/07/2017

1609. Where the assessee had not claimed deduction u/s 80-IA in the return filed u/s 139(1) but had claimed in the return filed u/s 153A, the Court observed that the time limit for filing revised return had not expired and therefore, the deduction not claimed earlier could have been claimed in the revised return. If the claim could be made under revised return, the same could also have been made under the return filed u/s 153A. It further held that alternatively, the return filed u/s 153A was an original return and not revised return and therefore, on that ground also the deduction u/s 80-IA would be allowed to the assessee. Further, where the AO had denied deduction u/s 80-IB on the ground that the assessee was not developer but a contractor and the CIT(A) and the Tribunal had allowed the deduction on the ground that the assessee was engaged in development of road and was not a mere contractor as he had deployed his own capital, used his own management and expertise in maintenance and had to bear the risk, the Court upheld the view of the Tribunal.

PCIT vs. VIJAY INFRASTRUCTURE LTD. (2017) 99 CCH 0128 AIHC ITA No. 29 of 2016 dated 12.07.2017

1610. The assessee engaged in the business of civil construction and related services for the Government had lower profit margins. The AO, without rejecting the books of accounts of the assessee u/s 145 made addition to the income returned by the Assessee by estimating gross profit. The Court observed that it was sine qua non for the AO to come to a conclusion that the Books of Accounts maintained by the assessee were incorrect, incomplete or unreliable before the proceeding to make his own assessment. Since there was no finding by the AO regarding the books of accounts of the assessee being incorrect, the AO was not justified in estimating the profit of the assessee.

PCIT vs. MARG LIMITED (2017) 99 CCH 0125 ChenHC Tax Case Appeal No. 302 of 2017 dated 20/07/2017

1611. Where pursuant to search and seizure, the AO made an addition on substantive basis in the hands of an overseas company [which was resident in India under Section 6(3)], the Tribunal held that the AO was unjustified in making a similar addition on protective basis in the hands of the assessee merely because her husband owned 50 percent of the share capital of the overseas company and the overseas company did not admit to the jurisdiction of India and did not file a valid return. Further noting that the AO had also made a similar addition on protective assessment in the hands of the assessee's husband it held that there was no justification in making the same addition in the hands of three people. It further noted that the CIT(A), in the assessee's husband's case, deleted the entire protective addition, and accordingly concluded that the addition made in the assessee's case also ought to be deleted.

Smt Mala Kalsi – TS-573-ITAT-2017 (Del) -ITA Nos. 5026, 5027, 5029, 5030, 5031 & 5032/DEL/2015 dated 01.12.2017

1612. The Assessee filed a writ petition seeking permission for filing income tax return without aadhar number and prayed to direct tax authorities not to initiate any coercive steps against assessee under Income-tax Act, in lieu of any obligation flowing from section 139AA. The Court held that in view of decision in case of Thiagarajan Kumararaja v. Union of India [W.P. No. 28181 of 2017 dated 6-11-2017], section 139AA makes it compulsory for assesseees to give Aadhaar number and that all income tax assesseees had to necessarily enroll themselves under Aadhaar Act and obtain Aadhaar number, which would be their identification number, as that had become a requirement under Income tax Act. Accordingly, the assessee's writ petition was dismissed.

Preeti Mohan v Union of India – [2018] 89 taxmann.com 343 (Madras) - W.P. NO. 27826 OF 2017 dated 20.12.2017

1613. Where pursuant to a survey conducted under section 133A at the nursing home of assessee. various account books and registers including the OPD register and indoor patient register were examined and seized, the Court held that AO was not justified in rejecting the books of accounts of the assessee and imputing adjustment @ 50 percent of the receipts of the assessee on the allegation that there were some discrepancies between entries recorded in books of account of assessee and registers and documents seized during survey, as the allegation of discrepancies

made by the AO were wholly vague inasmuch and the AO had not recorded nature and extent of discrepancy. Further, the Court noted that the assessee had also produced his cash book, ledger as also bank passbook and no specific discrepancy had been pointed out in those books of account. Accordingly, it held that mere absence of vouchers would not give rise to any presumption that there was any non-disclosure of income inasmuch as there was no evidence to doubt correctness of entries made in OPD register as also Indoor Patient register.

Dr. Prabhu Dayal Yadav v CIT - [2018] 89 taxmann.com 126 (Allahabad) - IT APPEAL NO. 5 OF 2008 dated 11.12.2017

Reassessment

1614. The Court, dismissing Revenue's appeal upheld the quashing of reassessment proceeding by holding that the exercise of recording reasons appeared to be ritualistic and formal rather than meaningful. Section 151 of the act clearly stipulated that the CIT a competent authority to authorize the reassessment notice, had to apply his mind and form an opinion. The mere appending of the expression approved said nothing and reasons had to be recorded to agree with the noting put up.

N.C Cables Ltd (2017) [98 CCH 0010 DelHC]

1615. The Apex Court dismissed the Assessee's SLP against the High Court's ruling which held that where the Assessee claimed land sold to be an agricultural land on the basis of certificate which was subsequently found to be fake by the AO, reopening u/s 148 of the Act was valid.

Thakorbhai Maganbhai Patel vs. ITO (2017) 78 taxmann.com 201 (SC) (SL (C) 188 of 2017 dated 03.02.2017)

1616. The Court set aside the order of the Tribunal wherein the assessee's ground challenging the reassessment proceedings was dismissed ex-parte (after the Tribunal denied the assessee's application of adjournment) on the ground that no material and evidence had not been adduced by the assessee in support of its ground on reassessment and that the said issue did not emanate from the order of the CIT(A). The Court noted that the assessee had categorically challenged the said ground before CIT(A) who had dismissed in in Para 3 of his order. Further it held that the assessee specifically raised the ground of challenging the reassessment before the Tribunal and that it was for the Tribunal to call for such records and examine whether the initiation of reassessment proceedings was valid or not as the issue of initiation of reassessment proceedings was a jurisdictional issue. Accordingly, it remanded the issue back to the file of the Tribunal.

Dr. Javed Akhtar & Anr vs. CIT (2017) 98 CCH 0094 All HC (ITA No. 499 of 2007 dated March 1, 2017)

1617. Where the assessee was accused of being involved in illegal mining and accordingly notices u/s 148 of the Act were issued on the ground that assessee was involved in under invoicing in iron-ore, the Court held that 'under invoicing' was a 'sufficient reason' to believe that there was escapement of assessment and accordingly dismissed the assessee's writ petition and upheld initiation of reassessment proceedings u/s 147/148. The Court also clarified that the sufficiency of reasons and examination of invoices which were relied upon by the Revenue for exercising jurisdiction u/s 147/148 could not be decided in a writ proceeding as these were factual issues.

Prasanna Ghotage vs Dy.CIT [TS-709-HC-2016(KAR)] (W.P.Nos 109810 to 109811 of 2016) dated 16/12/2016.

1618. The Court held that the disallowance of payment of privilege fee under the Karnataka Excise Act 1956, paid by the assessee to the State Government, by the Assessing Officer was without jurisdiction and also ultravires to his powers under the Act. The Assessing officer had no authority or competence to hold that the privilege fee was not having character of statutory fee or that the State legislature in exercise of its power could not decide the quantum of fee or percentage of revenue on the income earned from the business.

Commissioner of Income Tax Bang. Vs. Karnataka State Beverages Corporation Ltd. [2017] 79 taxmann.com 125 (Karnataka) dated 03/03/2017.

1619. Where the Petitioner, a principal member of an AOP formed with his brothers, filed a writ petition requesting the Court to issue a writ of Certiorari quashing the notice issued by the AO under section 148 of the Act on the ground that the AO issued a query / notice to the Petitioner in its individual capacity alleging that income of the AOP had escaped assessment whereas the query / notice was to be issued to the Petitioner in the capacity of member of the AOP, the Court noting that since it was not able to cull out whether any separate query / notice was sent to the Petitioner in his capacity of a member of AOP as the relevant documents were not furnished in the Writ Petition, it held that it could not interfere under Article 226 in the facts of these cases. Accordingly, it left it open to the Petitioner to raise all contentions available to them under the law before the statutory authority

Maruti Nandan Sah & Anr Vs. Income Tax Officer & Anr. (2017) 98 CCH 0108 UAHC (Special Appeal No. 29 of 2017, 30 of 2017)

1620. The Court allowed the petition of the assessee and held that where an assessing officer had completed assessment u/s 143(3) by making addition to assessee's income in respect of unexplained investment in immovable property on the basis of valuation of property by stamp duty authorities, he could not reopen the said assessment for enhancement of the said addition merely on basis of report of the District Valuation Officer.

Akshar Infrastructure (P.) Ltd. V Income-tax Officer [2017] 79 taxmann.com 239 (Gujarat) (SCA No. 16481 of 2010)

1621. The Court allowed petition of the assessee and held that in absence of any tangible material available to prima facie show that assessee had received any money in cash on account of sale consideration of land, re-opening notice merely on the basis of one Sauda Chitthi seized from a third party, was unjustified, specially when the concerned persons who signed the sauda chitthi were not owners of the land sold and neither the assessee nor the person who purchased the land were signatory to the sauda chitthi and also the sauda chitthi was not acted upon. Accordingly, the impugned proceedings for re-opening of assessment and the impugned notice was quashed and set aside.

Chintan Jadavbhai Patel V. Income-tax Officer [2017] 79 taxmann.com 302 (Gujarat)

1622. Where re-assessment proceedings were initiated against the assessee and the assessee contended that notice u/s 148 was invalid as it was issued during pendency of proceedings before Tribunal (Bangalore) and all issues raised were similar to original proceedings, the Tribunal observed that the current issue of undisclosed investment in land was entirely new based on survey conducted u/s 133A and was not subject matter of appeal. However it quashed the reassessment on the grounds that assessee's objection against issuance of notice u/s 148 was not dealt with by the AO, there was no nexus between AO's finding and the material brought into notice and that section 147/148 was not meant for reopening an already concluded assessment. As regards the appeal for the subsequent Assessment Year, the Tribunal quashed the best judgement assessment u/s 144 by holding that since return was filed beyond the belated return filing due date, return was to be treated as 'invalid' and the AO could only issue notice u/s 148 based on information he had in order to complete the assessment.

Sri Jaswanth Kumar Kothari [TS-144-ITAT-2017 (Bang)] (ITA Nos. 788 & 1027/Bang/2013)

1623. The Tribunal upheld order of CIT(A) and dismissed appeal of the assessee challenging the legality and validity of re-opening of assessment u/s 147 of the Act. The Tribunal notes that the Assessing officer had received information from DGIT(Inv), which was based on information received from Sales Tax Department which reflected that the assessee was beneficiary of bogus accommodation entry from 28 hawala dealers. It held that it was a tangible and material information sufficient for the purposes of re-opening of the assessment. Further as the said re-opening was done by the Assessing officer within four years from the end of the assessment year and no scrutiny assessment u/s 143(3) r.w.s. 143(2) of Act was framed originally by Revenue, first proviso to Section 147 of the Act was not applicable. Accordingly, the Tribunal held that re-opening of the assessment by the Assessing officer u/s 147 was valid and legal.

Ratnagiri Stainless Pvt Ltd v. Income Tax Officer - (2017) 49 CCH 0142 MumTrib (ITA No. 4463/Mum/2016)

1624. Where the Assessing Officer sought to reopen assessment on ground that even though assessee had earned certain exempt income under section 10(34) during relevant year, yet no disallowance had been made under section 14A, the Court held that in view of fact that assessee had disclosed all material facts relating to tax free investment and interest expenses in its books of account at time of assessment, impugned reassessment proceedings initiated after 4 years from the end of the assessment year deserved to be quashed as there was no failure on part of assessee to disclose all material facts necessary for assessment.

Kumari Aditi Janmejay Vyas v DCIT - [2018] 89 taxmann.com 336 (Gujarat) - SPECIAL CIVIL APPLICATION NO. 14693 OF 2016 dated 12.01.2017

1625. Despite specific objection raised by the assessee-petitioner to the reopening of assessment u/s 147 of the Act, the assessing officer failed to pass a speaking order disposing those objections. Consequently, assessee filed a writ petition and contended that the impugned order was passed just one day prior to the last date for passing such assessment, as required under Section 153(2) of the Act and that the Court at any event could not extend the time period by giving an opportunity to the respondent to further reassess the income of the petitioner. The Court held that where the AO had passed the order of assessment within the prescribed period of limitation and thereafter, if such order was put to challenge before the Court of law and consequently, was set aside on some reason, which in the opinion of the Court was a curable defect, it was always open for the Court to remit the matter back to the AO for passing a fresh order of assessment after curing those defects, even though time prescribed under statute got expired by that time. Accordingly, the impugned order was set aside and the matter was remitted back to the AO to pass a speaking order on the objections raised by the petitioner, after giving an opportunity of hearing to them.

Home Finders Housing Limited v. Income Tax Officer - (2017) 98 CCH 0136 ChenHC (WP No. 1019 of 2017)

1626. The assessee filed a writ petition challenging order u/s 147 of the Act passed by the AO, on the ground that the impugned order proceeded to tax sums received in form of share application amount, which was transferred to "forfeiture of share account", under head income from "profits and gains of business/profession", whereas, notice u/s 148 was issued on a different ground, which, ultimately, did not form part of impugned order. The Court held that section 147 of the Act empowered an Assessing Officer to reopen the assessment, if, AO had reason to believe, that any income chargeable to tax has escaped assessment for the relevant year, "and also bring to tax", any other income, which may attract assessment, though, it was brought to AO's notice, subsequently, albeit, in the course of the reassessment proceedings. However, the purported income discovered subsequently, could be brought to tax, only, if the escaped income, which caused, in the first instance, the issuance of notice under Section 148 of the Act, was assessed to tax. Accordingly, the impugned order was set aside.

Martech Peripherals Pvt Ltd v. Deputy Commissioner of Income Tax & Anr - (2017) 98 CCH 0137 ChenHC (WP No. 10710 of 2014)

1627. The Tribunal held that the initiation of the re-assessment proceedings by issuance of notice u/s 148 beyond 4 years, without recording reasons for reopening and without recording a finding that the escapement of income was due to the failure of the assessee to disclose fully and truly all material facts, was void ab initio as recording of the failure on part of the assessee was a condition precedent for initiation of proceedings u/s 147 of the Act. The assessee's appeal was, accordingly, allowed.

Kushal Kumar Kankaria v. Deputy Commissioner of Income Tax - (2017) 49 CCH 0148 HydTrib (ITA No. 134/HydTrib)

1628. The Court held that where the AO in this reasons, based on information received from Director of Income Tax, (Investigation) alleged that the assessee had received a sum of money by way of accommodation entries for the purpose of converting its unaccounted cash but there was no link established by the AO between the information received by the him and the conclusions reached by him, the Tribunal was justified in concluding that the proceedings under section 147 and 148

of the Act did not satisfy the requirement of law. It held that the reasons to believe contained not the reasons but the conclusions of the AO one after the other and that there was no independent application of mind by the AO to the tangible material which forms the basis of the reasons to believe that income has escaped assessment. The Court held that the conclusions of the AO were at best a reproduction of the conclusion in the investigation report and therefore amounted to a 'borrowed satisfaction', which could not be the basis for re-opening of assessment.

Pr CIT v Meenakshi Overseas Pvt Ltd (2017) 99 CCH 0028 DelHC - ITA 692/2016 dated 26.05.2017

1629. Where the AO had initiated block assessment proceedings under section 158BC of the Act, the Court held that the AO was not justified in issuing notices under section 148 of the Act seeking to reopen assessment for the same years covered under the block assessment proceedings as it would result in parallel proceedings. Accordingly, it quashed the notice issued under section 148 of the Act.

South Asian Enterprises Ltd v CIT – (2017) 99 CH 0029 (Del HC) – WP C 4623 / 2001 dated 25.05.2017

1630. The AO initiated reassessment proceedings under section by issuing notice under section 148 of the Act 4 years after the end of the assessment year alleging that the assessee had wrongly claimed deduction of interest income earned under section 80IC of the Act whereas the said amount ought to have been taxed under the head income from other sources. The Court noted that the claim under section 80IC of the Act had been verified by the AO during the original assessment proceedings and therefore held that though the notice states that the assessee had failed to fully and truly disclose material particulars, it did not bring out how the disclosure made by the assessee was not full and true especially when the AO in its original assessment order had specifically mentioned that the deduction under section 80IC was provided for "after verification". Accordingly, it held that where the conditions provided for in the first proviso to Section 147 of the Act were not fulfilled, the reassessment proceedings initiated were invalid and it set aside the notice issued and order passed by the AO dismissing the objections filed by the assessee.

Akum Drugs and Pharmaceuticals Ltd v ITO – (2017) 99 CCH 0022 (Del HC) – WP C 6448 / 2016 dated 22.05.2017

1631. AO had issued notice under section 148 of the Act which was stayed by the High Court on 18.03.2013 and the final order of the Court (dismissing the assessee's writ petition) was passed on 29.07.2013. The AO passed his final assessment order on 26.02.2014 after extending the period of limitation by the time taken for communication of order of the Court. The Court held that the period for communication of the order passed by the Court to the AO could not be considered while determining the period for limitation under section 153 of the Act. It held that the AO could claim extension of the period for the period for which the proceedings were stayed by the High Court but could not claim benefit of the period taken for communication of order to the AO and accordingly held that the order passed by the AO was time barred. Further, it appreciated the contention of the assessee that the AO was well aware of the proceedings occurring in the Court as the DR was present in Court during the hearings and detailed affidavits were also filed by the Department. Accordingly, it upheld the order of the Tribunal annulling the reassessment order passed.

ACIT v Sun Pharmaceutical Industries Ltd – (2017) 50 CCH 0009 Ahd Trib – ITA No 1688 / Ahd / 2015 – 05.05.2017

1632. The original assessment of the assessee was concluded under section 143(3) of the Act. The AO based on information received from the Investigation Wing proceeded to reopen assessment after a period of 4 years from the end of the relevant assessment year stating that income of the assessee had escaped assessment on account of unexplained share application money received by it. The Tribunal noted that the issue had already been examined by the AO during the original assessment proceedings and held that the case had been reopened by the AO only on the basis of the information gathered from DIT(Inv.), New Delhi and not by applying his own mind and accordingly held that the notice under section 148 of the Act was invalid.

Additionally, it noted that the sanction for reopening of assessment beyond 4 years had been done by obtaining approval from Addl. Commissioner and not from the Commissioner or Pr. Commissioner or Pr. Chief Commissioner, which was the pre-requisite provided in Section 151 of the Act and therefore held that the initiation of the proceedings u/s 148 of the Act was also invalid for lack of requisite sanction.

Hi Gain Investment Pvt Ltd v ITO – (2017) 50 CCH 0034 (Del Trib)

1633. Where the assessee had returned long term capital gains arising out of sale of land but for the purpose of computation of such gains adopted the market value of the land sold (i.e. Rs 2 crore) as its cost as opposed to the written down value of Rs. 1.80 lakhs, the Court dismissing the assessee's writ petition held that the AO was justified in initiating reassessment proceedings and further dismissed the assessee's contention that it was the option of the assessee either to compute capital gain based either upon market value of the asset or the written down value.

J.B. Amin & Brothers (HUF) v UOI - [2018] 89 taxmann.com 222 (Bombay) - WRIT PETITION NO. 13064 OF 2017 dated 22.12.2017

1634. Where the assessing officer issued notice under Section 148 to reopen the assessee's case for which original assessment had taken place under Section 143(1) and claimed to have obtained adequate sanction from the JCIT under Section 151(2), since the reasons for reopening assessment referred to Section 147(b) of the Act, which was no longer on statute, the Court admitted the writ petition and held that the sanction granted by the higher Authority for issuing of a reopening notice had to be on due application of mind and could not be a mechanical approval without examining the proposal sent by the Assessing Officer. It observed that if the JCIT would have applied his mind to the application made by the Assessing Officer, then the very first thing which would have arisen would be the basis of the notice, as the provision of law on which it is based is no longer in the statute and therefore held that the non-pointing out of the mistake / error by the JCIT on the part of the Assessing Officer was prima facie evidence of non-application of mind on the part of the sanctioning authority while granting sanction.

KALPANA SHANTILAL HARIA vs. ASSISTANT COMMISSIONER OF INCOME TAX – (2017) 100 CCH 0165 MumHC - WRIT PETITION (L) NO. 3063 OF 2017 dated Dec 22, 2017

1635. The Tribunal upheld initiation of reassessment proceedings and rejected the assessee's contention that the reassessment proceedings were bad in law since the AO obtained prior approval from the CIT and not from the Joint / Additional CIT as prescribed under Section 151 of the Act. The Tribunal noted that as per the internal processing sheet used by the income-tax authorities for the purpose of granting approvals, both the Add CIT as well as the CIT had recorded their satisfaction and approved the initiation of reassessment proceedings. Accordingly, it held that merely because a higher authority expressed similar satisfaction it would not obliterate from the satisfaction of the lower appropriate authority. It further held that even if there was any defect in the proceedings, it was curable under Section 292B of the Act,

Mayurbhai Mangaldas Patel v ITO – TS- 559-ITAT-2017 (Ahd) - I.T.A. No.3451/Ahd/2014 dated 30.11.2017

1636. The Court dismissed the assessee's writ and upheld reopening of assessment u/s 147 for AY 2007-08 and AY 2008-09 (beyond completion of 4 years of relevant AY) on ground that assessee had followed wrong method of accounting for amalgamation resulting in excessive depreciation claim on goodwill while computing profits u/s 115JB. Based on the Company Court order which came to the notice of the Revenue during subsequent years assessment proceedings, the Revenue claimed that since all assets and liabilities had been transferred to assessee company in totality, the 'pooling of interest' method was the appropriate method for accounting and not the 'purchase method' followed by assessee. Accordingly, the Court held that fresh materials could also include subsequent years' assessments if AO could see the same pattern of claim being made in earlier years and therefore held that reassessment was warranted where the AO came across material subsequently, such as fresh facts, or materials which pertain to a previous assessment or assessment orders. Regarding assessee's claim that the scheme of amalgamation was approved by Company Court, the Court observed that the Company Court had no occasion to conduct a detailed inquiry about the appropriateness of the method nor was

the Court competent to return conclusive findings on this issue, thus, it could not ipso facto bar any inquiry by the AO.

JOHNSON PRODUCTS PRIVATE LIMITED v ACIT - [TS-586-HC-2017(DEL) - W.P.(C) 2697/2015 dated 08.12.2017

1637. The Court held that where Directorate of Investigation (DIT) informed Assessing Officer that assessee-company (whose return had been processed under Section 143(1) of the Act) had received share application money from several entities, which were companies with no real business and were only engaged in business of providing bogus accommodation entries to beneficiary concerns and the information was further confirmed by directors/dummy directors/key persons of said entities in their respective statements recorded by the AO, the reassessment notice against assessee on basis of said information was justified. It further held that since no scrutiny assessment took place in the case of the assessee, there was no question of entertaining the contention that the reassessment proceedings were initiated on the basis of a change of opinion.

Ankit Agrochem (P.) Ltd v JCIT - [2018] 89 taxmann.com 45 (Rajasthan) - WRIT NO. 1101 OF 2017 dated 18.12.2017

1638. Where in the case of the assessee, the original assessment proceedings were completed under section 143(3) and the AO Subsequently, reopened assessment and made additions on account of provision for diminution in value of assets and provision for doubtful debts, which was set aside on the ground of change of opinion by the Tribunal which was in turn upheld High Court, the Court admitted the assessee's writ petition and held that the AO was unjustified in once again initiating reassessment proceedings on ground that set off of unabsorbed depreciation against book profit was not in order. It held that when the High Court had already set aside reassessment proceedings for relevant assessment year, there was no warrant for issue of further notice under section 148 and even otherwise noted that since assessment had been reopened only on basis of change of opinion and that too beyond period of four years, impugned reassessment proceedings deserved to be quashed.

Rallis India Ltd. v DCIT - [2018] 89 taxmann.com 88 (Bombay) - WRIT PETITION NO. 328 OF 2011 dated 20.12.2017

1639. Where during survey proceedings, the AO observed that the assessee had sold land to various entities and had incorrectly disclosed the income arising therefrom as agricultural income exempt from tax pursuant to which he issued notice under Section 148 of the Act, the Court observed that since the assessee's return was processed under Section 143(1) of the Act and no assessment had taken place, the assessee was not justified in contending that the AO had proceeded to reopen assessment based on a mere change of opinion. Further, it also held that the sufficiency and adequacy of the reasons which have led to formation of a belief by the AO that the income has escaped the assessment could not be examined by the court and accordingly dismissed the assessee's Petition.

Ayush Agrotech P Ltd v Pr CIT - [2018] 89 taxmann.com 63 (Rajasthan) - SPL. APPL. WRIT NO. 1102 OF 2017 dated 18.12.2017

1640. The original assessment in case of assessee for AY 2006-07 was completed under section 143(3), subsequent to which the Assessing Officer reopened assessment taking a view that assessee wrongly carried forward unabsorbed depreciation pertaining to assessment year 1998-99 on ground that it had lapsed in view of prospective amendment in section 32(2). The Court upheld the order of the Tribunal wherein it held that since the assessment year in question was merely a transient year where carry forward of earlier year had been brought forward to that year and again carried forward to next year for set off in appropriate assessment year, the carry forward of unabsorbed depreciation had no impact on 'chargeable income' for relevant year which was alleged to have escaped assessment and accordingly set aside the reassessment proceedings. Accordingly, the Revenue's appeal was dismissed as no substantial question of law arose.

Pr CIT v Accura Polytech Ltd - [2018] 89 taxmann.com 12 (Gujarat) - TAX APPEAL NOS. 882 & 883 OF 2017 dated 06.12.2017

1641. The AO sought to reopen the assessment of the assessee under section 148 read with section 147 of the Act beyond a period of four years from the end of the relevant assessment year contending that the assessee had failed to deduct tax on the lease rent paid to the Development Authority. The Court held that for reopening of assessment beyond a period of 4 years two conditions had to be fulfilled – i) the AO must have reason to believe that income escaped assessment in a particular assessment year and ii) the AO must have reason to believe that such escapement of income occurred on account of omission on the part of the assessee to disclose fully and truly all material facts necessary for its assessment. It noted that the AO had not satisfied the second condition as the assessee had submitted complete details of lease rent paid to the Development Authority during the financial year and the fact that no tax had been deducted was clearly evident from such details. Accordingly, it allowed the writ Petition filed by the assessee and held that no notice under section 148 of the Act could have been issued and the notice erroneously issued by the AO stood vitiated due to non-compliance of the preconditions for issue of such notice.

Noida Power Company Ltd v CIT – (2017) 99 CCH 0010 All HC – Writ Tax No 139 of 2016 dated 02.05.2017

1642. Assessee's original assessment proceedings were concluded under section 143(3) of the Act. Subsequently, the Director General of Central Excise as well as the Income-tax authorities had examined on oath one of creditors from whom the assessee had claimed to have borrowed funds from, pursuant to which the creditor had stated that it had not given any loan to the assessee. It was also noted that neither was the loan accounted for in the creditors accounts nor was the assessee reflected as a debtor therein. Accordingly, based on this information, the AO sought to initiate reassessment proceedings by issuing notice under section 148 of the Act. The Tribunal held that since the basis for reassessment i.e. the information from the Director General of Central Excise and the Income tax authorities was fresh information and the assessment had been reopened within 4 years from the end of the relevant assessment year, the notice issued by the AO under section 148 was valid.

Bintal D Baxi v ITO – (2017) 50 CCH 0001 (Ahd Trib) – ITA No 920, 921 and 922 / Ahd / 2014 dated 1.05.2017

1643. Where during the original assessment proceedings, the AO had issued a detailed questionnaire covering the payments received by the UK based assessee on account of operation and maintenance of power plant projects and no addition was made therein, the Court held that the AO was not justified in reopening assessment and passing order under section 147 of the Act taxing the receipts as fees for technical services as it amounted to a mere change of opinion. It held that there was no new material brought on record and noted that the assessee had discharged its burden of disclosing fully and truly all material facts before the AO during the original assessment proceedings. Accordingly, it held that the assumption of jurisdiction under section 148 of the Act was not valid.

DIT (IT) v Rolls Royce Industrial Power India Ltd – (2017) 99 CCH 0019 (Del HC) – ITA 1058, 1061 & 1063 / 2011 dated 18.05.2017

1644. The assessee company had entered into a joint venture agreement with M/s. Parsvnath Developers Ltd and received 7,02,54,000/- for which it handed over possession of land as well as development rights which was shown as a liability in the balance sheet. It had filed return of income, which was processed u/s 143(1) of the Act. Subsequently, the AO reopened assessment by issuing notice u/s 148 contending that that there was failure on part of assessee to disclose fully and truly such facts for framing assessment as the assessee had failed to offer the consideration received by it to tax under the head income from capital gains. The Tribunal dismissed the claim of the assessee that there was no fresh material to re-open assessment and held that the AO had jurisdiction to issue notice u/s 148 for bringing to tax income escaping assessment in intimation u/s 143(1)(a) as the assessee's claim that the said consideration was not taxable was not acceptable. It held that failure to take steps u/s 143(3) of the Act would not render AO powerless to initiate reassessment proceedings when intimation u/s 143(1) had been

issued. Further vis-à-vis assessee's contention that no reasons had been provided by the AO, the Tribunal held that there was no material on record to suggest that assessee had asked for reasons for reopening after filing return of income in response to notice issued u/s 148. It held that there was no written request made by the assessee after filing return of income asking for reasons recorded for reopening and noted that the assessee had also participated in the reassessment proceedings. Therefore, it held that the assessee could not now raise that ground. Accordingly, it upheld the validity of the order passed under section 147 read with section 148 of the Act.

SUMERU SOFT P. LTD. & ANR. vs. INCOME TAX OFFICER & ANR - (2017) 50 CCH 0020 ChenTrib - ITA No. 2101/Mds/2016, 2484/Mds/2016 dated 08.05.2017

1645. The AO obtained information through AIR that the assessee had deposited cash of Rs. 63,27,996 in his bank A/c during the year on the basis of which he issued the letter of enquiry to the assessee to verify the genuineness and correctness of this AIR information. The assessee did not respond to the said information contending that since no proceedings were pending before the AO, the letter of enquiry was not valid in eyes of law and that, he was not under obligation to respond to this invalid letter. The AO in the absence of reply by the assessee formed the opinion for re-opening the assessment. He obtained information from the banks u/s 133(6) and calculated the peak of the bank accounts and made addition in the income from the business. The assessee contended before the CIT(A) that the deposits were only to the extent of Rs.41.15 Lakhs viz-a-vis AO's addition of Rs. 63,27,996 and accordingly, contended that the reassessment initiated was not based on proper facts and was therefore bad in law. The CIT(A) accepted the contention of the assessee that the deposits were only to the extent of Rs.41.5 Lakhs, however, it dismissed the assessee's ground of appeal and directed the AO to compute the income of the assessee after giving credit of turnover already disclosed by the assessee. The Tribunal observed that the bank deposits considered by the AO were Rs. 63,27,996 whereas actually the bank deposits were only to the extent of Rs. 41.15 Lakhs and accordingly, held that the AO while recording the reasons for reopening of the assessment recorded incorrect facts. Accordingly, holding that reopening of the assessment u/s 147 was clearly invalid and bad in law. It quashed the re-opening of the assessment and deleted the additions made by the AO.

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

1646. Where the AO based on the audit objections raised by the audit department of Income-tax, reopened the assessment of the Petitioner and passed the assessment order without disposing of the assessee's objections u/s 148, the Court set aside the impugned assessment order on the ground that the AO was acting under the dictate of the audit party and did not form his own judgment which was against the mandate of section 147. Further, it held that as per the Apex Court decision in the case of GKN Driveshafts (India) Ltd. v. ITO and Ors. reported in [2003] 259 ITR 90 (SC), the AO ought to have disposed off the objections of the assessee before proceeding further in the reassessment proceedings. Accordingly, it set aside the order of the AO.

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

1647. The Court allowed the assessee's [successor to India Cellular Towers Infrastructure Ltd. ('ICTIL'), a telecom company] writ and quashed reassessment proceedings for AY 2009-10 on the ground of delay in issuing notice u/s. 143(2) despite validly issued reopening notice u/s. 148. It noted that though Section 148 notice was issued in February, 2013 (i.e. within prescribed time-limit), the Revenue failed to issue notice u/s. 143(2) within prescribed time-limit (i.e. before September 30, 2013 i.e. within six months from the end of the Financial Year in which the return was furnished by an assessee) pursuant to return filed u/s. 148. Relying on the ruling of the Apex Court in the case of Hotel Blue Moon [TS-113-SC-2010] which was reiterated in Madhya Bharat Energy Corporation [TS-653-HC-2011(DEL)-O] and Jai Shiv Shankar Traders (P.) Ltd. [TS-5736-HC-2015(DELHI)-O], it held that the delay in issuing a notice u/s 143(2) would be fatal to the reassessment proceedings.

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

1648. The Court, relying on the decision of the Apex Court in *GKN Driveshafts (India) Limited Vs. Income Tax Officer*, (2003) 1 SCC 72, held that once the AO proceeded to re-open assessment by issuing notice under section 148 of the Act, the assessee / Petitioner was entitled to seek reasons for issuance of such notice, upon which the AO was bound to furnish the reasons within reasonable time. Noting that in the instant case, the AO had re-opened assessment but had failed to provide the Petitioner with the reasons for re-opening assessment, the Court held that the notice issued by the AO was bad in law. It further held that the AO had acted beyond the ambit of the provisions of Section 147 of the Act by taxing sale consideration arising from transfer of property situated in Kovalam as capital gains in the hands of the Petitioner, where all the details pertaining to such property had been submitted to the AO during original assessment proceedings wherein no addition was made. Accordingly, it held that the AO proceeded to initiate proceedings under section 147 of the Act on a mere change of opinion which was invalid.
S.M. KUTUBUDDIN vs. ACIT (2017) 99 CCH 0042 ChenHC W.P. Nos 12801 of 2016 and 11196 and 27344 of 2016 dated 02.06.2017
1649. Where the AO initiated re-assessment proceedings based on certain information from the DG, Investigation Wing, Pune, alleging that the assessee had undertaken certain hawala transactions / bogus purchases, the Tribunal, relying on the decision in *ACIT Vs. Rajesh Jhaveri Stock Brokers Pvt. Ltd.* (2007) 291 ITR 500 held that the initiation of reassessment proceedings were justified where the original return of income filed by the assessee was processed under section 143(1) of the Act. On the merits of the case, it held that since the assessee failed to produce the suppliers from which it had made the impugned purchases and failed to maintain a stock register to prove that it had made sales from the impugned purchases, the AO was correct in making an addition on account of bogus purchases. However, it held that the GP rate of 20 percent on gross purchases adopted by the AO was not justified and it upheld the order of the CIT(A) restricting the addition to the GP rate of 10% on goods purchased from hawala dealers, over and above GP rate declared by assessee
RAJDEEP ENGINEERING SYSTEMS PUNE PVT. LTD. vs. DCIT (2017) 50 CCH 0147 PuneTrib ITA Nos. 972 to 974/PUN/2016 dated 02.06.2017
1650. The Petitioner had claimed deduction u/s 10B which was allowed by the AO in the original assessment. The AO re-opened the assessment u/s 148 on the reason that the deduction u/s 10B was claimed without obtaining the approval from the Board. Rejecting the Petitioner's objection, he passed the order disallowing the assessee's claim u/s 10B. The Court observed that during the original assessment, the AO had asked for the details for the claim of deduction u/s 10B and only after being satisfied, the AO had allowed the deduction. Accordingly, it held that re-opening the case on this ground would amount to change of opinion and accordingly, there was no reason to believe that income had escaped assessment. Accordingly, it set aside the order of the AO.
E-INFOCHIPS LIMITED vs. DCIT (2017) 99 CCH 0063 GujHC (Special Civil Application No. 2527 of 2017) dated 12.06.2017
1651. The Apex Court dismissed the Revenue's SLP challenging the order of the HC which held that notice issued u/ 148 on assessee was time barred u/s 149 and that relaxation of time limit of sec. 149as provided by sec 150 (assessment in consequence of finding given in an order passed, inter alia, in appeal by any authority) read with Explanation 3 to Sec. 153 was not applicable. The High Court noted that notice u/s 148 was issued on assessee in March, 2011 on the basis of a Tribunal order passed in case of one society (to whom assessee advanced loan), wherein it was held that interest income was not to be taxed in the hands of the said society but was taxable in the hands of assessee. The High Court held that the provisions of Sec. 150 read with Explan 3 to Sec. 153 would apply only if an opportunity of hearing had been given to the assessee before the Tribunal passed the order and as one essential ingredient of Explan 3 was missing and, the deeming clause would not get triggered and accordingly the bar of limitation prescribed by Sec 149 would not be lifted.
CIT vs. M/s Rural Electrification Corporation Ltd. TS-360-SC-2017 (SLP No. 19165/ 2014 dated August 28, 2017)

1652. The Petitioner had purchased a bungalow for consideration of Rs.60 lakhs and while registering the sale deed paid an additional stamp duty. In the order of assessment u/s 143(3), the AO did not make any addition. However, he made reference to the District Valuation Officer (DVO) u/s 142A for his opinion on the fair market value of the property in question. The DVO estimated the fair market value as on the date of the sale at Rs.1.71 crore. After receipt of the valuer's report, the AO issued the notice u/s 148 for re-opening the assessment with the reason to believe that the assessee had undervalued the property and had made investment in excess of the amount declared. Accordingly, he held that the assessee had unaccounted investment as per the provisions of section 69 of the Act. The Court based on the judgment of Division Bench of the Court (wherein the reference to the DVO was held as invalid) held that the report of the DVO was also invalid. Further, it observed that the same information was available with the AO at the time of original assessment which was noticed by the AO, but which did not prompt him to make any addition except for calling of DVO's report which by itself could not form a ground for reopening of the assessment.

ANAND BANWARILAL ADUKIA vs. DCIT (2017) 99 CCH 0109 GujHC SPECIAL CIVIL APPLICATION NO. 6660 of 2013 dated 04/07/2017b

1653. The Court allowed the Assessee's writ and quashed reassessment proceeding initiated beyond the period of four year from the end of the relevant AY viz AY 2005-06. It held that the AO erred in issuing notice u/s 148 seeking to deny the benefit under the India – UAE DTAA contending that i) the Assessee had not filed its TRC ii) Assessee's UAE residence permits was invalid as the Assessee resided outside UAE for more than 6 months. It held that these requirements were introduced w.e.f i) 1/04/2013 and ii) 28/11/2007, respectively and therefore would not apply to the relevant AY. Further, the Court noted that the Assessee during regular assessment had disclosed the relevant information to show that it was entitled for the benefits of DTAA with UAE and therefore reopening was on account of a mere change of opinion which was impermissible.

Prashant M. Timblo vs. CCIT TS-335-HC-2017 (WP No. 678-679/2013 dated July 25, 2017)

1654. The Tribunal allowed the appeal of the assessee and held that in the absence of any independent application of mind the AO could not reopen the assessment u/s 148 acting merely under the information from the Investigation Wing that the Assessee had obtained accommodation entries in the form of share application money. It observed that the AO had arrived at a satisfaction that income had escaped assessment in a mechanical manner without due application of mind as there was no rational connection between the formation of belief and the seized material. Further, it held that there must be direct nexus between the material coming to the notice of the AO and formation of the belief that income had escaped assessment failing which no reopening could be done.

Baseasar Properties Pvt. Ltd. vs. ITO (2017) 50 CCH 0248 Del Trib (ITA No. 5750/Del/2016 dated August 18, 2017)

1655. Where the original assessment proceedings were completed u/s 143(3) and the AO reopened the assessment after 4 years on the ground that the assessee had received unsecured loan from JP Infrastructure Pvt. Ltd. in which the shareholders of the assessee held beneficial interest exceeding 10% and therefore, such loan amount received was deemed dividend u/s 2(22)(e), the Court rejected the Revenue's contention that the assessee had not disclosed its share holding pattern to enable the AO to examine the applicability of Section 2(22)(e) at the time of original assessment proceedings. It observed that the assessee had made disclosures about the borrowings from J.P. Infrastructure in the return and did not have any onus to disclose its share holding pattern to enable the AO to examine the applicability of Section 2(22)(e). Accordingly, it held that if the AO desired to scrutinize this aspect of the matter it was always open for him to call upon the assessee to provide for such details as and when necessary. Accordingly, it held that the re-opening of the assessment was bad in law.

Gujarat Mall Management Company Pvt. Ltd. vs. ITO (2017) 99 CCH 167 GujHC Special Civil Application NO. 16590 of 2017

1656. Where the AO issued notice u/s 148 alleging that the assessee had claimed a loss on speculative transactions, without disclosing the fact that the transaction was indeed speculative, the Court noting that the material relied on by the AO formed part of the return and accompanying documents filed by the assessee, held that there was thus no failure on the part

of the assessee to disclose the material facts. Based on the submission of the assessee, it further observed that the issue was also examined by the AO during the regular assessment.

Adani Wilmar Limited vs. DCIT (2017) 99 CCH 0175 GujHC Special Civil Application NO. 11220 of 2017 dated 09/08/2017

1657. Where the AO issued notice u/s 148 alleging that income had escaped assessment in the hands of the assessee as it had claimed deduction u/s 80IC but filed its return after a delay of 46 days, the Court noting that the assessee's claim was not disputed on merits, quashed the notice, order disposing of the objections and consequent assessment order. It also set aside the rejection of application filed before CBDT for condonation of delay in filing ROI observing that the delay in the assessee's case was not so extraordinary that it could not be condoned.

Fiberfill Engineers vs. DCIT (2017) 99 CCH 0188 DELHC (W.P. (C) No. 3935/2015 dated 10/08/2017

1658. Where the AO re-opened the assessment u/s 148 (beyond 4 years period) on the ground that the assessee had received amount from the company (where he was substantial shareholder) which was taxable as deemed dividend u/s 2(22)(e) and made the additions, the Tribunal observed that the return of income was processed u/s 143(1) and rejected the assessee's contention that in absence of any fresh material after order u/s 143(1), reassessment was based on change of opinion on the ground that an intimation issued u/s 143(1)(a) could not have been held to be an assessment and accordingly, there was no change of opinion. It further rejected the assessee's argument that the amount received from the company was advance received towards agreement to sell agricultural land and was therefore in the nature of ordinary course of business which could not have been considered as deemed dividend u/s 2(22)(e) noting that sale-deed for the land was not registered, there was no mention in the company's 'books of account' of any transaction in respect of the property under consideration and the company had only 2 directors and the assessee was a director as well as the chairman of the company. Therefore, the transaction was for avoiding deemed dividend taxation. Accordingly, it upheld the reassessment proceedings initiated by the AO.

Kapil N. Shah [TS-357-ITAT-2017(Mum)] I.T.A. No. 1580/Mum/2013 dated 11/08/2017

1659. Where the AO had re-opened the assessment after 4 years by issuing notice u/s 148 on the ground that i) the Petitioner was not allowed to claim deduction u/s 10B in respect of one of its unit where it had incurred a loss; ii) the Petitioner was not bringing any sale proceeds in India from rendering manufacturing services to its AEs, the Court observing that both the issues were examined by the AO at the time of original assessment proceedings and that there was no allegation that there was a failure to disclose fully and truly all material facts, quashed the notice issued u/s 148.

Swarovski India Pvt. Ltd. vs. DCIT (2017) 99 CCH 0214 DelHC W.P.(C) 5807/2014 dated 30.08.2017

1660. The Court dismissed assessee's writ challenging notice issued u/s 148 and upheld reopening of assessment for AY 2009-10 (beyond 4 years period) which was based on fresh material unearthed by the IT department through the investigation wing indicating that purchase made by assessee from one supplier was bogus. It rejected assessee's stand that since the entire issue of genuineness of purchases was examined by AO during original scrutiny assessment, reopening beyond 4 years was invalid and held that the purchases from relevant supplier were admittedly not part of original proceedings, and therefore neither the question of change of opinion nor the concept of full disclosure would have a bearing. It further noted that relevant supplier had received funds of Rs. 4.48 crores from the assessee which were immediately withdrawn in cash and that summons issued by the department on the supplier were not responded to and moreover the supplier was not found to be existing at the given address.

Gujarat Ambuja Exports vs DCIT-TS- 406-HC-2017(GUJ)- SPECIAL CIVIL APPLICATION NO. 10745 of 2016 dated 11.09.2017

1661. Where the Assessing Officer finalized the re-assessment proceedings without having first disposed of the objections of the assessee, the Court allowed assessee's writ and quashed the assessment order passed by AO and held that the Assessing Officer was bound to furnish reasons within a reasonable time and dispose of the objections filed by the assessee by passing a speaking order. Since the procedure required to be followed was not adhered to, relying on the decision in the case of GKN Driveshafts (India) Ltd, held that the Assessing Officer was not justified in finalizing the assessment without disposing the objections of the assessee
Jayanthi Natarajan vs ACIT (2017) 100 CCH 0016 Chen HC W.P. No. 1905 of 2017 & W.M.P No. 1925 of 2017
1662. The Petitioner, engaged in business of selling, purchasing and developing land, sold plot of land and offered the sum as long term capital gain. During the regular scrutiny proceedings u/s 143(3), the AO observed that the assessee was in business of purchase and development of land and had shown land as stock in trade. Therefore, he held that income earned by the assessee through sale of land was business income and not capital gains. He rejected the contention of the assessee that no notice u/s 143(2) was served on the assessee and therefore the assessment proceedings were not valid. The CIT(A) held that the assessment proceedings were invalid since there was no proof of service of notice u/s 143(2) on the assessee. He did not give any finding on the merits of the case. Subsequently, the AO issued notice u/s 147 for reopening the assessment of the assessee. The Court rejected the Petitioner's contention that there was change of opinion by the AO since this aspect was covered at the time of original assessment proceedings. It held that assessment order passed u/s 143(3) was set aside by CIT on the ground of invalidity and accordingly, since there was no original assessment, there cannot be case of change of opinion. It further held that merely on the ground that the reasons recorded by the AO proceeded on the same basis on which he had already made additions but which failed on account of setting aside the order of assessment by CIT, that would not preclude the AO from carrying out the exercise of reopening of the assessment.
KRISHNA DEVELOPERS AND COMPANY vs. DCIT (2017) 99 CCH 0145 GujHC SPECIAL CIVIL APPLICATION NO. 8352 of 2017 dated 25/07/2017
1663. Where the original assessment proceedings were completed u/s 143(3) and notice u/s 148 was issued for re-opening the assessment after four years from the end of relevant AY with the reason to believe that expenditure in connection with dividend income earned was not disallowed u/s 14A r.w.Rule 8D, the Court noting that the assessee's return of income for the impugned AY was subject to multiple scrutinies u/s 143(3), 263, 147 (which was challenged in the writ proceedings and set aside), held that the Revenue had more than sufficient opportunity to scrutinize the returns of the Petitioner and this issue was never raised at the time of original assessment proceedings u/s 143(3) and proceedings u/s 263. Observing that there was a full disclosure by the assessee of all the material facts relating to the exempt income, it held that the notice under Section 148 was bad in law.
UNITECH LIMITED vs. DCIT (2017) 99 CCH 0141 DelHC W.P. (C) 12324/2015 dated 24/07/2017
1664. Where the notice u/s 148 was issued to a company which had amalgamated with Petitioner and had therefore ceased to exist on the date of issue of notice, the Court held that the proceedings u/s 148 were void ab initio since the company had ceased to exist by reason of amalgamation with the Petitioner.
BDR Builders & Developers Pvt. Ltd. vs. ACIT (2017) 99 CCH 0142 DELHC W.P. (C) 2712/2016 dated 26.07.2017
1665. Where the assessment was completed u/s 143(3) and subsequently the AO re-opened the assessment of the assessee by issuing notice u/s 148 with the reason to believe that i) the assessee had erroneously claimed 1/5th of IPO expenditure as the expenses did not qualify for deduction u/s 35D since the assessee had not commenced new business and ii) the assessee had not disallowed interest expense u/s 14A r.w.Rule 8D(ii) against the dividend income earned, the Court held that since the claims of the Petitioner were thoroughly scrutinized during regular assessment u/s 143(3), the reasons to believe recorded by the AO were nothing but a mere change of opinion. Accordingly, it quashed the notice issued u/s 148 and the assessment order passed.

BHAGVATI BANQUETS AND HOTELS LTD. vs. DCIT (2017) 99 CCH 0110 GujHC SPECIAL CIVIL APPLICATION NO. 323 of 2014 dated 06.07.2017

1666. The Petitioner was issued notice u/s 148 on 23/03/2015 by one AO and, subsequently another AO, without obtaining approval of Additional CIT, issued a fresh notice u/s 148 on 18/01/2016 and supplied the reasons to believe that the assessee had obtained accommodation entries of Rs. 13.5 crores based on the information received from Investigation wing. The Court observed that the Revenue did not pursue the proceedings u/s 129 but issued fresh notice u/s 148 on 18/01/2016 without obtaining approval of Additional CIT. It further observed that the reasons to believe were communicated vide one single sentence without any supporting material. Accordingly, it held that there were numerous legal infirmities which lead to inevitable invalidation of all the proceedings. Therefore, it set aside both the notices issued u/s 148 and the consequential assessment order.

MASTECH TECHNOLOGIES PVT. LTD. vs. DCIT (2017) 99 CCH 0102 DelHC W.P.(C) 2858/2016 & C.M. APPL.11983/2016 dated 13.07.2017

1667. The AO issued notice u/s 148 for reopening assessment of Petitioner (charitable trust) for AY 2009-10 with the reasons to believe that the Petitioner during AY 2011-12 had entered into business transfer agreement with Ananya Finance for Inclusive Growth Pvt Ltd., (AIFG) to transfer on slump sale basis its assets and liabilities for consideration of Rs. 45 crores and at the same time it had given Rs. 45 crores as corpus donation to another trust for subscribing the share capital of AIFG. Therefore, the Petitioner had routed funds to AIFG through the trust in the form of Share Capital and had created complex structure to siphon of funds with a view to earn profit. Further, the Petitioner had borrowed funds from certain financing institutions and had lent to NGOs for lending to poor women and accordingly, this activity of lending money could not be said to be for 'relief to poor' as the Petitioner was not directly reaching out to poor but was acting as a mediator. Accordingly, the Petitioner had been carrying out the activity in the nature of trade, commerce of business and not charitable activity. The Court observed that issue of transfer of assessee's business to AIFG took place during AY 2011-12 and such issue was, therefore, not relevant for AY 2009-10. It further observed that the AO had examined these issues during original assessment. Accordingly, it held that any attempt to re-examine these issues would be considered as change of opinion which was not permissible. Accordingly, it set aside the notice issued u/s 148.

FRIENDS OF WWB INDIA vs. DCIT (2017) 99 CCH 0123 GujHC SPECIAL CIVIL APPLICATION NO. 17108 of 2014 dated 13.07.2017

1668. The original assessment proceedings were completed u/s 143(3) and the AO re-opened the assessment u/s 147 after expiry of the 4 years from the end of the relevant AY on the ground that the Petitioner had failed to disclose fully and truly all material facts and with the reasons to believe that i. the Petitioner had claimed exempt income but did not disallow any expense under section 14A. ii. while computing the deduction u/s 10A, the Petitioner excluded telecommunication charges both from the export turnover as well as total turnover. iii. The Petitioner had claimed deduction u/s 35D which it had not claimed in the earlier 2 years. iv. The Petitioner had claimed deduction towards payment for purchase of software license which was a capital expenditure. v. Depreciation on certain items of computer peripheral was wrongly claimed @ 60% instead of 25% since the same was wrongly treated as a part of "computer system" instead of "Plant and Machinery." vi. The Petitioner had not furnished details of payment exceeding Rs. 1 lakh as required by AO in the course of original assessment proceedings. The Court observed that the AO's reason for re-opening the assessment was not based on any tangible material but was a mere change of opinion since all these information were available with AO at the time of original assessment. Accordingly, it held that there was no failure by the assessee to make a true and full disclosure and the re-assessment was bad in law.

HCL TECHNOLOGIES LTD. vs. DVCIT & ANR. (2017) 99 CCH 0124 DelHC W.P.(C) 8164/2010 dated 20/07/2017

1669. Where the assessee's ROI was processed u/s 143(1) and there was no regular assessment proceedings u/s 143(3) and thereafter, the AO issued a notice u/s 148 on the ground that the income of the assessee had escaped assessment, the Court reversed the Tribunal's order

quashing re-assessment proceedings on the ground that since the AO had considered all the material while preparing intimation u/s 143(1), there was change of opinion which was invalid. The Court held that intimation u/s 143(1) was an acknowledgment and not an order of assessment passed by the AO and therefore, it could not be said that the AO had framed any opinion. Accordingly, it held that the initiation of re-assessment proceedings was valid.

CIT vs. VAIBHAV CASTING PVT. LTD. (2017) 99 CCH 0111 AIIHC ITA No. 569 of 2012 dated 18.07.2017

1670. The Court allowed assessee's writ petition challenging notice u/s 148 by holding that reopening of assessment under the directives and compulsion of the audit party was impermissible. Even though no specific ground was raised in writ petition claiming that reopening was based on audit objection, the Court took cognizance of the fact that such contention was raised in objections filed before AO which was not disposed by AO. The, Court called upon the Revenue to produce the original assessment file and noted that AO had not accepted the audit objection and had written a letter to CIT as well as Deputy Accountant General of Audit stating the detailed reasons as to why the stand of audit party not correct. Notwithstanding this correspondence, reopening notice was issued on the same issue and, therefore, it was held by the Court that notice was issued under the directive and compulsion of audit party which was not permissible.

Nabros Pharma Pvt. Ltd. vs. DCIT TS-287-HC-2017 (Special Civil Application No. 18772 of 2014 dated July 12, 2017)

1671. The Court held that where the audited accounts were already available with the AO and formed part of the assessment records, merely suggesting that there was a failure on the part of the Assessee to disclose material necessary for the purpose of making assessment without demonstrating that any fresh tangible material was available could not satisfy the precondition of reopening of assessment after more than four years from the end of the relevant AY.

Oracle India (P.) Ltd. vs. ACIT (2017) 83 taxmann.com 368 (Delhi) (W.P.(C) No. 7828/2010 dated July 26, 2017)

1672. The assessee had filed return of income which was processed u/s 143(1). The AO re-opened the assessment u/s 147 based on information received from investigation wing that the assessee had received accommodation entries to the extent of Rs. 1.56 crores in the garb of share application money and that no return was filed by the assessee and therefore, income had escaped assessment. Subsequently, the AO observed that there was some clerical error in computing the escaped income and the accommodation entries were to the extent of Rs. 78 Lakh. The Court observed that the AO proceeded on the presumption that the assessee had not furnished ROI, however, the same was filed and processed u/s 143(1). It further observed that the AO had also erred in computing the extent of the accommodating entries. Accordingly, it held that the information received from the Investigation Wing could not have been said to be tangible material without a further inquiry being undertaken by the AO for forming reasons to believe for re-opening the assessment. Therefore, it held that the assessment was bad in law.

PCIT vs. RMG POLYVINYL (I) LTD. (2017) 99 CCH 0085 DelHC ITA 29/2017 & CM No.1009/2017 dated 07/07/2017

PCIT vs. SNG DEVELOPERS LIMITED (2017) 99 CCH 0106 DelHC ITA 92/2017 dated 12/07/2017

1673. Where during the original assessment proceedings, the assessee had furnished details of 5 companies from whom it received share application money and the AO had examined these details and raised further queries which were duly answered by the assessee, the Court held that the AO was unjustified in initiating reassessment proceedings beyond a period of 4 years from the end of the relevant year based on a report from the DDIT (Investigation) stating that the said companies were mere paper companies as the said report did not have any specific adverse findings vis-à-vis the assessee and the AO had failed to conduct further independent verification of the alleged paper companies. It held that since the reasons for reopening of assessment did not spell out what information or fact was not disclosed by the assessee and there was no new specific material on record, the reassessment proceedings were bad in law. Accordingly, it quashed the notice issued under Section 148 as well as the consequent proceedings.

SABH INFRASTRUCTURE LTD v ASSTT. COMMISSIONER OF INCOME TAX - W.P.(C) 1357/2016 dated 25.09.2017

1674. The Court held that if the AO does not follow the law laid down in GKN Driveshafts 259 ITR 19, the reopening proceedings have to be quashed. There is no reason to restore the issue to the AO to pass a further/fresh order because it would give a licence to the AO to pass orders on reopening notice, without jurisdiction (without compliance of the law in accordance with the procedure), yet the only consequence, would be that in appeal, it would be restored to the AO for fresh adjudication after following the due procedure. This would lead to unnecessary harassment of the assessee by reviving stale/ old matters. Accordingly, it allowed assessee's appeal.
KSS Petron Private Ltd vs ACIT-ITA No. 224 of 2014 dated 03.08.2017

1675. The Tribunal held that where no approval of JCIT had been obtained by AO under section 151(2) of the Act before the issue of notice u/s 148, the issue of notice u/s 148 was invalid and consequently the assessment order passed in pursuance thereto was also invalid.
ITO & ANR vs Nikhil Vinod Aggarwal & Anr. (2017) 51 CCH 186 MumTrib. ITA No. 2574/mum/2017 dated 13.10.2017

1676. The Court held that the AO was justified in invoking reassessment proceedings in the case of the assessee on the basis of information received from the investigation unit stating that the assessee had received a bogus receipt since the assessee failed to produce the donors or establish the creditworthiness of the donors even after being afforded various opportunities to do so.
Sheela Ahuja v CIT – (2017) 100 CCH 78 (All HC) – ITA NO 24 of 2008 dated 09.11.2017

1677. The assessee owned coffee estates in Coorg and claimed exemption under Section 10(1) on income from the sale of coffee subjected to only pulping and drying. The AO reopened assessment seeking to tax 25 percent of the receipts of the assessee on the ground that the sale of coffee seeds took place after drying and pulping which amounted to sale of cured coffee seeds taxable under Rule 7B. The Court held that the assessee had fully and truly disclosed all facts before the AO during original assessment and therefore held that the reassessment proceedings were based on a change of opinion which was not valid in law.
P Chidambaram – TS-525-HC-2017 (Mad) W.P.Nos.1589, 1590, 1843 and 1855 of 2017 dated 13.11.2017

1678. The Tribunal upheld initiation of reassessment proceedings in the hands of the assessee, based on information that the assessee was a beneficiary of a discretionary trust having an account in a German Bank which was not disclosed by the assessee and also confirmed the addition on account of undisclosed income. It observed that the AO had received information through the Government of Germany (which was given to the CBDT) which in turn received information from the employee of the bank in which the trust had an account specifically mentioning details of the assessee. Since the assessee failed to prove that it had no beneficial interest in the said bank account, it upheld the additions made by the AO.
Hasmukh Gandhi – TS_534-ITAT-2017 (Mum) ITA Nos. 2795 to 2798/Mum/2011 and others dated 15.11.2017

1679. The assessee's original assessment was reopened by the AO under Section 147 of the Act based on information received from DGIT(Inv) pursuant to which he proceeded to examine the source of advances given by assessee company to Loop Telecom Limited (LTL) and made a request for information to revenue authorities in Mauritius to verify the claim of assessee that an amount of USD 185 million credited in its books of account which formed the source of advances to LTL was share application money received from a Mauritius based company. However, without waiting for the information from Mauritius revenue authorities and aborting the very process of seeking of requisite information, the AO passed a reassessment order on same date on which report was received from said authorities treating the advance as an interest free loan and imputing interest @20 percent on the said loan. The Pr.CIT passed the order u/s 263 of the Act setting aside the order passed u/s 147 of the Act by the AO. The Tribunal held that the Principle Commissioner of Income-tax was justified in setting aside the order of the AO under

Section 263 of the Act and directing him to decide the issue afresh noting that the AO had completed reassessment in case of assessee without making proper enquiries with regard to preliminary basic facts about source of share application money found credited in books of account of assessee, as well as not considering information which was called for by him from Mauritius Tax Authorities. Accordingly, it held that the reassessment order passed by him was erroneous and prejudicial to interest of revenue.

ATC Telecom Tower (P.) Ltd. vs. Principal Commissioner of Income-tax, Mumbai [2017] 86 taxmann.com 97 (Mumbai - Trib.) [03-10-2017

1680. The Court set-aside the reassessment order passed by the AO noting that the AO had passed the final reassessment order one day before the deadline for completion of reassessment proceedings without disposing off the assessee's objections against reasons for reopening assessment and remitted the matter back to his file directing him to pass a speaking order on the objections against re-opening raised by the assessee. It rejected the assessee's contention that it could not remit the matter to AO to redo the assessment beyond the period prescribed u/s 153(2), thereby extending the period of limitation. And held that if the AO passed the order of assessment within the prescribed period of limitation and thereafter, if such order is put to challenge before the Court and is consequently set aside on some reason, which in the opinion of the Court is a curable defect, it is always open for the Court to remit the matter back to the AO for passing a fresh order of assessment after curing those defects. Citing the distinction between empowering original authority 'to do' and 'redo' the exercise, it held that when the power "to do" was exercised within the statutory period of limitation, the power to "redo" such exercise would not fall under the purview of limitation once again.

Home Finders Housing Limited [TS-449-HC-2017(MAD)] - Writ Petition No.1019 of 2017

Revision

1681. The Tribunal quashed revision order under section 263 directing AO to initiate penalty under section 271(1)c in respect of assessee's erroneous deduction claim under section 10B for AY 2010-11 on the ground that the CIT could not, after the conclusion of the assessment proceedings, make up his mind or arrive at the required affirmative conclusion towards initiation of penalty proceedings in substitution of the lapse committed by the AO.

Easy Transcription & Software Pvt Ltd [TS-15-ITAT-2017(Ahd)]

1682. The Tribunal quashed section 263 proceedings by holding that where the AO had applied its mind and conducted inquiry, CIT was not justified in assuming jurisdiction under section 263. The provisions of section 263 were not recourse for roving enquiries. The issues raised by CIT were already examined by AO and only after considering assessee's explanation. Merely because the AO had failed to give any reasons in the assessment order, it could not be said that there was no application of mind.

IBM India Pvt. Ltd vs CIT [TS-16-ITAT-2017(Bang)]

1683. The Court allowed the assessee's writ & directed the CIT to consider assessee's revision petition u/s 264 for AY 2013-14. It noted that the assessee received intimation u/s 143(1) wherein certain deduction was not allowed, consequent to which a revised return was filed by assessee which was not considered by AO and the CIT also declined to entertain assessee's revision petition u/s 264, and held that even though a mere intimation did not amount to an order which could be revised u/s 264 considering that CIT's revisionary powers were very wide, if there was a failure on part of taxpayer in making a claim for deduction, the CIT was empowered to grant the assessee opportunity. It further held that independent of the notice issued u/s 143(1) (a), when the Petitioner had filed a revised return and sought for interference by the Commissioner, necessarily the claim had to be considered in accordance with law.

Agarwal Yuva Mandal vs. Union Of India and Pr.CIT TS-30-HC-2017(KER) W.P.(C) No. 26779 OF 2016(V) dated 10.01.2017

1684. Where the assessee, engaged in the construction business had reported its transactions in its return of income viz. provision of maintenance services, which had been accepted by the AO without any disallowance and subsequently, the CIT issued notice under section 263 of the Act

alleging that the assessee, by changing its method of accounting as per AS 7, had shown income amounting to Rs.11.98 crore as deferred revenue income, the Court held that the invocation of Section 263 of the Act was not warranted in the circumstances of the case since the method of accounting adopted by the assessee was subject to scrutiny by the AO and also since the method was a known, recognised method of accounting and therefore there was no error on the part of the AO.

Pr CIT v A2Z Maintenance & Engineering Services Ltd – (2017) 98 CCH 0055 Del HC – ITA 452 / 2016 CM Appl 26465 / 2016

1685. The Tribunal quashed the CIT's revisionary order u/s 263, and rejected the curtailment of deduction u/s 10A for assessee's engineering design services division applying provisions of Sec. 10A(7) r.w.s. 80IA(10). The CIT proceeded to invoke Section 10A(7) rws 80IA(10) on the ground that the assessee had shown disproportionately high profit margin on engineering design and development Services (270%) as against business support services (7.39%). The Tribunal noted that the margin of 270% was relevant only when the engineering design services were benchmarked under TNMM, but in the instant case they were benchmarked under CUP method and accepted by TPO, pursuant to which AO himself had adopted the said profit margins, and after verification had allowed the deduction under section 10A. Relying on Honeywell Automation India Limited [\[TS-71-ITAT-2015\(PUN\)-TP\]](#), it held that the onus to prove that there existed an arrangement between parties which resulted into higher profits was upon the department and there was nothing on record in the instant case to prove so. Further, with regard to the validity of the proceedings under section 263 of the Act, the Tribunal held that in order to invoke the provisions of section 263, the order of the AO must be both erroneous and prejudicial to the interest of Revenue and a mere disagreement with the view of the AO could not be the basis/justification for invoking the provisions of section 263. It also held that order of CIT passed u/s 263 lacked jurisdiction for not coming to a conclusion and directing the AO to make enquiries and carry out fresh search, if necessary.

Eaton Industries Private Limited vs. CIT - TS-227-ITAT-2017(PUN)-TP - ITA No.1148/PUN/2012 dated 24.03.2017

1686. The CIT believing that order passed by the assessing officer assessing net loss of the assessee was prejudicial to interest of Revenue, issued show cause notice to assessee, subsequent to which the details of expenses incurred (which were also furnished to the AO) to the CIT. However, the CIT without specifying which particular document or evidence the assessee was expected to produce but had failed to do so made only a general assertion that despite opportunity the assessee did not produce evidence. The Tribunal held that once assessee had met CIT's objections in SCN by furnishing explanation and details, then onus was on CIT to prove with cogent material that explanations put forth were not proper and assessment was erroneous and prejudicial to interest of Revenue. Accordingly, the Tribunal cancelled CIT's impugned order passed u/s 263 and AO's order u/s 143(3) was restored.

Riverbank Developers Pvt Ltd. Vs Commissioner of Income Tax (2017) 49 CCH 0136 KolTrib (ITA No. 1329/Kol/2016)

1687. Where inquiry in respect of the requirement of disallowance of interest under section 14A r.w. rule 8D of the Rules was conducted by the AO in the assessment proceedings and he took a possible view after application of mind that no disallowance was called for on interest, ostensibly in respect of rule 8D(2)(ii) of the Rules and that disallowance was called for under rule 8D(2)(iii) of the Rules, the Tribunal held that mere fact that the CIT was not in agreement with the view adopted by the AO and had a different opinion on the same, would not render the order of assessment erroneous and prejudicial to the interest of Revenue. Thus CIT exceeded his jurisdiction u/s 263 of the Act in this case. Accordingly, order of CIT was set aside and appeal of the assessee was allowed.

Future Ideas Co. Ltd v. Principal Commissioner of Income Tax - (2017) 49 CCH 0157 MumTrib (ITA No. 3062/Mum/2016)

1688. Assessee was served with a notice u/s. 153C of the Act in connection with search and seizure proceedings in the case of M/s. MBS Jewellers Pvt. Ltd. and its group cases pursuant to which it filed its return of income declaring an income of Rs. 85,000/- and the AO completed assessment u/s. 143(3) r.w.s. 153C of the Act accepting the returned income resulting in NIL demand. The CIT issued a show cause notice under section 263 of the Act alleging that the AO failed to examine certain information in the seized material (with respect to certain sale deeds executed by the assessee which were subsequently cancelled) and since the said notice was not served on the assessee by the AO as the assessee's address was unknown, the CIT set aside the original order passed by the AO with a direction to re-examine and pass appropriate assessment orders. The Tribunal held that the CIT was incorrect in concluding that the AO had not verified the issue and held that the AO had certainly verified this aspect as it was very basis for assessment proceedings. It further noted that the original order passed by the AO was also approved by Jt. Commissioner, being assessment consequent to search and seizure proceedings and in those circumstances, it could not be stated that AO had not verified issue. It also held that without giving proper opportunity to assessee, revision proceedings u/s. 263 could not be finalized as provisions of Section 263 mandated that CIT may pass such orders after giving opportunity of being heard and since the mandatory requirement of opportunity of being heard had not been provided to assessee, it held that the order passed by the CIT was void ab-initio. Accordingly, it held that the CIT erred on both fronts i.e. concluding that there was an error in the order of the AO due to non-examination of facts and in proceeding to pass order under section 263 of the Act without affording the assessee an opportunity of being heard.

Anthi Reddy Yamireddy v DCIT - (2017) 50 CCH 0046 HydTrib - ITA No. 96/HYD/2017 dated 23.05.2017

1689. The assessee had sold its unit in a slump sale and declared capital gains tax which had been accepted by the AO in scrutiny assessment after examination of the issue by issuing notices under section 142(1) and 143(2) of the Act. The CIT having jurisdiction of the AO issued notice under section 263 stating that the AO failed to examine sale of other assets during the year, failed to obtain form 3CEA and failed to examine whether the assets added by the assessee during the year qualified for benefit under section 50B of the Act. The Tribunal held that it was settled law that the twin conditions i.e. AO's order was erroneous and prejudicial to interest of revenue was sine qua non for assumption of revisionary jurisdiction by CIT. It held that every loss of revenue as consequence of order of assessment order could not be treated as prejudicial to interest of revenue. It held that since the AO had made enquiries into slump sale transaction which took place in relevant assessment year and action of AO in accepting claim of assessee that transaction in question was slump sale after detailed enquiry was plausible view, the twin conditions required for exercising jurisdiction u/s 263 were found missing/ existing/absent. Accordingly, the order passed u/s 263 of the Act was quashed by the Tribunal.

Ambo Agro Products Ltd v Pr CIT - (2017) 50 CCH 0042 KolTrib - ITA No. 676/Kol/2016 dated 19.05.2017

1690. The assessee had declared income derived from sale of shares as short term capital gains, which had been accepted by the AO in his order passed under section 143(3) and subsequently in his order under section 143(3) r.w.s. 153A (wherein the AO disallowed professional tax paid) and the same had also been accepted in prior assessment years. In the opinion of CIT, the gains should have been declared as business income instead of short term capital gains and be charged at maximum marginal rate. Accordingly he issued notice under section 263 of the Act. The Tribunal noted that evidences for above assessment years were filed before AO in proceedings u/s 143(3) r.w.s. 153 A Act which were verified by AO and therefore it could not be said that the said view was erroneous and prejudicial to interest of revenue so as to be covered under mandate of Section 263. Accordingly, it held that the assumption of jurisdiction under section 263 was invalid.

Anand Jain v CIT - (2017) 50 CCH 0013 (Mum - Trib) - ITA 3895 / Mum / 2013 dated 05.05.2017

1691. The assessee individual had sold agricultural land (which had been acquired prior to 1981) during the year and adopted the Fair market value as on 1.4.1981 as the cost of acquisition (@ Rs.290 per square meter) which was derived by way of a valuation report. For the purpose of arriving at such value, the valuer used the Jantri rate (a rate prescribed for computing fair market

value of agricultural land) as on 2006 stating that no other rate was available. The AO accepted the valuation and the consequent capital gains computation as provided by the assessee. Subsequently, the CIT having jurisdiction over the assessee called for the assessment records and noted that the Jantri rate for 1999 was available and as per that rate the value of land adopted as cost of acquisition was lower than declared by the assessee resulting in a higher income from capital gains. Accordingly, he issued a notice under section 263 for revision of the order of the AO. The Tribunal held that for the invocation of Section 263 two conditions had to be satisfied – i) the order of the AO had to be erroneous and ii) the order of the AO ought to have been prejudicial to the interest of the Revenue. It held that since the AO had conducted adequate enquiry and the observations of the AO were clearly mentioned in the body of the order and the view taken by him was permissible in law, such order could not be erroneous or prejudicial to the interest of the Revenue. Accordingly, it held that the CIT had wrongly assumed jurisdiction under section 263 of the Act and held that the notice issued by him was liable to be quashed.

Vipul T Joshi v DCIT – (2017) 50 CCH 0032 Ahd Trib – ITA No 1710 / Ahd / 2014 dated 15.05.2017

1692. The Petitioner had paid tax on interest from FDs and had claimed refund in its return of income. The refund was received on 25th April, 2014. Subsequently, the AO observed that the assessee's assets and liabilities (including FD) was taken over by a company and therefore, he held that interest on FD was to be included in income of company since after take over of the assets the FD belonged to the company. Thereafter, the assessee requested Department for intimation u/s 143(1) and filed application to CIT u/s 264 for revising his intimation on the ground that the same interest could not be taxed twice in the hands of the assessee as well as the company. The CIT observed that the assessee was granted refund and accordingly was aware that his return was processed. Therefore, he held that the revision application was made after 1 year from the date on which refund was granted to the assessee and accordingly, the application was time barred. The Court observed that as per section 264(3), an application could be made within 1 year from the date on which the order was communicated to the assessee or the date on which he comes to know about intimation (whichever is earlier). It held that till the time Petitioner had copy of intimation u/s 143(1), it could not have been said that the Petitioner had knowledge that his return was processed even though refund was granted to him. Accordingly, it restored the Petitioner's revision application to file of PCIT.

HARGOVIND PANDEY vs. PCIT (2017) 99 CCH 0136 DelHC W.P.(C) 4705/2017 dated 27/07/2017

1693. The Petitioner pursuant to assessment order passed filed an application before CIT u/s 264 for revision of the order, claiming deduction of provision for wage arrears which was rejected by the CIT on the ground that the Petitioner had not claimed the deduction in respect of provision for wage arrears by revising the return and therefore, the issue did not arise from the assessment order. The Court relied on Gujarat High Court's decisions in the case of C. Parikh & Co. v. CIT (1980) 122 ITR 610 (Guj) and Jammu and Kashmir High Court's decision in the case of Smt. Sneha Lata Jain v. CIT (2004) 192 CTR 50 wherein it was held that u/s 264, the Commissioner was empowered to call for the record of any proceeding or pass such order thereon and held that the mere fact the Petitioner did not make any claim in the original return and also in its revised return before the passing of the assessment order by the AO would not stand in the way of the CIT exercising revisionary jurisdiction to grant relief. It further held that the Apex Court's decision in Goetze India Limited v. Commissioner of Income Tax (2006) 284 ITR 323 would also not restrict the scope of the revisionary jurisdiction of the CIT. Accordingly, it held that the CIT erred in rejecting the application of the Petitioner on the ground of maintainability.

RITES LIMITED vs. CIT (2017) 99 CCH 0074 DelHC W.P.(C) 5331/2014 dated 03/07/2017

1694. The Tribunal held that where during the assessment proceedings the AO had examined details of rents received by the Assessee alongwith the agreement with the tenants and, thereafter, treated the same as income from HP, CIT was incorrect in assuming jurisdiction u/s 263 and directing the AO to make fresh enquiry as to whether the said rental income could be treated as income from business merely on the ground that the AO had not made any elaborate discussion in that regard in the order. The Tribunal observed that the CIT ought to have given findings as to

how the order was prejudicial and erroneous to the interest of the revenue and without the same CIT could no assume jurisdiction u/s 263.

Basudev Kumar Sanghai vs. CIT (2017) 50 CCH 0255 Mum. Trib. (ITA No. 5300/Mum/2014 dated August 21, 2017)

1695. Where the AO had allowed the Petitioner's claim of interest paid u/s 24(b) on Optionally Fully Convertible Debentures which was utilized for repayment of loan borrowed for the construction of building and the CIT issued notice u/s 263 proposing to revise the original assessment order contending that the interest paid on debentures was not be allowable since the debentures were not directly utilised for the purpose of construction, the Court relying on the CBDT Circular dated 20.08.1969 (which provides that interest paid on the second borrowing used merely to repay the original loan obtained for construction of property was allowable u/s 24 if it was proved to the satisfaction of the Income-tax officer), observed that the AO had examined this aspect at the time of original assessment proceedings and had accordingly, allowed the claim. Therefore, it set aside the notice issued u/s 263.

Aryan Arcade Ltd. vs. CIT (2017) Special Civil Application NO. 2914 of 2016 99 CCH 0176 GujHC Aug 10, 2017

1696. Where the assessee acquired assets on its own account as well as under a build operate and transfer scheme (for 30 years) and claimed depreciation @ 50% on such assets as they were used for less than 180 days which was allowed by AO after making proper inquiries, the Court held that the Pr.CIT was not justified in initiating proceedings u/s 263 and by merely relying upon CBDT Circular No. 9 of 2014 contenting that the depreciation wa excessive and erroneously allowed as under the BOT scheme, the assessee was only entitled to amortization of assets merely relying on CBDT circular no 9 of 2014. The Court held if the Pr.CIT was of the view that the AO did not undertake any inquiry, it was incumbent for him to conduct inquiry to conclude that the AO order was erroneous and prejudicial to the interest of the Revenue which was not done in the instant case. Accordingly, order u /s 263 was quashed.

PCIT vs Delhi Metro Express Pvt Ltd (2017) 100 CCH 0012 Delhi HC ITA No. 705/ 2017 dated 05.09.2017

1697. Noting that during the original assessment proceedings, the assessee withheld his actual source of investment in immovable property and the AO summarily accepted assessee's claim that the source of such investment was loan raised from his mother by merely placing on record documents produced without any verification on deliberation on them, the Tribunal upheld the revision of the assessment order u/s 263, considering that the CIT, on perusal of records, had gathered that the loan from the assessee's mother was utilised for payment to another entity and not to the seller of property, who was already paid in earlier year. However, vis a vis CIT's invocation of revisionary power on the ground that stamp duty of the property was more than the declared value, it held that provisions of sec 50C would not be attracted in the hands of the assessee being the buyer of property and therefore assessee's case could not be revised for the purpose of verifying tax liability of the seller i.e, third party.

Parth Ajit Pawar [TS-419-ITAT-2017(MUM)] I.T.A. No. 3835/Mum/2017 dated 14.09.2017

1698. The Court held that the initiation of revision proceedings on the ground that the AO did not conduct a detailed inquiry on account of paucity of time was unfair on the assessee and therefore invalid. It held that the Pr CIT must be satisfied that the order of the AO was erroneous with respect to the material made available to him and noted that the assessee had furnished all the details available with him along with an explanation to the queries raised by the AO. Accordingly, it held that the Pr CIT was incorrect in invoking Section 263.

Pr CIT v Mera Baba Reality Associates Pvt Ltd - ITA No. 637/2017 dated 21.08.2017

1699. The Court upheld the invocation of Section 263 of the Act by the Commissioner observing that while passing the assessment order under Section 143(3) the AO failed to verify the variation in cost of fixed assets of Rs.298.93 crore and failed to scrutinize two other issues viz. i) applicability of TDS provisions to certain expenditure claimed by the assessee and ii) benchmarking of transactions with group companies under Section 40A(2) of the Act, which was prejudicial to the

interest of the revenue. However, it held that the assessee was to be given an opportunity of being heard prior to invocation of revision proceedings. Accordingly, it directed the CIT to pass his order only after providing the assessee an opportunity of being heard.

BSES Rajdhani Power Ltd v PR CIT – (2017) 100 CCH 74 (Del HC) – ITA No 387 / 2017 dated 08.11.2017

1700. The Tribunal, dealing with the powers and duties of the CIT held that the CIT(A) cannot refuse to entertain a revision petition filed by the assessee u/s 264 of the Act if it is maintainable, on the ground that a similar issue has arisen for consideration in another year and is pending adjudication in appeal or another forum. It held that when a statutory right is conferred on an assessee, the same imposes an obligation on the authority. New and extraneous conditions, not mandated and stipulated, expressly or by implication, cannot be imposed to deny recourse to a remedy and right of the assessee to have his claim examined on merits.

Paradigm Geophysical Pty Ltd vs DCIT-W.P.(C) No. 6052/ 2017 dated 13.11.2017

Search

1701. The Court held that the Petitioner was entitled to avail remedy under Pradhan Mantri Garib Kalyan Yojana Deposit scheme with respect to Rs.30 lakhs cash seized by police officials and handed over to Income Tax officials. Noting the Petitioner's submission that the cash amount seized was sale proceeds of old jewellery belonging to him, his wife and mother, which was sold by him to one of the broker post demonetization. The Court affirmed the action of police officials in enquiring the petitioner prayer for directing unconditional return of the seize amount. However, it examined petitioner's eligibility under PMGKY Scheme and observing that the possession of undisclosed income in cash was not any offence under Indian Penal Code, moreover no FIR was registered against petitioner with respect to amount seized, held that the petitioner was eligible for availing the PMGKY Scheme. Accordingly, it directed any declaration of undisclosed income under the PMGKY Scheme, it directed IT Dept. to consider the same and pass appropriate order thereon.

Vishal jain vs. State of Punjab & Others TS-56-HC-2017(P&H) CWP No. 1072 of 2017 dated 23.01.2017

1702. The Court, dismissing the Revenue's appeal, held that where the Revenue could not, in any manner, show that **the** findings rendered by the Tribunal viz incriminating materials seized during the course of search conducted on Mr. Dilip Dhrai did not belong to the Assessee were perverse and since proceedings u/s 153C, as it stood prior to 1st June, 2015, could only be initiated against the Assessee if documents seized during the course of search conducted on another party belonged to the Assessee the proceedings initiated u/s 153C were bad in law.

CIT vs. Arpit Land Pvt. Ltd. and Anr. (2017) 98 CCH 0063 – Bom HC (ITA No. 83 of 2014 dated 07.02.2017)

1703. The Apex Court dismissed Revenue's SLP against Delhi HC ruling in case of Pepsi Foods Pvt. Ltd. with respect to AYs 2006-07 to 2011-12 wherein the High Court quashed the Section 153C notice issued to Pepsi Foods by holding that satisfaction note issued by AO failed to express "satisfaction" of the kind required u/s 153C which was a prerequisite for issuance of notice. The High Court stated that the satisfaction note ought to have provided the basis for conclusion of AO's satisfaction that seized documents 'belong to' person other than searched person and there should be cogent material available with AO to arrive at such satisfaction.

Pepsi Foods Pvt Ltd - TS-584-SC-2017 - Petition(s) for Special Leave to Appeal (C) No. 4659/2015 dated 04-12-2017

1704. Where during assessment initiated pursuant to search proceedings conducted in the premises of the assessee (engaged in business of real estate) the AO disallowed the expenditure incurred by the assessee on filling up the land purchased by it with soil making it suitable for sale, the Court applying the benefit of presumption of validity of contents of books of accounts available under section 132(4A), held that since the expenditure incurred by the assessee was supported by documents seized at time of search and the AO did not endeavour to carry out an enquiry and

investigation into source of investment or genuineness of expenditure made, no disallowance could be made under Section 37(1) of the Act.

CIT v Damac Holdings P Ltd - [2018] 89 taxmann.com 70 (Kerala) - IT APPEAL NOS. 263 OF 2014 dated 12.12.2017

1705. Where search proceedings were carried on in the premises of the Director of the assessee as a result of which a sum of Rs.2 crore of cash had been seized and the director had given a statement that a portion of the cash belonged to the assessee, pursuant to which, the assessee was served a notice under section 153C of the Act, the Court held that the said notice could not be considered as a defective notice as it was issued based on the statement of the director which constituted sufficient material for initiation of proceedings.

Pr CIT v Nau Nidh Overseas Pvt Ltd – (2017) 98 CCH 0072 Del HC – ITA 58, 59, 82, 83 /2017 & CM Appl 2767, 3614 & 3615 / 2017

1706. The Court, relying on the decision of the Division bench in Pr CIT v Devangi Alias Rupa (Tax Appeal No 54 / 2017) upheld the order of the Tribunal wherein it was held that the scope of Section 153A of the Act was limited to assessing only search related income and not other allegedly escaped income which comes to the notice to the AO. It held that the assessment made under section 153A had to have relation to the search / requisition and should be connected with something found therein. If in relation to any assessment year, no incriminating material was found, no addition or disallowance could be made in respect of that assessment year.

Pr CIT v Dipak J Panchal – (2017) 98 CCH 0074 Guj HC – Tax Appeal No 134 of 2017

1707. Where pursuant to a search operation the Assessing Officer made additions to the total income of the Assessee, the Tribunal held that the additions so made were beyond the scope of section 153A of the Act, because no incriminating material or evidence had been found during the course of search so as to doubt the transactions of the assessee and as on the date of search no assessment proceedings were pending for the year under consideration. It further held that the Assessing officer was not justified in disturbing the concluded assessment without there being any incriminating material being found in search. It was held that the action of the assessing officer was based on conjectures and surmises and hence the said additions were deleted.

Shape Builders (P) Ltd. Vs. Deputy Commissioner of Income Tax (2017) 49 CCH 0114 Del Trib (ITA No. 2406/DEL/2014)

1708. Notice u/s 132 of the Act issued in name of a dead person was duly received by Petitioner as the legal heir of that dead person and he also participated in assessment proceedings u/s 158BC of the Act. Subsequently notice u/s 158BD was issued to the Petitioner on the basis of information coming to light in course of search which was challenged by the Petitioner. The Apex court held that as the issue of invalidity of the search warrant was not raised at any time prior to issue of notice u/s 158BD and the fact that the petitioner had participated in assessment proceedings, notice u/s 158BD could not be challenged. The Apex Court, accordingly, dismissed the Special Leave Petition filed by the assessee.

Gunjan Girishbhai Mehta v. Director of Investigation [2017] 80 taxmann.com 23 (SC) (SLA No. 30282 of 2015

1709. Where the AO initiated search proceedings at the premises of the assessee on 10.02.2006 wherein the Department seized certain incriminating material pertaining to AY 2004-05 onward, consequent to which the AO made an addition in the hands of the assessee for AYs 2000-01 to 2004-05 treating the capital gains claimed by the assessee as business income, the Court held that since the incriminating material pertained to AY 2004-05 onward, no addition could be made for the AYs 2000-01 to 2003-04 as no such material was found with regard to these years. Accordingly, it upheld the order of the Tribunal deleting the addition and dismissed the appeal filed by the Revenue.

Pr CIT v Devangi Alias Rupa – (2017) 98 CCH 0051 Guj HC – Tax Appeal No 54, 55, 56, 57 Of 2017

1710. The Apex Court dismissed the assessee's SLP against the order of the Gujarat High Court wherein the block assessment proceedings under section 158BD of the Act were held to be valid. Noting that in the instant case, though the search warrant under section 132 of the Act was issued on a dead person, the assessee, in the capacity of legal heir participated in the block assessment proceedings under section 158BC of the Act, the Court dismissed the contention of the assessee challenging the subsequent issue of notice under section 158BD of the Act, in the name of a deceased was invalid as the assessee had participated in the assessment proceedings under section 158BC and had not raised the issue of invalidity of search warrant at any time prior to the issue of notice under section 158BD.

Gunjan Girishbhai Mehta v Director of Investigation – TS-123-SC-2017 dated March 21, 2017

1711. The Court while dismissing the Revenue's appeal held that the AO had jurisdiction to make additions under block assessment only on the basis of the material found during the course of search and not as a result of other documents/ materials which come to his possession subsequent to the conclusion of the search operation unless and until such material has relation or connection with martial / evidence found during the course of search. The Court noted in respect of additions pertaining to cash credit, foreign travelling expenditure, professional receipts, suppressed rents and gifts, the AO had not found any material during the course of search operation and that the additions were made either on the basis of conjecture or surmises or the same were already disclosed by the Assessee in the ROI and, therefore, did not constitute any material relatable to evidence found during the course of search.

The Court further rejected the contention of the Revenue that the Third Member should not have gone into the issue of jurisdiction of the AO to make additions under block assessment as the Third Member could not have gone beyond the five issues referred to him which did not contain the issue on jurisdiction and held that Tribunal could not be denied to decide upon a foundational issue because of certain perceived procedural issue as the same would expose the legal system to insurmountable barriers – most fundamental of that being the litigant would always have to approach Superior Courts to decide upon the issue of jurisdiction. The Court further held that the Tribunal rightly decided the issue with regard to the jurisdiction of the AO to make an addition under block assessment as the same was mandated by provisions of section 254 (1) and (2) r.w. section 255 (4).

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

1712. Where the Assessee engaged in execution of construction contracts, filed return of income consequent to notice u/s 153A in which it did not exclude from its income the amounts retained by its customers till completion of defect liability period as the amount could not be quantified in the short time but it did file a note along with its return seeking appropriate deduction when completing the assessments, the Court held that the claim was made in principle even though not quantified and thus was to be allowed. It further noted that even if the claim was considered to be a fresh claim and could not be entertained by the assessing officer, there was no bar/impediment in raising the claim before the Appellate Authorities under the Act for consideration. The Revenue's appeal was, accordingly, dismissed.

Commissioner of Income Tax, Pune v. B.G. Shirke Construction Technology (P.) Ltd [2017] 79 taxmann.com 306 (Bombay) (ITA Nos. 1392 & 1531 of 2014)

1713. During search operations conducted in case of the assessee (medical practitioner), cash and jewellery were found, which the assessee claimed to belong to his family members. The AO observing that the assessee's family members did not have any source of income to justify discovery of such large amounts of cash found, made additions in the hands of the assessee on account of undisclosed income, which was deleted by the Tribunal on the ground that lack of the capacity to possess cash could not be a reason to discard the ownership. The Court held that such finding of Tribunal was erroneous as there was a complete lack of any plausible explanation as to the source of acquisition of money by the assessee's family members.

Commissioner of Income Tax Vs. Dr.G.G.Dhir (2017) 98 CCH 0127 AllHC (ITA No. 55 of 2010)

1714. The AO of the assessee, also the AO of another group of companies viz. Jagat Group had carried out a search in the premises of the Jagat Group and documents belonging to the assessee were found and seized from the above premises. Accordingly, the AO issued notices under section 153C of the Act to the assessee and conducted consequent assessment proceedings making an addition in the hands of the assessee under section 68 of the Act on account of share capital / premium received by the assessee during the year under review. The Tribunal held that as per Section 153C of the Act, the satisfaction of the AO of the searched person (i.e. the Jagat Group) was a must for assuming jurisdiction under section 153C of the Act in case of a person other than the searched person (the assessee). It noted that the AO did not record any satisfaction in the proceedings of the searched person and therefore held that the proceedings initiated against the assessee would not survive. Accordingly, it upheld the order of the CIT(A) deleting the addition and dismissed the appeal of the Department.

Victory Accommodation Pvt Ltd v ACIT – (2017) 50 CCH 0044 (Del Trib) – ITA Nos 6216 & 6217 / Del / 2014 dated 19.05.2017

1715. The AO had undertaken a search in the premises of a third party wherein certain documents belonging to the assessee had been found. As the AO had jurisdiction over the assessee as well, he recorded his satisfaction regarding the documents seized and proceeded to initiate search proceedings by issuing notice under section 153C of the Act. The Court dismissed the Petition filed by the assessee and held that merely because the AO did not record that the documents seized did not belong to the third party at whose premises the search was undertaken, the initiation of proceedings could not be declared void as the AO had recorded the fact that these documents belonged to the assessee.

Ganpati Fincap Services Pvt Ltd v CIT – (2017) 99 CCH 0027 (Del HC) – W.P.(C) 525/2015, 527/2015, 529/2015, 2220/2015, 2221/2015, 2224/2015, 2225/2015, 2226/2015, 2227/2015, 2228/2015, 2229/2015, 2245/2015, 2246/2015, 2247/2015, 2248/2015 dated 25.05.2017

1716. The Court upheld the order of the Tribunal wherein the Tribunal had deleted the addition made by the AO on account of unexplained investments on the basis of a document found in the premises of a broker during search proceedings conducted in the premises of the broker since the AO failed to prove how the document belonged to the assessee. The Revenue claimed that the said document seemed to suggest that assessee purchased land at Rs.32.85 crore whereas the assessee had only declared Rs.16.42 crore as a purchase in its books of accounts and therefore the balance amount of Rs.16 crore was unexplained investments taxable in the hands of the assessee. It held since the document did not 'belong to' the assessee, the AO was incorrect in proceeding to make addition in the hands of the assessee and it held that the Revenue could not seek to point out that the document 'pertained to' or 'related to' the assessee.

Pr CIT v Vinita Chaurasia – (2017) 99 CCH 0020 Del HC – ITA 1004 and 1005 / 2015 dated 18.05.2017

1717. A search had been carried out in the premises of the maternal uncle (the Nanda Group in whose case incriminating material had been found) of the Petitioner wherein a key to a locker belonging to the Petitioner deceased maternal grandmother, (which had been handed down to the Petitioner), had been found. The authorities on the presumption that the Petitioner's locker may contain such cash, jewellery, FDRs or other important documents which could represent undisclosed income, issued a warrant of search authorization to search the Petitioner's locker. Subsequently, notice under section 153A of the Act was issued requiring the Petitioner to furnish returns of total and undisclosed income post which notices under section 142(1) of the Act were also issued to the Petitioner in response to which the Petitioner filed objections which were unanswered. The Court, in the writ proceedings, quashed the authorization warrant and the subsequent notices issued and noted that there was no incriminating material linking the Petitioner to the activities of the Nanda Group. It held that it was only when the Revenue authorities had investigated the issue and gathered some credible evidence supporting the alleged link between the Petitioner and the Nanda Group that they could issue a search warrant and proceed further and since that was not done so in the instant case, they were unjustified in initiating search proceedings against the Petitioner.

Ameeta Mehra v Addnl DIT- (2017) 99 CCH 0015 (Del HC) – WP C 1471 / 2013 dated 16.05.2017

1718. Search was undertaken on various premises of the Bindal Group (consisting of 10 companies) to which the 4 Petitioners belonged, pursuant to which returns were filed by all the companies in response to notices under section 153A of the Act. While the assessments were pending, applications were filed by the 10 companies comprising the Bindal Group before the Settlement Commission under Section 245 C (1) of the Act, where undisclosed income of the companies on account of cash, jewellery and other valuables seized during the search as well as the details of the documents seized during the search as well as non-genuine share capital and non-genuine unsecured loans introduced were now disclosed. Subsequently, the Pr CIT filed a report covering all 10 companies and specifically mentioned that the Bindal Group had filed a consolidated cash flow statement which did not cover fully the income of the 4 Petitioners as a result of which only 50 percent of the income that should have been declared had been declared. Accordingly, though the Settlement Commission admitted the application of 6 companies, it declined to entertain the applications filed by the 4 Petitioners. The Court noting that the 4 Petitioners formed part of the Bindal Group consisting 10 companies (the applications for the balance 6 being accepted by the Settlement Commission), held that it was not possible to examine the state of affairs of any one company of the group in isolation of the entire group. It noted that the applications filed by the Petitioners showed the manner of deriving the unexplained income and held that if as contended by the Revenue, there was no full and true disclosure of facts by all ten companies, then the Respondent ought to have challenged the order of the ITSC permitting the applications of the six other companies to be proceeded with, which it failed to do. It held that merely because the consolidated cash flow was not in respect of four Petitioners could not mean that they had not disclosed the manner of earned undisclosed income. Accordingly, the Court held that the order of the Settlement Commission rejecting the application of the Petitioners was invalid and directed the Commission to entertain the applications of the Petitioners along with the other 6 applications filed by the Group.
Bindlas Duplux Ltd & Ors v Pr CIT – (2017) 99 CCH 0017 Del HC – W.P.(C) 5424/2016, 5425/2016, 5427/2016, 5428/2016 & CM 22583/2016, 22585/2016, 22589/2016, 22591/2016 dated May 17, 2017

1719. During the search and seizure operations conducted u/s 132 at the assessee's premises during A.Y. 2006-07, various documents as well as cash, jewellery and other valuables belonging to the assessee were seized. The assessee made disclosure of Rs. 110 Lakhs on account of change in the method of accounting of franchisee fees and undisclosed franchise fees for the A.Y. 2006-07 (i.e. the year in which search was conducted). On this basis, the AO initiated the assessment u/s 153A for the year of search as well as 6 years prior to A.Y. of search and contended that since the modus operandi of the business of the assessee for the earlier A.Ys (6 years prior to A.Y. of search) was same as the A.Y. in which search was conducted, there would have been such undisclosed income in the earlier A.Ys as well. Accordingly, he estimated the undisclosed income at a certain percentage of the amount of disclosure made by the assessee and made the additions for AY 2000-01 to 2004-05. The CIT(A) held the additions to be unsustainable as they were merely based on suspicion that the assessee must have earned undisclosed income in the earlier A.Ys. and deleted the addition. The Tribunal upheld the order of CIT(A). The Court observed that the disclosure of Rs. 110 Lakhs by the assessee was made only for the year of search and not for the relevant years and accordingly, there was no incriminating material on the basis of which the franchisee commission could have been added for the earlier A.Ys. Relying on the decision of this Court in the case of CIT v. Kabul Chawla (2016) 380 ITR 573(Del.), it held that invocation of assessment u/s 153A without any incriminating material for each of the earlier A.Ys was bad in law and additions made by the AO were not justified. Accordingly, it confirmed the deletion of additions made by the AO in respect of franchisee fees.
PCIT & ORS. vs. Meeta Gutgutia Prop. Ferns 'N' Patels & ORS. (2017) 99 CCH 0024 DelHC ITA 306-310/2017

1720. During the course of search proceedings for A.Y. 2011-12 u/s 132, cash was found and seized from the premises and bank lockers of the assessee. The assessee offered the cash seized as

his undisclosed income for A.Y. 2005-06 to A.Y. 2011-12 and requested the AO for adjustment of seized cash against his tax liability arising on account of the offered income. The AO levied interest u/s 234B up to the date of issue of orders u/s 143(3) r.w.s 153A for non-payment of advance tax in respect of undisclosed income and then adjusted the cash seized against the tax liability including interest u/s 234B. Before the CIT(A), the assessee contended that interest u/s 234B should have been restricted till the date when the assessee requested for adjustment of cash seized against the tax liability and not till the date of passing the order of AO. CIT(A) rejected the assessee's contention on the ground that the only at the time of passing the assessment order u/s 153A/153C, the AO could arrive at the conclusion that the cash seized belonged to the assessee and then only he could adjust the cash seized against the tax liability. He further held that advance tax instalments had already expired and accordingly, the cash seized could not have been adjusted against the advance tax liability. Further, he held that the Explanation to 2 to Section 132B also excludes advance tax from the term 'existing tax liability'. The Tribunal observed that Explanation 2 to section 132B which excludes advance tax from the ambit of existing liability was effective from 1st June, 2013 and was not applicable to the assessment years involved in the appeal and accordingly held that the assessee was entitled to adjustment of cash seized against the tax liability including advance tax arising on undisclosed income. Accordingly, it deleted the interest levied u/s 234B by the AO.

N. Venkatanathan vs.DCIT (2017) 50 CCH 0065 MumTrib ITA Nos. 7378 to 7383/Mum./2014

1721. The Court, upheld Tribunal's order quashing block assessment u/s 158BC on the ground that no formal notice u/s 143(2) was issued to assessee. The assessee had filed a block return on July 12, 2004, 28 months after the issue of notice u/s 158BC on February 11, 2002. The relevant block assessment period was from 1990-2001. CIT(A) and Tribunal set aside assessment order made by AO on the ground that notice u/s 143(2) was not issued before rejecting returned income. Before the Court, the Revenue contended that return filed by the assessee was after a long delay and could be treated as invalid and non-est return due to which issue of notice u/s 143(2) was not required by AO to complete assessment. Referring to the provisions of section 143, the court held that assessment u/s 143(3) would be made by AO by issuing notice u/s 143(2) only when return had been filed u/s 139 or u/s 142(1) and if it was necessary to ensure that income had not been understated by assessee. Further, as per the provisions of section 144, it held that if the assessee had not filed return of income or if the return filed was held to be invalid or non-est, AO could have proceeded to frame assessment u/s 144. Accordingly, it held that though the assessee had filed a belated return, the AO based on the return filed framed an assessment assessing income higher than the returned income and therefore notice u/s 143(2) was necessary.

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

1722. Pursuant to search carried on by the Railway Police one of the assessee's employee was found in possession of cash of Rs 30 lacs, which was requisitioned and seized u/s 132A, consequent to which search proceedings were initiated in the case of the assessee treating the seized cash as the assessee's concealed income. The Apex court, dismissing the assessee's appeal rejected the assessee's contention that proceedings initiated u/s 132 were invalid as it could not be based on a search conducted on a train by police authorities. It held that since such plea was not raised before any lower authorities and that in any case the retrospective amendment to section 132A (vide Finance Act 2017) provided that the income tax authorities were not required to disclose the reason to suspect/believe as recorded u/s 132, the contention of the assessee was invalid and was not to be considered.

N.K Jewellers vs CIT-TS-426-SC-2017-civil appeal no. 5216 / 2008 dated 13.09.2017

1723. The Apex Court admitted Revenue's SLP against High Court order quashing assessment made by AO/TPO u/s 153A pursuant to search and seizure operations as no new incriminating material was found during the search and seizure operations which took place after completion of scrutiny assessment u/s 143(3). Observing that the scrutiny assessment concluded was based upon queries and assessee had disclosed all material which came to be reviewed subsequently under section 153A proceedings, the High Court quashed the assessment order.

Pr.CIT vs Baba Global Ltd-TS-691-SC-2017-TP-ITA no. 938/2016 dated 28.08.2017

1724. Pursuant to search proceedings conducted in the BM Gupta group, the Assessing Officer initiated search proceedings in the case of the assessee on the basis of certain documents found at the premises of BM Gupta which allegedly pertained to the assessee. The Court rejected the contention of the Revenue that even prior to the amendment u/s 153 (1st June 2015), it was sufficient that the seized documents pertained to the assessee and it is not necessary to show that the material belonged to the assessee. It held that prior to the amendment it was sine qua non for the material to 'belong' to the assessee.

CIT & Ors vs Renu Construction Constructions Pvt. Ltd & Ors (2017) 100 CCH 0021 Delhi HC ITA no. 499/2011, 32/2012, 35/2012, 41/2017, 125/2017 dated 06.09.2017

1725. The Court held that merely visiting the premises on the pretext of concluding the search but not actually finding anything new for being seized cannot give rise to a second panchnama so as to extend the limitation period for passing the section 153A assessment order. In such event, there would be no occasion to draw up a panchnama at all. The visit and the panchnama drawn up on the date cannot lead to postponement of the period for completion of assessment with reference to section 153B(2)(a) of the Act.

Pr.CIT vs PPC Business and Product Pvt Ltd - ITA 290/2016, ITA 605/2016, ITA 606/2016 ITA 607/2016 dated 17.07.2017

1726. The Apex Court dismissed the appeal filed by the Revenue by holding that the High Court was correct in upholding the finding of the Tribunal that as per sec 153C the incriminating material seized during the course of search must pertain to the relevant AYs whereas the documents which were seized did not establish any co-relation, document-wise with the AYs under consideration. It also noted that the satisfaction note recorded by the AO was analysed by the Tribunal and after due consideration the Tribunal reached a conclusion that the documents belonged to a different AY.

CIT vs. Sinhgad Technical Education Society TS-358-SC-2017 (Civil Appeal No. 110080/2017 dated August 29, 2017)

1727. The Court dismissed the appeal of the Revenue and held that no notice u/s 153C could be issued to the Assessee for AY 2006-07 as notice u/s 153C to the Assessee was issued on 04/01/2013 and, therefore, the six-year period prior to AY 2013-14 would be AY 2007-08 to AY 2012-13. The Court held that in the case of a person other than the searched person, only subsequent to the notices issued under Sec 153A to the searched person the AO could issue notice. Therefore, the starting point for computation of the block period of six years would be the date on which notice was issued to the 'other person' under Sec 153C and not the date on which the search was conducted as contended by the Revenue.

Pr. CIT vs. Sarwar Agency Pvt. Ltd. (2017) 99 CCH 0191 Del HC (ITA No. 422/2017 dated August 17, 2017)

1728. Where based upon the statements made by the director's of the assessee-company in the course of search u/s 132, the AO made additions u/s 68 on the allegation that the assessee had received bogus share-application money, the Court upheld the order of the Tribunal and deleted the additions made by the AO observing that the statements recorded u/s 132 did not by themselves constitute incriminating material for making additions and therefore, the assumption of jurisdiction by the AO u/s 153A was invalid.

PCIT vs. Best Infrastructure (India) Pvt. Ltd. & ORS. (2017) 99 CCH 0163 Del HC ITA No. 13/2017, 11/2017, 12/2017, 20/2017, 14/2017, 15/2017, 16/2017, 17/2017, 18/2017, 19/2017, 21/2017, 22/2017

1729. The Court dismissed the appeal of the Revenue and held that where the document seized during the course of search conducted in FY 10-11 did not contribute incriminating material for that year, it could not be the basis of inferring that a certain modus operandi existed for the other

assessment years covered under search and therefore held that the addition made during the course of proceedings u/s 153A r.w.s. 143(3) for AY 05-06 to AY 07-08 was not warranted. Accordingly, the additions were deleted.

Pr. CIT vs. Dharampal Premchand Ltd. (2017) 99 CCH 0202 Del HC(ITA No. 512-514/2016 dated August 21, 2017)

1730. Where in a search and seizure operation conducted by the investigation wing of Income Tax department, no incriminating documents and material belonging to the assessee and relating to the subject AY was found, the Tribunal confirmed CIT(A)'s order which held that no proceeding u/s 153C could be initiated against the assessee as the jurisdictional requirement (i.e. the incriminating material should be relating to the assessee and of the subject AY) was not met in assessee's case. Accordingly, the Tribunal dismissed Revenue's appeal against CIT(A)'s order.

PCIT vs Index Securities Private Limited & Ors (2017) 100 CCH 0004 delhi HC -ITA no. 566/2017, 567/2017, 568/2017, 569/2017, 570/2017, 571/2017

1731. The Court dismissed Revenue's appeal against Tribunal's order wherein the additions made u/s 68 and 14A pursuant to proceedings u/s 153A/153C were deleted on the ground that no incriminating material in support of additions was brought on record by the Revenue. The Court held that in light of the finding in the Tribunal's order, no substantial question of law arose in the appeal filed by the Department.

CIT & Ors vs Deepak Kumar Agarwal & Ors (2017) 100 CCH 0011 MumHC ITA no. 1709 of 2014 dated 11.09.2017

1732. A search took place in the premises of the assessee pursuant to which a handwritten document was seized containing details of house construction expenses of Rs. 49 Lakh. The explanation offered by the Assessee was that the said paper was not related to him but to the company where he was director. Since the said document was seized from the residence of assessee, the AO drew a presumption u/s 292C that it belonged to him and held that Rs. 49 Lakh constituted the unexplained income of the assessee since the assessee had not submitted any evidence like a confirmation letter or any other document to show that expenditure related to any project of its company. The Tribunal observed that the document did not indicate that it pertained to the assessee nor was the address and location of the property mentioned therein nor such property was located by the AO during the assessment proceedings. Further, it noted that the AO had also not brought on record any forensic evidence to prove the handwriting of the loose paper was of the assessee and no corroborative material was brought on record to substantiate the addition. It further observed that no attempt was made by the AO to find out that the construction expenses of any project of the company of which the assessee was a director. Accordingly, it deleted the addition. The Court upheld the view of the Tribunal and held that the addition of Rs. 49 lakhs was based on surmises and conjectures and that too on the basis of a single document without making any further enquiry.

CIT vs. SHRI PRAVEEN JUNEJA (2017) 99 CCH 0115 DelHC ITA 57/2017 dated 14/07/2017

1733. Where an application for issue of shares and confirmation thereon issued by the assessee was found pursuant to search proceedings carried out in the premises of the Dalmia Group of companies and the AO of the Dalmia group recorded a satisfaction that the aforesaid documents belonged to the assessee and handed them over to the AO of the assessee to initiate proceedings against the assessee under Section 153C, the Court held that once the application and confirmation were submitted by the assessee to the Dalmia group it could not be said to belong to the assessee. Accordingly, it quashed the satisfaction note issued by the AO of the Dalmia Group and the consequent proceedings initiated in the case of the assessee.

CANYON FINANCIAL SERVICES LTD. & ORS. vs. ITO & ORS (2017) 99 CCH 0089 DelHC W.P.(C) 3241/2015, W.P.(C) 3242/2015, W.P.(C) 3243/2015, W.P.(C) 3245/2015, W.P.(C) 3246/2015, W.P.(C) 3248/2015 dated 10/07/2017

1734. The Court quashed assessment passed u/s. 153A in the assessee's case as no assessment was 'pending' as on the date of initiation of search for relevant AY and no incriminating material was found during the course of search. The Court accepted assessee's reliance on P&H HC ruling in Vipin Khanna (255 ITR 2201) and CBDT Circular 549/1989 which provided that when

there was failure to issue notice u/s. 143(2) on assessee within prescribed time, the return would be taken as final and no scrutiny proceedings could be initiated thereof. The Court noted that for the relevant AY, no notice u/s. 143(2) or 142(1) was issued to assessee and the period for issuing such notice expired on September 30, 2009. Accordingly, the assessment order passed u/s 153A was quashed.

Chintels India Ltd. vs. DCIT TS-293-HC-2017 (ITA 581,707 & 731/2016 dated July 19, 2017)

1735. The Tribunal held that where the cash seized from assessee-individual's premises during AY 2009-10 pursuant to search and seizure operation u/s. 132 of the Income-tax Act, was deposited in the PD (Personal Deposit) account of the department, it was not available to the assessee as on the valuation date, it could not be considered as assessee's wealth u/s 2(ea)(vi) of the Wealth Tax Act and accordingly not liable for wealth tax.

B. Rajeswar Rao TS-440-ITAT-2017(HYD)-WTA No.80 of 2016 27.09.2017

1736. The Tribunal held that the Addl CIT had recorded that he was granting 'mechanical approval' u/s 153D to the draft assessment order for want of time to have meaningful discussion, the assessment order was bad in law and had to be annulled. It further held that the Respondent was entitled to raise an objection under rule 27 even in respect of fresh issues and it was not necessary that the ground should have been decided against the Respondent by the CIT(A).

AAA Paper Marketing Ltd vs ACIT-ITA No. 167 / Lkw / 2016, 168 / lkw / 2016 dated 28.04.2017

1737. Where the Assessing Officer had issued a notice u/s 153C and made additions u/s 69C of the Act, based on material seized from the residential premises of a third party (Dilip Dherai) which did not belong to the assessee and a statement made by Dilip Dherai which was later retracted, the Court held that, the Tribunal was correct in concluding that addition could not be sustained in the absence of material which would conclusively show that huge amounts revealed from seized documents were transferred from one side to another. Further, it held that finding by Tribunal that section 153C was not attracted and its invocation was bad in law was correct and no substantial question of law arose. Accordingly, it dismissed Revenue's appeal.

CIT vs Lavanya Land Pvt Ltd-ITA No. 72 of 2014, 114 of 2014 dated 23.06.2017

1738. A search was conducted at premises of one 'S' who was the employee of assessee's agent namely 'Matrix' during which certain computer printouts were seized which indicated that the assessee had received Rs. 2 lakhs for hosting ICC award function in Sydney. The AO, relying on the said print out added said amount to assessee's income. The Tribunal noting that a) the passport submitted by assessee clearly established fact that neither she had travelled to Sydney during relevant period nor hosted ICC event for which she was supposed to receive cash payment and b) that the employee from whose computer such printout was taken had stated before departmental authorities that she was not aware of fact mentioned in seized printout as it was relating to period prior to her appointment, held that the AO erred in simply relying upon an untested/unverified document and without any other corroborative evidence to demonstrate that assessee had actually received cash payment for hosting any event in Sydney. Accordingly, it held that the impugned addition was unsustainable.

ACIT vs Katrina (Kaif) Rosemary Turcotte- ITA No. 3092 / mum / 2015 (Mumbai Tribunal) dated 11.10.2017

i. **Withholding tax**

1739. The Tribunal noted that CUTE i.e Common Utility Terminal Charges paid by the assessee (a Foreign Airline Company) were for providing the airline with technical infrastructure, telecommunication facilities and telecommunication infrastructure and held that the said payments made by the assessee, constituted a payment for 'facility' and not fees for technical service (FTS), hence TDS u/s 194J was not applicable. Further, relying on SC ruling in Japan

Airlines, it held that charges paid for Passenger Service Fees (PSF) were not in nature of rent and thus TDS u/s 194I was also not applicable.

Singapore Airlines Ltd. [TS-697-ITAT-2016(Mum)]

1740. The assessee paid interest to NBFCs without deducting tax contending that as per section 194A(3)(a)(b), NBFCs fell in the exclusionary clause and accordingly no TDS was to be deducted. The AO disallowed the amount u/s. 40(a)(ia). CIT(A) upheld the order of the AO. Before the Tribunal, the assessee contended that in view of second proviso to section 40(a)(ia) no disallowance could be made when recipients of amount have offered the same as income and paid tax thereon. However, the Tribunal observed that the assessee did not file relevant material before the AO in this regard but the details were available with revenue regarding income offered by these NBFCs. Accordingly, it remitted the matter to the AO for verification of fact that recipient NBFCs had already taken into account amount of interest received by them for computing income in their return of income and in case the AO was satisfied then no disallowance was called for u/s. 40(a)(ia).

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

1741. The Court dismissed Revenue's appeal for AY 2011-12 and held that domestic software purchase payments by assessee (an Indian Company engaged in buying and selling software) was a case of outright purchase and hence did not amount to royalty. Consequently, section 194J would not be applicable. The transaction was one of purchase and sale of a product and nothing more. The provisions of section 9(1)(vi) would get attracted in the case of sale of copyright and not in a transaction of sale of copyrighted article.

Vinzas Solutions India Private Limited [TS-28-HC-2017(MAD)]

1742. Where the assessee bank had made interest payments to Vishveshvaraya Technological university during AY's 2011-12 to 2015-16 without deducting TDS u/s 194A in light of the fact that, VTU was granted Section 12AA registration for AY 2016-17 and that it had applied to CBDT u/s 119(2)(b) praying for retrospective recognition of registration u/s 12AA, which was pending, the Tribunal directed the AO to await the CBDT's decision on it in respect of application filed u/s 119, before initiating proceedings, u/s 201(1)/(1A), since, if the CBDT accepted VTU's application, the assessee's liability to deduct TPS would efface. In the event CBDT doesn't consider VTU's application favorably, the Tribunal directed the AO to re-adjudicate the impact of form 26A furnished by VTU and also held that interest u/s 201(1A) would be computed from the date which tax was deductible to the date of filing of return by deductee-VTU. Accordingly, it restored the matter back to the file of AO.

**State Bank Of Mysore vs. The Income Tax Officer(TDS) TS-61-ITAT-2017(PAN)
ITA NO. 207-210/PAN/2016 ITA NO. 211-215/PAN/2016 dated 03.02.2017**

1743. The Apex Court dismissed the SLP filed by the Revenue against the judgement of Delhi High Court wherein the Court had quashed section 201(1)/(1A) proceedings initiated against the assessee in respect of TDS default on pre-paid cards payments by rejecting the Revenue's action of invoking extended time limit u/s 153(3)(ii) for giving effects to findings/ directions issued by Court for issuing notice u/s 201. The High court had also accepted assessee's contention that the proviso to Section 201(3) has to be read in consistency with the law laid down by Delhi HC ruling in NHK Japan Broadcasting Corporation and that prior to March 31, 2011, the Department was not permitted to initiate Section 201 proceedings for a period more than four years.

ACIT vs. M/s Tata Teleservices TS-42-SC-2017 SLP 2420/2017 dated 06.02.2017

1744. The Tribunal deleted interest u/s 201(1A) levied for alleged short deduction of TDS u/s 194A on interest payments made by assessee-company during AY's 2008-09 and 2009-10 noting that the parties to whom assessee paid interest had obtained lower tax deduction certificates u/s 197 from their respective AO's. It rejected the Revenue's view that the lower TDS rate specified in the certificate u/s 197 was valid only in respect of the amount specified in the certificate and the assessee ought to have deducted TDS at the normal applicable rate in respect of the remaining sum and referring to Section 197(2) along with relevant Rule 28AA(2), clarified that once the

certificate u/s 197(2) is issued for lesser/no TDS deduction, the person making the payment is at liberty to deduct tax at rates specified in the certificate and that it did not make any reference to any income specified in such certificate, it held Section 197 was "person specific" and cannot be extended to the amounts specified by the recipient of the payment while making an application for grant of certificate u/s 197 of the Act.

Twenty First Century Securities Ltd. vs. I.T.O. TS-43-ITAT-2017(Kol) ITA No.s 464 & 465/Kol/2014 dated 03.02.2017

1745. The Court held that no TDS u/s 194 I had to be deducted on lease premiums, bi-annual or annual for limited/ specific period, paid towards the acquisition of lease hold rights as the same **were** capital in nature. The Court noted that amounts constituting annual lease rents (generally 1% of the total consideration) were in the nature of rent and TDS had to be deducted u/s 194 I and Interest on overdue payments or other such amounts could not be treated as capital in nature and TDS had to be deducted on the same.

The Court, further rejected the plea of GNOIDA i.e. GNOIDA is a Municipal Authority and eligible for benefit of section 10(20)] and held that GNOIDA **was** not a Municipal Authority as defined u/s 10(20) since it did not have a "self-governing structure" as mandated by Article 243P and 243Q of the Constitution of India.

Rajesh Projects (India) (P.) Ltd. vs. CIT (2017) 78 taxmann.com 263 (Delhi) (W.P (C.) Nos. 8085 of 2014 dated 16.02.2017)

1746. The Tribunal held that the Assessee could not be treated as Assessee in default for non-deduction of tax on retrenchment payment. The Tribunal noted that the Assessee had retrenched 69 employees out of those 69 employees five employees approached the Assessee for out of court settlement, that an MOU was entered into with the said employees, however, it was not acted upon by the Assessee since approval of HO was not obtained, that said five employees then filed an application before Regional Labour Commissioner ("RLC"), that the matter, thereafter, travelled to the Hon'ble Bombay High Court and the Hon'ble Bombay High Court directed the RLC to decide the matter on merits, that the RLC, subsequently, decided the issue in favour of the ex-employees and issued a certificate of recovery to the Collector Mumbai for recovery of the dues as land revenue dues and that pursuant to such order the bank account of the Assessee was attached and the money was forcefully recovered. The Tribunal based on such facts held that there was no employer employee relationship in between the Assessee and its ex-employees. The Tribunal noted that the Assessee was under a bonafide belief that such payments are capital receipts in the hands of the ex-employees and no TDS deduction was required and that the said ex-employees had paid due taxes on the same. The Tribunal further, by following the decision of Arun Bhai R. Naik (379 ITR 511), held that there was no obligation cast upon the employer to make retrenchment payments and the same would not fall within the purview of 17(3)(i) (i.e. profit in lieu of salary) since ex-employees had no vested right to receive the said payments.

ITO vs. Kuwait Airways Corporation (2017) 78 taxmann.com 187 (Mum. Trib.) (ITA No. 3303/Mum/2012 dated 15.02.2017)

1747. The Tribunal, following the decision of the Apex Court in the case of ITC Ltd. (384 ITR 14), held that since the contract of employment was not the proximate cause of receipts of TIPS by the employees from a customer, no TDS was to be deducted u/s 192 by the Assessee (Hotel Employer) while disbursing to TIPS its employees since TIPS were collected from the customers in a fiduciary capacity.

EIH Ltd. vs. ITO (2017) 78 taxmann.com 242 (Del. Trib.) (ITA No. 2642-2645/Del/2015 dated 14.02.2017)

1748. The Tribunal, following the order of the Hon'ble Bombay High Court in Yashpal Sahni (165 Taxman 144), held that the Assessee could not be made to pay a tax upon denial of credit of TDS on the ground that TDS was not getting reflected in Form 26AS. The Tribunal noted that the Assessee received lease rentals net of TDS which was discernible from its Bank Statements, which implied that tax had been duly deducted and, therefore, when TDS had been already deducted, though not paid to the credit of the **Central Government**, the Assessee could not be held liable to pay tax and credit of such TDS had to be allowed to the Assessee in view of

section 205. The Tribunal further noted that recovery could be initiated against the person who had deducted the TDS but not paid the same to the credit of the government.

Shetbro Hotels and Resorts Pvt. Ltd. vs. ITO (2017) 49 CCH 0048 Mum Trib (ITA No. 2205/Mum/2016 dated 15.02.2017)

1749. The Court reversed the order of the Tribunal for AY1996-97 and deleted the disallowance made u/s 40(a)(i) towards non-deduction of TDS on interest paid by assessee (a domestic company) on machinery imported from supplier based in Canada, pursuant to benefit u/s 10(15) (iv)(c) [which provides that interest payable by an industrial undertaking in India on moneys borrowed/ debt incurred by it in a foreign country in respect of purchase outside India of raw materials / capital plant and machinery, etc to the extent to which such interest does not exceed the amount of interest calculated at the rate approved by the Central Govt. in this behalf, having regard to the terms of the loan or debt and its repayment is exempt], considering the fact that the Department of Economic Affairs which was part of the Central Government had approved the interest rate at which the transaction took place in 1995. It held that the Department of Economic Affairs was also a part of the Central government and also noted that the interest rate at which the transaction was undertaken was also subsequently approved by the Department of Revenue in 1999.

Tej Quebecor Printing Ltd v JCIT – (2017) 98 CCH 0053 Del HC – ITA 385 / 2004

1750. The Court dismissed assessee-company's writ, holding that TDS under the Income Tax Act, 1961 cannot be adjusted against the tax payable on the undisclosed income declared by the assessee under the Voluntary Disclosure of Income Tax Scheme of 1997 (VDIS) as VDIS is a part of the Finance Act, 1997 and is a self-contained code and is different and distinct from the 1961 Act and hence TDS and/or any other mode of payment of tax under the 1961 Act cannot be used to discharge the obligation to pay Tax under the scheme of 1997 Act on undisclosed income.

Earnest Business Pvt. Ltd v CIT [TS-93-HC-2017(BOM)] (WP No. 616 of 1998) dated 10/03/2017

1751. Where upon survey u/s 133A, no incriminating material of whatsoever nature was found at the business premises of the appellant in the form of excess cash, evidence of unaccounted borrowings, investments etc. and the statements taken u/s.133A of the partner were later on retracted and the only evidence Revenue was harping upon was the duplicate set of books of accounts on which most of the entries, as admitted by the Accountant and the Consultant had been modified / re-arranged in order to prepare projected financial data to be provided to banks for getting sanctioned higher working capital credit limits, the Tribunal held that it was a well established judicial precedent that statement recorded u/s.133A of the Act had no evidentiary value for the reason that the Officer was not authorized to administer oath and take any sworn evidence which alone had evidentiary value as contemplated under law and thus in view of totality of facts, the Tribunal found no reason to interfere with the order of CIT(A) who had deleted the impugned addition u/s.68 of the Act and accordingly, dismissed the appeal of the Revenue.

Assistant Commissioner of Income Tax v. Shree Krishna Developers - (2017) 49 CCH 0143 AhdTrib (ITA Nos, 1177 & 1231/Ahd/2011)

1752. Where the Assessing Officer had completed the assessment u/s. 153C of the Act and made the addition in dispute without any incriminating material found during the search and seizure operation and the addition was purely based on the material already available on record and where the perusal of the assessment order undisputedly indicated that no reference whatsoever had been made to any material found/ seized during the course of search, the Tribunal held that completed assessments could be interfered with by the AO while making the assessment under Section 153 only on the basis of some incriminating material unearthed during the course of search and thus addition in this case was not sustainable in the eyes of law. Accordingly, the Tribunal deleted the addition and allowed assessee's appeal.

Global Realty Creations Ltd & Ors v. Deputy Commissioner of Income Tax (2017) 49 CCH 0147 DelTrib

1753. Where the assessee was aware of the fact that its employees had visited foreign countries by availing LTC/LTF concession and hence were not entitled for exemption of reimbursement of LTC u/s 10(5) of the Act (as section 10(5) exemption is available only in case of travelling within India), the Tribunal held that the assessee was under an obligation to deduct tax at source treating such an amount as not exempt and since the assessee failed to enforce its duty to deduct tax at source as envisaged u/s 192, it was an 'assessee in default' u/s 201(1) of the Act. The appeal of the assessee-bank was, accordingly, dismissed.

Syndicate Bank v. Assistant Commissioner of Income Tax (TDS) - [2017] 80 taxmann.com 179 (Bangalore-Trib.) (ITA Nos. 1398 to 1403 and 1435 to 1477 (Bang.) of 2016)

1754. Where the assessee bank was held as assessee in default u/s 201(1) & 201(1A) of the Act due to late filing of TDS statements and failure to furnish necessary forms, the Tribunal held that assessee being a public sector bank, its TDS was automatically deducted as per provisions of the Act by a centralized core banking system and though there were some technical issues like non submission of declaration forms within due date, same could not be a valid ground for treating assessee as an assessee-in-default u/s 201(1), particularly when assessee had explained reasons for such mistakes and furnished all details and requested for one more opportunity to explain the case. The Tribunal, accordingly, remitted the matter back to the file of the Assessing officer.

State Bank of India v. Income-Tax Officer (TDS) - [2017] 80 taxmann.com 195 (Vishakhapatnam-Trib.) (ITA No. 444 (Vizag.) of 2016)

1755. The Apex Court held that the disallowance under section 40(a)(ia) could be made on any amounts paid or payable during the year without deduction of tax at source and dismissed the contention of the assessee that it would apply merely to amounts which were left 'payable' at the end of the year. Therefore, it held that where the assessee had made payments to sub-contractors for transportation of LPG without deduction of tax under section 194C of the Act, the disallowance under section 40(a)(ia) was rightly made by the AO.

Palam Gas Service v CIT – (2017) 81 taxmann.com 43 (SC) – Civil Appeal No 5512 of 2017 dated 03.05.2017

1756. Assessee was responsible for executing the contract of transportation/carriage of goods on behalf of the Principals and besides using its own trucks and lorries, it also hired trucks and lorries from other owners or directly from the drivers available in the market or through brokers on random basis as and when required, on freight to freight basis. The AO made an addition observing that Section 194-C was applicable in case in hand on the ground that the Assessee was a Transporter and failed to deduct tax at source u/s.194-C. The Court upheld the order of the CIT(A) and Tribunal and held that the payments made to lorry hire charges by assessee was direct expense which was allowable under Section 28 and no disallowance under section 40(a)(ia) could be made especially when there was no contract between the assessee and the persons from whom it hired trucks and lorries. It held that in the absence of any evidence to prove contentions of AO on which the addition was based, even if, there was regular pattern and continuous transportation, it could not be said that those individual truck owners/drivers of transporters were contractors or sub-contractor of assessee company.

CIT v Shark Roadways Pvt Ltd - (2017) 99 CCH 0018 AIIHC - INCOME TAX APPEAL No. 9 of 2013 dated 01.05.2017

1757. The assessee had earned rental income and offered realized as well as unrealized rent under the head "income from house property". It claimed deduction of the amount of unrealized rent u/s 23(1) r.w.r 4 and claimed TDS credited on both, realized as well as unrealized rent. The AO restricted the TDS credit to the amount of rent received. The CIT(A) confirmed the action of AO. The Tribunal observed that the assessee offered the total rental income (realized as well as unrealized) and then claimed deduction of unrealized rent under section 23(1) r.w.r 4. It further observed that the taxes were duly deducted by the deductor and paid to the account of the Government and also the assessee had produced the TDS certificates for the tax deducted. Accordingly, it held that as total rental income (including unrealized rent) was duly offered to tax under head 'Income from House Property', corresponding TDS credit was to be allowed.

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

1758. The Tribunal held that the amounts paid by way of reimbursement of expenses do not constitute income in the hands of the recipient. Consequently, the payer is under no obligation to deduct TDS u/s 194C and no disallowance of the expenditure can be made u/s 40(a)(ia). It further held that CBDT Circular no. 715 dated 08.08.1995 was applicable only where consolidated bills were raised inclusive of contractual payments and re-imburement of actual expenditure but not when separate bills were there for reimbursement of expenditure received.
ACIT vs St. Mary's Rubbers Private Ltd [2017] dated 15.06.2017

1759. Where the supplier viz. HCL, under contract awarded by the assessee, supplied the assessee equipment as per the specifications mentioned in the contract and the materials used in supplying such equipment were sourced from other third parties (and not the assessee). The Tribunal held that the assessee was not be liable to deduct tax u/s 194C on payment made to HCL as it did not constitute 'work' for a contract under the said section.
ITO (OSD) vs Mahanagar Telehone Nigam Ltd [2017] 85 taxmann.com 191 (Delhi Trib.) ITA No. 4715 (delhi) of 2015 dated 01.09.2017

1760. The Tribunal held that the payments made by assessee (a nodal agency) to GEPIL an environment infrastructure company entrusted with the job of municipal solid waste management by way of disbursement of grant provided by state government under Jawaharlal Nehru National Urban Renewal Mission (JNNURM) was not liable to TDS as the said payment was not a payment which the assessee was obliged or responsible to make and therefore the primary requirement of section 194C or 194J failed as admittedly the assessee was not the person responsible for payment within the meaning of provisions of chapter XVIIIB of the Act. It noted that the assessee was merely acting as an agent of the state government and thus was only a pass through agency of these funds.
Asansol Durgapur Development Authority vs ITO(TDS)-TS 389 -ITAT-2(KOL) I.T.A Nos. 279 & 280/Kol/2016 dated 08.09.2017

1761. The Court, reversing the order of the Tribunal, held that royalty payment made by the assessee to the Airport Authority of India ('AAI') for use of lounge premises, constituted 'rent' under the expanded definition u/s. 194-I. The Court observed that in each case the agreement in question has to be examined to ascertain if the payment is predominantly for the use of space. The Court held that the in the instant case question of being able to operate lounge without the actual use of the space simply did not arise. Since the payment for use of space was inseparable from the payment of royalty for the right to operate the lounge. It held that the payment of the sum by the Assessee to AAI fell within the definition of rent. It also rejected ITAT's conclusion that interest u/s. 201(1A) (for TDS default) could not be charged once the payee had paid the tax and directed the Revenue to compute interest u/s. 201(1A) till the date of payment of taxes by the deductee in terms of SC ruling in Hindustan Coca Cola Beverage (P) Limited (293 ITR 355). However, the Court confirmed ITAT's order on deleting penalty u/s. 271C and opined that the question of whether the payment of royalty for the right to operate the executive lounge was infact 'rent' u/s. 194-I was a debateable issue and, therefore, no penalty could not be levied as it was a debateable issue.
CIT vs. ITC Ltd. TS-274-HC-2017 (ITA No. 73/2005 dated July 4, 2017)

1762. Where the assessee, an advertising agent, deducted tax @ 2 percent under Section 194C on payments made to Star India but had made an inadvertent error / mismatch in the PAN of the deductee while furnishing its TDS returns (vis-à-vis the actual PAN of the deductee), which it was unable to correct on the CPC system as the system only accepted correction of typographical errors upto 2 alpha and 2 numeric fields as opposed to 5 changes proposed to be made by the assessee, the Court held that the AO was unjustified in invoking Section 206AA alleging non-furnishing of PAN, requiring deduction of tax @ 20 percent. Noting that Section 200A makes reference to a statement of TDS or a correction statement, it held that no where did the Act or

Rules provide that a correction of PAN was to be restricted to 2 alpha and 2 numeric fields and that the Department was unjustified in suggesting that corrections were to be limited only to the aforesaid fields. Accordingly, it directed the Department to verify whether the PAN sought to be corrected by the assessee belonged to the respective deductee and delete addition made under Section 206AA.

Purnima Advertising Agency (P.) Ltd. vs. DCIT (2017) 83 taxmann.com 205 (Special Civil Application No. 18631/2014 dated July 10, 2017)

1763. The Court upheld initiation of proceedings u/s. 201(1)/201(1A) and rejected assessee's stand that the notice initiating the said proceeding was issued after almost 10 years and therefore was barred by limitation. The Court held that where limitation to pass an order was not provided under the statute then the order had to be passed with a reasonable time and not beyond that. The Court remarked that a reasonable period would depend on the facts and circumstances of each case and no straightjacket period could be applied. The Court noting the facts of the case held that the assessee did not deduct TDS u/s. 195 on payment of sale consideration to an NRI relating to sale of land. Further, re-assessment proceedings were initiated against the NRI (deductee), and Revenue first explored possibility of recovering entire tax from the person ultimately liable to pay tax (i.e. NRI). However, the Revenue had failed to do so as the Tribunal decided against the revenue (in the case of the NRI) on reassessment proceedings, but, allowed the Revenue to initiate action against the deductor pursuant to which the Revenue thereafter exercised power u/s. 201(1)/(1A) against the Assessee. The Court further disagreed with the view taken by Delhi HC in NHK Japan Broadcasting Corporation (305 ITR 137) that period of limitation of 4 years, as applicable for making assessment u/s. 147, should be made applicable for exercising power u/s. 201(1)/(1A). Accordingly, it held that the initiation of proceedings u/s 201(1)/(1A) was done within a reasonable time.

M/s Mass Awash Pvt. Ltd. vs. CIT (IT) TS-289-HC-2017 (Misc. Bench No. 1088/2016 dated July 10, 2017)

1764. The Court upheld the order of the Tribunal and held that merely on basis of complaints filed by few pilots against assessee airlines that assessee had deducted higher TDS amounts from their salaries but paid lesser amount to authorities, liability u/s 201 could not be thrust upon assessee. The Court held that the Tribunal's reasoning that revenue's findings were essentially based upon conjectures and complaints rather than evidence or material was reasonable and sound. Accordingly, it dismissed the appeal filed by the Revenue.

CIT vs. Modiluft Ltd. (2017) 83 taxmann.com 269 (Delhi) (ITA No. 240/2004 dated July 3, 2017)

1765. Where the assessee received payments for testing products received by it from third party suppliers and the AO incorrectly held that the assessee was liable to deduct tax at source on payments made by it (without realising that the assessee was earning income and not making payments), which was correctly reversed by the CIT(A), the Court held that the Tribunal was unjustified in confirming the AOs order which misunderstood the facts of the case and in reversing the order of the CIT(A) without making any findings or even referring to it. Accordingly, it set aside the issue to the file of the Tribunal for fresh hearing.

Thyocare Technologies Ltd v ITO – ITA No 53 of 2016 (Bom) dated 11.09.2017

1766. The Petitioner HUF had invested in RBI taxable bonds but had inadvertently furnished the PAN of its Karta and the RBI had accordingly, deducted tax on the PAN of the Karta. However, the Petitioner had offered income from bonds to tax and the Karta had not claimed any TDS credit in his return of income. The AO did not accept the request for TDS credit made by the Petitioner. The CIT rejected the revision application of the Petitioner holding that on account of mismatch of PAN reflected in the TDS certificate and that of the Petitioner, the credit could not be granted. On a writ petition being filed, the Court observed that as per Rule 37BA where whole or part of the income on which tax had been deducted at source is assessable in the hands of a person other than the deductee, credit could be given to such other person provided the deductee files declaration with the deductor in this respect containing the details of person to whom credit should be granted along with the reasons and the deductor issuing the TDS certificate in name of that other person. It observed that the Petitioner had not filed any declaration with RBI. However,

the Petitioner HUF had offered the income to tax and the TDS was not claimed by Karta in his return of income. Accordingly, it directed the Department to grant TDS credit to the Petitioner HUF.

NARESH BHAVANI SHAH vs. CIT (2017) 99 CCH 0129 GujHC SPECIAL CIVIL APPLICATION NO. 9352 of 2015 dated 18/07/2017

1767. Where the Assessing Officer made a disallowance u/s 40(a)(ia) as the assessee had deducted TDS in respect of expenditure on customer support services under section 194C by applying a rate of 2 per cent and not u/s 194J at rate of 10 per cent as those expenses were incurred mainly for purpose of solving customer grievances and technical issues raised by such customers, the Tribunal held that there was no infirmity or illegality in order of Commissioner (Appeals) in holding that provisions of section 40(a)(ia) would not be applicable in case of assessee as there was nothing in section to treat assessee as defaulter where there was shortfall in deduction of TDS. Accordingly, it deleted the disallowance made u/s 40(a)(ia) of the Income Tax Act.

Dish TV India Ltd. v. Assistant Commissioner of Income-tax, Range-11(1), Mumbai2017] 86 taxmann.com 177 (Mumbai - Trib.)

1768. The Tribunal dismissed assessee's appeal against CIT(A)'s order treating the assessee as assessee in default u/s 201(1) and held that where the assessee (engaged in business of providing cellular mobile telephone services to its customers through network of distributors) paid commission to its distributors for rendering distribution services of its pre-paid SIM cards, the relationship between assessee and its distributors was that of principal and agent and TDS u/s 194H had to be deducted. Further, noting that the assessee had itself deducted tax on payments to its distributors for the post-paid SIM cards, it held that the service being same in respect of post paid SIM cards/ e coupons supplied, TDS was applicable to pre paid services as well. Accordingly, it dismissed assessee's appeal.

Tata Teleservices Limited vs DCIT (2017) 51 CCH 200 Hyd Trib. ITA NO. 755 to 757/H/2012, 153/H/2013 dated 25.10.2017

1769. Where the assessee had incurred expenses on account of legal and professional charges and deducted tax at rate lower than what was prescribed under section 194J of the Act, the Tribunal deleted the disallowance by relying on the decision in the case of S.K Tekriwal wherein it was held that no disallowance under section 40(a)(ia) can be made for short deduction of tax.

DEPUTY COMMISSIONER OF INCOME TAX & ANR. vs. COX & KINGS (I) LTS. & ANR. ITA No. 5583/Mum/2015, 5440/Mum/2015 (CO No. 117/Mum/2017) DATED Oct 6, 2017-(2017) 51 CCH 0161 MumTrib

1770. Where the assessee's holding company (BDAL) had incurred certain expenses on behalf of the assessee, being in the nature of travelling and accommodation charges of crew members and deducted tax at source wherever required, and the AO disallowed the claim of the assessee on the ground that assessee should have deducted tax at source while reimbursing the amount to M/s BDAL, the Tribunal, relying on the decision in the case of Ask Wealth Advisors (P) Ltd vs ACIT (2014) [51 taxmann.com 128] held that no disallowance could be made in hands of subsidiary company on reimbursements made by it to Holding Company, if holding company had already deducted tax at source from the payments.

DHL AIR LIMITED vs. DEPUTY COMMISSIONER OF INCOME TAX (INTERNATIONAL TAXATION) BOMBAY TRIBUNAL (2017) 51 CCH 0152 ITA No. 1438/Mum/2017 dated 04.10.2017

1771. The Tribunal held that that payment made by the assessee, engaged in business of trading in foreign exchange to Restricted Money Chargers (RMCs) for buying foreign currency and travelers cheques was not subject to TDS under section 194H since the contract was in the nature sale of goods whereby RMCs held these foreign currency/travellers cheques as their stock in trade and sold them to the assessee making it a direct sale transaction on principal to principal basis and not a contract of agency representing commission income as defined under section 194H of the Act since there was no principal agency relationship. Accordingly, it held that no disallowance u/s 40(a)(ia) could be made.

DEPUTY COMMISSIONER OF INCOME TAX & ANR. vs. COX & KINGS (I) LTS. & ANR. ITA No. 5583/Mum/2015, 5440/Mum/2015 (CO No. 117/Mum/2017) DATED Oct 6, 2017-(2017) 51 CCH 0161 MumTrib

1772. The Court dismissed Revenue's appeal and held that payment of carriage fees / placement fees by the assessee to cable operators for placing its TV channels in the prime band was subject to withholding tax under Section 194C and not 194J of the Act. It held that by agreeing to place the channel in a particular brand or frequency, the cable operators do not render any technical services. Further, it held that the payment would be covered under the definition of 'work' contained under Section 194C and also rejected the Revenue's alternate argument that the placement fee was in the nature of commission subject to TDS under Section 194H of the Act.

**UTV Entertainment Television – TS-523-HC-2017 (BOM)
INCOME TAX APPEAL NO. 525 OF 2015 dated 10.10.2017**

1773. The Tribunal, relying on the decision of the Court in NHK Japan Broadcasting Corporation held that where no limitation was prescribed in Section 201 of the Act, action ought to have been initiated within a period of 4 years, which constituted reasonable time. Accordingly, it held that the AO erred in initiating proceedings under Section 201 on March 1, 2006 with respect to assessment years 2000-01 and 2001-02 and accordingly directed the AO not to treat the assessee as an assessee in default for the impugned years.

SMS Iron Technology Pvt Ltd – TS-555-ITAT-2017 (Del) ITA No. 4480 to 4486 / Del / 2014 dated 25.10.2017

1774. Where Kerala State Electricity Board (KSEB) entered into a contract of consultancy with a Canada based Consultant for carrying out a project in site of KSEB, and as per terms of an agreement, entered into between KSEB and Consultant, liability to pay salary of the assessee deputed by the Canadian Consultant to project site was of Consultant itself whereas tax component had to be satisfied by KSEB, the Court held that in view of fact that salary of employees deputed by Consultant was included in consultancy charges, both salary and tax both were borne KSEB, in whose project assessee were employed and, therefore, provisions of section 195A would be applicable to assessee's case since both salary and tax was paid by the same person. Accordingly, it dismissed assessee's contention that the tax element was not liable to Section 195A and that it was taxable as income from other sources.

Horace Dansereau v ACIT - [2017] 88 taxmann.com 228 (Kerala) IT APPEAL NOS. 7, 9, 11 TO 16, 19 AND 20 OF 2007 dated 12.12.2017

1775. Where the assessee made payment of rent on which it deducted tax at source only in April and May 2006 as opposed to the deadline prescribed under Section 40(a)(ia) prevalent during the year under consideration i.e. March 31, 2006, the Tribunal held that since tax was deducted before the due date of filing of return, the amendment to Section 40(a)(ia) vide Finance Act, 2010 (which provided for TDS before the due date of filing of return) had retrospective application as it was introduced with a view to remove the unnecessary hardship caused to the assessee by the earlier provision. Accordingly, it deleted the disallowance under Section 40(a)(ia) of the Act.

DCIT v Saraf Services P Ltd - [2018] 89 taxmann.com 312 (Kolkata - Trib.) – IT APPEAL NO. 456 (KOL.) OF 2016 dated 01.12.2017

1776. Where the assessee had incurred and paid management charges to its Holding company and not deducted tax at source u/s 194J on the ground that it was in the nature of reimbursement of expenses incurred by the holding company on behalf of the assessee and TDS was not applicable, the Tribunal reversing the CIT(A) order, upheld the disallowance u/s 40(a)(ia) and held that once nature of payment was such that provisions of Sec. 194J were attracted the mode of payment would not alter the TDS obligation and that even if the said payment was on account of reimbursement of expenses incurred by the holding company the provisions of Section 194J could not be circumvented by modus operandi of payment routing through the holding company. Accordingly, it allowed Revenue's appeal.

ACIT vs Tungabhadra Steel Products Ltd-TS-485-ITAT-2017(bang)-ITA No. 984/bang/2017 dated 27.10.2017

1777. Where the assessee had made provision for payment for overseas expenses, payment to contractors, professional or technical services, commission and rent without deducting tax at source u/s 195, 194J, 194C, 194H and 194I and made a disallowance u/s 40(a)(ia), the Tribunal, relying on the decision in the case of IBM Ltd [TS-305-ITAT-2015(Bang)] held that the assessee would be liable to deduct tax on reversal provision for expenses created in books of accounts and when the assessee had admitted his default u/s. 40(a)(i) and 40(a)(ia), then in the proceedings u/s. 201 and 201(1A), the assessee cannot argue that there was no liability under chapter XVII-B. Accordingly, it upheld CIT(A)'s order treating the assessee as assessee in default.

Toyota Kirloskar Motors Pvt. Ltd vs The Income Tax Officer (TDS)-TS-487-ITAT-2017-ITA No.1185/Bang/2014 dated 31.10.2017

j. **Others**

Appeals

1778. The Court set aside the order of the Tribunal passed u/s 254(2) (dated 30th September, 2016) of the Act dismissing assessee's application for rectification of order passed u/s 254(1) (dated Feb. 3, 2016) in light of the subsequent decisions of the Court passed in favour of the assessee, noting that the order which was subject to rectification was passed beyond a period of 90 days after the hearing of the appeal was concluded (i.e. Sep. 20, 2015) which amounted to breach of Rule 34(5)(c) of the Income Tax Appellate Tribunal Rules, 1963 (Tribunal Rules). It relied on the coordinate bench ruling in Shivsagar Veg. Restaurant wherein the coordinate bench after referring to various decisions of the Apex Court directed the President of the Tribunal to frame guidelines to prevent delay in delivery of orders/judgments. In view of the fact that the order u/s 254(2) dated September 30, 2016, rejecting rectification application, did not consider the aforesaid Rules and the binding decisions of this Court, it held that the order was not sustainable on that ground alone. So far the second issue i.e. rectification of the order passed under Section 254(1) of the Act on the basis of a subsequent decision of the jurisdictional High Court was concerned, it held that since in any case, the order was being set aside on the first issue itself, this issue would be considered by the Tribunal while disposing of the rectification application. Thus it restored assessee's miscellaneous application to the ITAT for fresh consideration.

Otters Club [TS-19-HC-2017(BOM)]

1779. The Tribunal held that since the miscellaneous petition filed by assessee was seeking a review of earlier order of Tribunal by reconsidering application of principles laid down by superior Courts to facts of case (disallowance of service tax payable under Section 43B of the Act), the petition filed by the assessee was to be dismissed as it was contrary to the provisions of section 254(2) of the Act.

Gowthami Associates v ITO - [2018] 89 taxmann.com 192 (Bangalore - Trib.) - M.P. NO. 240 (BANG.) OF 2017 dated 22.12.2017

1780. Where the Revenue had preferred SLP before the Hon'ble Supreme Court against the order of the Court rejecting the review petition of the Revenue (in which it was contended that the appeal filed was maintainable as the tax effect of the impugned appeal was above Rs. 4,00,000/- and that the CBDT Circular No. 5/2008 dated 15/5/2008 was not applicable) and the Hon'ble Supreme Court directed the Court to re-hear the review petition and if required, the appeal again on merits, the Court, considering the subsequent CBDT Circular No. 21/2015 (which stated that appeals filed by the Revenue having tax effect lower than Rs. 20,00,000/- were to be withdrawn) which was applicable to pending appeals, held that even assuming that the tax effect was more than Rs. 4,00,000/- the same was covered by the subsequent CBDT Circular in light of which the review petition was liable to be dismissed at the threshold itself as the tax effect was less than

Rs. 20,00,000/- . Accordingly, it held that the question of deciding appeals on merits would not arise.

CIT vs. Velingkar Brothers (2017) 98 CCH 0103 Bom HC [Civil Application (Review) No. 8 of 2011 & Tax Appeal No. 16 of 2007 dated March 15, 2017

1781. Where appeal was filed by the Assessee-Charitable institution against order of CIT(A) after 1631 days and the Chartered Accountant engaged in the matter was unaware of the fact that appeal could be filed against order of CIT, post amendment made in Sec 253(1)(c), the Court held that in petitions for condoning delay not only the period of delay had to be taken into account but also the quality of explanation, the legal assistance, if any, sought and rendered to the litigant and the detriment that the condonation of delay would cause to the other party had to be looked into and since in this case the assessee did not receive the best legal assistance and there was nothing on record to suggest that Revenue refuted this averment made in petition and no detriment was caused to the Revenue, the delay was condoned and the matter was remitted back to the Tribunal for taking decision on merits.

United Christmas Celebration Committee Charitable Trust vs. Income Tax Officer - (2017) 98 CCH 0126 Chen HC (TCA No. 886 of 2016)

1782. Where appeal was filed by the Assessee-Charitable institution against order of CIT rejecting registration u/s 12AA, after 1902 days and the Chartered Accountant engaged in the matter was unaware of the fact that appeal could be filed against order of CIT, post amendment made in Sec 253(1)(c), the Court held that in petitions for condoning delay not only the period of delay had to be taken into account but also the quality of explanation, the legal assistance, if any, sought and rendered to the litigant and the detriment that the condonation of delay would cause to the other party had to be looked into and since in this case the assessee did not receive the best legal assistance and there was nothing on record to suggest that Revenue refuted this averment made in petition and no detriment was caused to the Revenue, the delay was condoned and the matter was remitted back to the Tribunal for taking decision on merits.

Hosanna Ministries vs. Income Tax Officer (2017) 98 CCH 0126 Chen HC (TCA No. 886 of 2016)

1783. The revenue filed an appeal against order of the Tribunal wherein the Tribunal recalled its order passed in miscellaneous petitions preferred by the Assessee. The Court held that the Tribunal was right in recalling the said order as that order was passed suo motu by the Tribunal without giving an opportunity of being heard to the affected party, that is, the Assessee and that the order was beyond the jurisdiction of the Tribunal in view of the fact that it was passed well beyond the period of limitation u/s 254(2) of the Act. Hence, it was held that even if suo motu powers were exercised by the Tribunal, they could not have been exercised beyond the period of limitation prescribed u/s 254(2) of the Act and accordingly, the appeal of the Revenue was dismissed.

Commissioner of Income Tax vs. Indian Overseas Bank (2017) 98 CCH 0125 ChenHC (TCA Nos. 879 to 882 of 2016)

1784. Where the appellant assessee sought to raise an additional ground at the time of the hearing of the appeal (relating to claim u/s 80-IA), the Court held that an additional ground could be urged by the appellant assessee for the first time in appeal only if it was supported by evidence already on record for the year under consideration and the same was not on record in this case and the fact that claim had been allowed by the AO in a subsequent year was irrelevant. Besides, in the present case the additional ground was not a pure question of law, but was depended on the satisfaction of the authority as to the facts existing in the subject assessment year for allowing the benefit of Section 80IA of the Act. Accordingly, appeal was disposed off in favour of the Revenue.

Ultratech Cement Ltd vs. Additional Commissioner of Income Tax - (2017) 98 CCH 0157 MumHC (ITA No. 1060 of 2014)

1785. Where CIT passed an order u/s 263 of the Act directing enquiry to be conducted in relation to raising of share capital at premium to the extent of Rs.21 Crores by the assessee-company, the

Court held that the Commissioner had only outlined the manner in which the enquiry was to be carried out and that there was no specific direction in the order stipulating in what way the case was to be decided. The Assessing Officer had been directed to pass a speaking order after providing reasonable opportunity to the assessee and upon verifying the source of share capital including the share premium of all the subscribers so as to ascertain the true nature of transaction. The Commissioner's order gave a guideline on how the Assessing Officer shall proceed with the enquiry and did not contain a mandate in which manner the assessing officer shall pass the order. Further, the court rejected the contention of the assessee that since the Board itself did not have the jurisdiction u/s 119 of the Act to pass an order of that nature, it had to be inferred that the Commissioner also lacked jurisdiction to direct the enquiry as contained in his order. It held that the said provision dealt with power and jurisdiction of the Board to issue instruction on subordinate authorities and did not relate to the power and jurisdiction of the Commissioner. The Stay petition and appeal of the assessee was, accordingly, dismissed.

Aim Fincon Pvt Ltd v. Commissioner of Income Tax - (2017) 98 CCH 0159 KoIHC (GA No. 698 of 2016)

1786. In the first round of proceedings, the Court had remitted the matter to the Tribunal for fresh adjudication. However, the Tribunal in its order merely reproduced the orders of the lower authority without assigning any reasoning or expressing its views on the findings of the lower authority. On second appeal to the Court, the Court held that the Tribunal was to consider the matter afresh and discuss the issue and the contentions raised before it. It noted that the Tribunal had failed to do so and had simply incorporated the passages, words and phrases of the lower authorities without enumerating its reasoning. Accordingly, it set-aside the order of the Tribunal and restored the issue to the file of the Tribunal for the second time.

Shri Arun Malhotra v Pr CIT – (2017) 99 CCH 0021 (Del HC) – ITA 303 / 2017 dated 17.05.2017

1787. Where the assessee had made petition before the Apex Court for withdrawal of SLP filed with the liberty to move the High Court in review petition and that the Apex Court dismissed the petition as withdrawn without stating anything in relation to whether the liberty for review petition was granted, the High Court held the review petition to be maintainable and not barred by SLP dismissed as withdrawn on the ground that once the Apex Court permitted the withdrawal of SLP without recording any reasons, it was as if no appeal was ever filed or entertained.

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

1788. The Apex Court set-aside the order of the High Court and held that the Court was not justified in allowing appeals filed by Revenue u/s 27A of the Wealth Tax Act without formulating substantial question of law. It observed that section 27A of the Wealth Tax Act and sec 100 of the Code of Civil Procedure, 1908 which are identically worded and are pari materi, provided that existence of substantial question of law is a sine qua non for admitting appeal by High Court. Accordingly, it remanded the matter to the High Court for deciding the appeal afresh on merits after formulating the substantial questions of law.

Maharaja Amarinder Singh vs CIT-TS-375-SC-2017 CIVIL APPEAL No.1349 OF 2007 dated 05.09.2017

1789. The Court dismissed the Revenue's notice of motion seeking condonation of delay of 1128 days in challenging order of the Prothonotary and Senior Master which dismissed the appeal as the Revenue failed to cure the defects / office objections in the Appeal within the time limit provided by the Prothonotary. It dismissed the contention of the Revenue that it was not aware of the fact that the appeal was dismissed due to non removal of objections until the subsequent appeals were listed for admission before the High Court. It observed that this was a case of gross negligence and utter callousness on the part of the Revenue/Department and further stated that if the Revenue and its officials were aware of lodging and filing of an Appeal, then, they must attend the Registry's office alongwith their advocate and take requisite steps. Noting that in the present case, the Revenue was given more than one opportunity to remove the office objections, the Court held that it could not set aside the orders of the Registry. Accordingly, it dismissed the Notice of Motion.

Pr CIT v Parle Bisleri Ltd - NOTICE OF MOTION (L) NO. 1672 OF 2017 dated 28.09.2017

1790. The Court refused to condone delay of 335 days on filing of Revenue's appeal. It held that government departments were under a special obligation to ensure that they performed their duties with diligence and commitment. Condonation of delay was an exception and should not be used as an anticipated benefit for Government departments. The mere fact that the AO was busy in other time-bearing assessments is not an excuse for delay particularly given the fact that section 260A provided a long time period of 120 days. Every day's delay has to be explained. Accordingly, it dismissed Revenue's appeal.

CIT vs Historic Infracon- ITA 409/2017 dated 19.05.2017

1791. The Court held that Where assessee is in appeal in the High Court which is filed under Section 260A of the IT Act, if the date of assessment is prior to March 06, 2003, Section 52A of the 1959 Act shall not apply and the court fee payable shall be the one which was payable on the date of such assessment order. Further, it held that In those cases where the Department files appeal in the High Court under Section 260A of the IT Act, the date on which the appellate authority set aside the judgment of the Assessing Officer would be the relevant date for payment of court fee. If that happens to be before March 06, 2003, then the court fee shall not be payable as per Section 260A of the IT Act on such appeals.

K Raveendranathan Nair vs CIT- dated 10.08.2017s

1792. Where the Court dismissed the appeal of the department on account of procedural defects in 2013 & the Department filed a notice of motion to reinstate the appeal after a delay of 1371 days, for which no satisfactory explanation was rendered, the Court dismissed the said notice of motion. Accordingly, the appeal of the Revenue stood dismissed. The Court lashed at the Department by observing that explanation so tendered reflected total negligence and callousness of the Revenue officials.

CIT vs. Reliance Industries Ltd. (2017) 84 taxmann.com 313 (Bom) (ITA (L) No. 1647/2012 dated August 22, 2017)

1793. Since the question before the Apex court i.e. quantum of deduction of rent & whether the payment of rent was statutory or contractual was a mixed question of law and fact, the Court noting that the issue was neither decided by any of the authorities below nor by the Tribunal or the High Court remanded the matter to the file of the Tribunal for fresh determination.

CIT vs. Travancore Cochin Udyoga Material (2017) 84 taxmann.com 189 (SC)(Civil Appeal No. 2015/2007 dated August 17, 2017)

1794. The Court dismissed the Assessee's second writ petition on the same cause of action by holding that the petitioner had withdrawn the earlier petitions without any liberty to file a fresh petition and by doing the Petitioner had indulged in Bench hunting tactics which was disapproved by the SC in the case Sarguja Transport AIR 1987 SC 88. The Court noted that in the earlier petition the Court was persuaded to go on with the matter despite the objection raised by the Revenue about the residential status of the petitioner. After a preliminary hearing, on finding that it was not possible to get over the objection raised and the allegation of suppression of a material fact, the Petitioner withdrew the writ petition, but without seeking any liberty to file a fresh petition on the same cause of action. The Court held that it would be acting contrary to judicial discipline, if a second writ petition on the same cause of action but with a marginal improvement was entertained. The Court further noted that was not a case where substantial justice demanded that the point of maintainability could be overlooked.

Kamal Galani vs. ACIT & others (2017) 99 CCH 0201 Mum HC (WP No. 1033/2017 dated August 14, 2017)

1795. Where the assessee being in full time employment with a bank was not well versed with the tax laws and was advised not to file an appeal by his Chartered Accountant to avoid multiplicity of litigation as the issue of deduction under Section 80-O for the impugned year was already pending before the Tribunal for a prior year and filed an appeal against the CIT(A)'s order before Tribunal after a delay of over 8 years on the advice of another Chartered Accountant, the Court

held that the assessee provided a reasonable and bonafide explanation for delay in filing the appeal and there was no intentional delay. Accordingly, it condoned a delay of over 8 years by assessee in filing an appeal against the CIT(A) order before the Tribunal. It further held that the Tribunal was unjustified in holding that the conduct of the assessee was beyond the comprehension of "human conduct and probabilities" and erred in commenting adversely against the ICAI, CA coaching classes and individual Chartered accountants.

Vijay Vishin Meghani [TS-455-HC-2017(BOM) - INCOME TAX APPEAL NO.493 OF 2015 dated 19.09.2017

1796. The Apex Court dismissed Revenue's appeal against High Court order and held that CBDT Instruction 3/2011 (laying down monetary appeal filing limits for Revenue's appeals) was retrospective in nature. It held that the circular would apply to even pending matters but subject to two caveats namely., (i) the circular should not be applied by High Courts ipso facto when the matter had a cascading effect and (ii) where common principles may be involved in subsequent group of matters or a large number of matters. Further, taking note of the divergent views by various High courts on this issue, the Apex Court approved Karnataka High Court Ruling in Ranka and Ranka wherein it was held that to bring the circular/instruction in harmony with the National Litigation Policy, it held that it would be appropriate to hold that the such circular/instruction also applies to the pending cases as otherwise an anomalous situation would arise.

DIT vs S.R.M.B Diary Farming (P) Ltd – TS- 549-SC-2017- SLP No.24055/2013 dated 14.11.2017

1797. The Tribunal held that the monetary limit for filing appeals (i.e. Rs.10 lakhs for appeals before Tribunal) as laid down by the CBDT vide Circular No 21 / 2015 would apply retrospectively to all pending appeals. Accordingly, it dismissed the appeals filed by the Revenue since the tax effect in the said appeals were less than Rs. 10 lakhs.

ITO v Dhirender Rehnani – (2017) 51 CCH 0343 Del Trib – ITA No 3036 / Del / 2016 dated 14.11.2017

1798. The Court held that the legislation amended Section 268A(4) of the Act with retrospective effect to ensure reduction of arrears in Supreme Court, High Courts and Tribunals by putting some prohibition on department, and accordingly CBDT circulars were issued instructing subordinate officers that no appeal shall lie, except where the issue decided by the CIT (Appeals) or Tribunal was contrary to the judgments of the Supreme Court, from an order where monetary limit of tax effect was lesser than that stipulated for different appellate fora. Accordingly, it held that the said Circulars would be binding on subordinate officers and that the department could not take a contrary view and insist for arguing matter on merits.

CIT v GAD Fashion [2017] 87 taxmann.com 239 (Rajasthan) - IT APPEAL NO. 575 OF 2008 dated 10.11.2017

1799. Where the assessee prayed for withdrawal of the appeal filed by him, which was declined by the Ld. DR (Accountant Member) on the ground that it should be listed together with the appeal filed by the department, the Tribunal held that the Petitioner/ Plaintiff is the 'dominus litis' and it was open to him to pursue or abandon his case and withdrawal cannot be denied except when the person making the prayer has obtained some advantage/ benefit which he seeks to retain. Accordingly, it allowed assessee's prayer and dismissed the appeal as withdrawn.

Sainath Enterprises vs ACIT-ITA No. 189 / mum / 2011 (Mumbai Tribunal) dated 18.11.2016

1800. Where the assessee could not attend the Tribunal hearing as its authorised representative was unwell and the Tribunal passed an ex-parte order on 25.08.2015, pursuant to which the assessee preferred a miscellaneous application on 23.08.2016 which was dismissed by the Tribunal on the ground that it had been preferred after an expiry of six months and Section 254(2) provides for a limitation of 6 months, the Court noting that at the time of passing the ex-parte order the time limit under Section 254(2) was 4 years, held that the miscellaneous application was filed within the time limit prescribed. Accordingly, it directed the Tribunal to decide the application under Section 254(2) within 3 months of receipt of the certified copy of its order.

District Central Co-op. Bank Ltd. v. Union of India [2017] 86 taxmann.com 176 (Madhya Pradesh)

1801. The Apex Court allowed Revenue's appeal and held that CBDT Instruction 3/2011 (laying down the monetary limit for Revenue's appeals) was not retrospective in nature and that it would not govern cases filed before 2011. With respect to assessee's specific reliance on para 10 of the CBDT circular of December 2015 (revising the monetary appeal filing limits and directing its retrospective application), it held that CBDT had no power to issue any circular having retrospective application. Accordingly, it remitted the matter back to the High Court for re-adjudication on merits and in accordance with law.
CIT vs Gemini Distillers – TS- 476-SC-2017-CIVIL APPEAL NO.16815/2017 dated 12.10.2017
1802. The Tribunal dismissed assessee's (amalgamating company) appeal as not maintainable in the absence of filing of amended memo and form 36 in the name of the new entity. Noting that the amalgamation of assessee with other group entities was effective from April 1, 2015 as per the High court order but the assessee wished to continue the appeal in the name of old entity on the ground that there is no requirement to file amended Form 36/memo as Rules 26 and 9 of the ITAT Rules do not provide so. The Tribunal held that in the case of amalgamation, the transferor company ceases to exist, and there is transfer all rights to the amalgamated company as per transfer scheme, hence the proceedings initiated by assessee can only be continued by the transferee company in its own name. Accordingly, it dismissed the appeal.
EADS India P Ltd vs Dy.CIT-TS-471-ITAT-2017 ITA NO. 1856 & 2638/Del/2014 dated 17.10.2017
1803. Relying on the decision in the case of K Ravindranathan Nair, wherein it was held that right to appeal was vested in the litigant at the commencement of lis and therefore such vested right cannot be taken away and cannot be impaired or made more stringent by any subsequent legislation unless the said legislation said so either expressly or by necessary intendment, the Tribunal held that the amendment to section 254(3) to curtail the limitation period for filing rectification applications to six months from four years was prospective and applicable to appeal orders passed after 01/06/2016 and not the order prior to it.
Lucent Technologies GRL LLC, (Since merged with Alcatel Lucent USA Inc) vs Addl CIT-MA No. 411 / mum / 2016 to 414 / mum / 2016 dated 09.10.2017
1804. The Tribunal held that the period of limitation for filing a rectification application is six months from the end of the month in which the order is passed and not from the date of receipt of order. Even if a liberal view is taken, it can be considered as the date of uploading of the order on the Tribunal website. Ordinarily anything which is uploaded in the public domain can be accessed by the public at large and even the assessee would have access to the order and such a date always be treated as the services of the order.
Srinivas Sashidhar Chaganty vs ITO – ITA No. 1420/hyd/2015 dated 12.07.2017
1805. The Court held that for the purposes of filing a rectification application, the period of limitation of six months commences from the date of receipt of the order sought to be rectified by the assessee and not from the date of passing the order.
Liladhar T Khushlani vs Commissioner of Customs- TAX APPEAL NO. 915 of 2016 dated 25.01.2017
1806. The Tribunal held that the amendment by the Finance Act, 2016 w.e.f 01.06.2016 specifying the time limit of 6 months to file a rectification application applies even to applications filed with respect to appeal orders passed prior to the date of the amendment and that it has no power to condone the delay in filing a miscellaneous application.
DCIT vs Hita Land Private Limited- Miscellaneous Application No. 103/Mum/2017 dated 25.04.2017

Clubbing of income

1807. The assessee had constructed building by obtaining loan from a trust. The assessee and her husband were trustees of the trust and their 3 children were beneficiaries of the trust. While computing the income from the property (building), the assessee deducted the interest on loan taken from trust. The AO contended that interest earned by the trust from the assessee pertained to the beneficiaries i.e. the 3 children of the assessee and accordingly, clubbed income of 2 minor children in the hands of the assessee u/s 64(1A). The same was confirmed by the CIT(A) and the Tribunal. The Court restored the matter to AO for further verification so as to verify whether deduction of interest claimed by the assessee was offered by the trust as its income and directed the AO to club the income in the hands of the assessee if the same was not offered to tax by the trust. As per the order of Court, during the second round of proceedings, the AO, observed that the trust had not offered equivalent interest on loan to tax as was claimed by the assessee as deduction. Accordingly, he clubbed the interest income relating to minor beneficiaries in the hands of the assessee which was confirmed by CIT(A). The Tribunal held that since the assessee could not establish that the interest income was offered by the trust to tax, the addition made by the AO was justified.

Dr. Anwar Basith vs. ACIT (2017) 50 CCH 0059 BangTrib ITA No. 495 & 496/Bang/2017

Deemed Dividend

1808. The Supreme Court by applying the provisions of Explanation 3 to Section 2(22)(e) upheld deemed dividend addition in hands of the assessee HUF in respect of loans/advances received from one concern (in which it beneficially held more than 10% share-capital) since the shareholder (i.e Karta in this case) was a member of the said HUF and had substantial interest in the HUF (being its karta). Rejecting the assessee's reliance on the co-ordinate bench ruling in C.P. Sarathy Mudaliar wherein it was held that HUF cannot be a shareholder of a company, the Apex court remarked that Mudaliar judgment was rendered in context of Sec 2(6A)(e) of the erstwhile Income Tax Act, 1922 wherein there was no provision like Explanation 3 to section 2(22)(e). Further, observing that in the audited return of the company, the assessee-HUF was shown as the registered and beneficial shareholder despite share certificate issued in the name of the Karta and also the money towards shareholding in the company was paid by assessee-HUF. The Apex court held that it was not even necessary to determine as to whether HUF can, in law, be beneficial shareholder or registered shareholder in a Company.

Gopal & Sons (HUF) [TS-1-SC-2017]

1809. Where the assessee received loan from another company in which it was not a shareholder but the AO sought to tax the loan received in the hands of the assessee as deemed dividend under section 2(22)(e) on the ground that the shareholder of the assessee was also a shareholder in the company from whom the assessee had received the loan, the Tribunal upheld the order of the CIT(A) and held that the deeming fiction contained in Section 2(22)(e) could only be applied only in the hands of the shareholder and not the non-shareholder viz., the concern. Accordingly, it deleted the addition made by the AO.

INCOME TAX OFFICER vs. J.K.M. INVESTMENT PVT. LTD. - (2017) 51 CCH 0533 KolTrib - ITA Nos. 1461 & 1462 /Kol/2015 dated 08.12.2017

1810. The assessee was a shareholder of two companies viz. SSP Developers Pvt. Ltd. (SSPD) and Vishnu Apartment Pvt. Ltd. (VAPL). VAPL sold commercial space to SSPD for Rs. 6.26 crore without the assessee's involvement. The AO added Rs.6.26 crore as deemed dividend u/s 2(22)(e) in the assessee's income on the ground that the assessee held 50% shares in SSPD and 18.33% shares in VAPL and the transaction of selling commercial space by VAPL to SSPD had indirectly benefitted the assessee. The CIT(A) observed that when the commercial space was sold by VAPL to SSPD, the assessee's shareholding in VAPL had been diluted to 5.5% and therefore accordingly held section 2(22)(e) which prescribes a minimum shareholder of 10% was not satisfied. Further, he observed that since the term "any payment" used in section 2(22)(e)

[providing for any payment by way of advance or loan to a shareholder] was not defined under the Act, in the ordinary sense the said term would mean benefit in cash and since no cash payment was received by the assessee, the AO erred in taxing the alleged benefit u/s 2(22)(e) of the Act. The Tribunal also held that the given transaction did not benefit the assessee as no money was received by the assessee as also assessee did not hold controlling share in transferor company, it upheld the CIT(A)'s deletion of addition made by the AO u/s 2(22)(e).

Siddharth Gupta [TS-221-ITAT-2017(DEL)] I.T.A. No. 6206/DEL/2013 dated 30.05.2017

1811. Where the assessee earlier operated a sole proprietorship, the business of which he transferred to a private limited company in which he had substantial interest as a result of which the assessee and the company had various accommodation adjustment entries for transfer of funds on a need basis, the amount received by the assessee from the private limited company could not be treated as a loan / advance and it was in the course of business and therefore was not taxable as deemed dividend under Section 2(22)(e) of the Act in the hands of the assessee.

DILIP GOVINDLAL SHAH & ANR. vs. INCOME TAX OFFICER & ANR- (2017) 51 CCH 0169 AhdTrib dated 06.10.2017

1812. Where the assessee had entered into MOU in December, 2012 with NIPL for sale of property, however, due to fall in market value of property, the Board of NIPL decided against acquiring the property, pursuant to which assessee returned the advance in March, 2013, the Tribunal held that amounts received by assessee was nothing but loan/advance from NIPL and that the assessee was camouflaging the same as a commercial transaction relating to sale of property in order to circumvent the provisions of Sec. 2(22)(e). Accordingly, it upheld deemed dividend addition u/s 2(22)(e) in the hands of the assessee.

Shri Hemanth Kumar Bothra vs The Asst. Commissioner of Income-tax-TS-495-ITAT-2017(Bang)- ITA No. 03.11.2017

1813. The Apex Court confirmed High Court ruling wherein it was held that deemed dividend was not taxable in the hands of recipient concern, if such concern was not a shareholder of lender company. The Court held that the High Court order was a detailed judgment going into section 2(22)(e) of the Act and accordingly, there was not infirmity in the order.

Ankitech Pvt Ltd-TS-462-SC-2017 CIVIL APPEAL No. 3961 OF 2013 dated 05.10.2017

1814. The Apex Court dismissed Revenue's appeal and upheld the order of the High Court wherein it was held that any payment by a closely-held company by way of advance or loan to a concern in which a substantial shareholder is a member holding a substantial interest is deemed to be "dividend" on the presumption that the loans or advances would ultimately be made available to the shareholders of the company giving the loan or advance. However, the legal fiction in s. 2(22)(e) does not extend to, or broaden the concept of, a "shareholder". As the assessee was not a shareholder of the payment company, the dividend was not assessable in its hands.

CIT vs Madhur Housing and Development company – CIVIL APPEAL No. 2076 of 2012 dated 05.10.2017

1815. Where the AO had added Rs.75,000 received by the assessee from a company in which it held substantial interest as deemed dividend u/s 2(22)(e) without examining the assessee's contention that Rs. 75,000 received by it was repayment towards Rs. 35 Lakhs given by the assessee to the company, the Tribunal restored the matter to CIT(A) by directing him to readjudicate the issue after by verifying the nature of Rs.35 Lakhs paid by the assessee to the company and thereafter decide the issue in accordance with law.

Nanak Ram Jaisinghani vs. ITO (2017) 50 CCH 0266 DelTrib ITA No. 2059/Del/17

Exempt Income / Income from Charitable Trust

1816. The Court quashed the order of Director of Income Tax denying exemption u/s 10(23) to the assessee by holding that only when it was found that the assessee had been carrying on its activities for the purpose of profit, contrary to its objects of providing education and medical care, the prescribed authority would be justified in rejecting the application for approval of exemption u/s 10(23C)(vi) of the Act. Merely because the assessee charged fees for educational courses or that it entered into arrangements with other charitable institutions to set up satellite centres to give medical treatment etc, would not justify rejection of its application. Accordingly, it directed the Revenue to consider the petitioner's application, process it and pass necessary orders in accordance with the law.

Venu Charitable Society and Anr. Vs. Director of Income Tax (2017) 98 CCH 0100 DelHC (W.P.(C) No. 7147/2012)

1817. The Court granted exemption u/s 10(10B) on VRS payment receivable by employees of Hindustan Photo Film Manufacturing company Ltd. ('HPF') and accordingly held that the payment was not subject to TDS. It noted that HPF, a wholly owned company of the Central Government, was declared sick and a decision was taken to close down the company in 2013, and, to overcome the financial crisis of the employees, the Cabinet sanctioned the VRS package for HPF employees as a non-plan budgetary support vide Govt. notification dated March 20, 2014 and rejected the Revenue's stand that since it was a VRS package, it would fall within Sec. 10(10C)(viii) ambit and accordingly, taxable if the receipt exceeded the exempted limit, observing that the nomenclature of the package was irrelevant, but what had to be considered was the purpose for which the package has been sanctioned. It noted that the VRS package was specially designed for the benefit of HPF employees and therefore as the purpose of the Scheme was to rehabilitate the employees, the monetary benefit accruing to the employees was in the nature of compensation and it undoubtedly fell within the parameters laid down under sub-section (10B) of Section 10 of the Income Tax Act. Further, it held that the exemption was not subject to ceiling of Rs. 5 lakhs under clause (2) of the first proviso to Section 10(10B) as the compensation would fall under second proviso to Sec. 10(10B) according to which no such ceiling would apply in respect of any scheme approved by Government having regards to need for extending special protection to workmen.

Hindustan Photo Film Workers' Welfare Centre vs. UOI and others - TS-121-HC-2017(MAD) - WP.Nos.18566, 18788, 18608 to 18610, 18789 of 2015 dated 17.03.2017

1818. Where pursuant to closure of a Government company, Central Government sanctioned a scheme for payment of compensation to its employees for their rehabilitation, the Court held that since it was a severance package and not a VRS package rolled out by company itself, amount of compensation would fall within the parameters of section 10(10B) and, thus, would be exempt from deduction of tax. The Writ petition filed by the assessee was thus allowed.

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

1819. The Court allowed Revenue's appeal against grant of exemption under section 11 on the ground that after the amendment of section 12A and introduction of section 12AA w.e.f 01.04.1997, grant of registration was a condition necessary to avail exemption under section 11 and trust and societies. Until and unless registration was granted no exemption could be claimed on the basis that application had been submitted for registration. In the present case, despite the fact that admittedly no registration certificate had been issued to Respondent till date, still exemption had been granted by authorities below. This was not consistent with requirement of Section 12A(1), as was applicable for relevant assessment year.

Maharishi Institute of Creative Intelligence U.P [(2017) 98 CCH 0012 ALLHC]

1820. Where assessee, a charitable trust, made repayment of loan to its trustee, the Court held that the Assessing officer without bringing any relevant material and evidence on record, could not draw an adverse inference that it was a case of transfer of funds to trustee in violation of provisions of Section 13(1)(c). The matter was, accordingly, remanded back to the Assessing Officer for fresh adjudication.

Devi Kamal Trust Estate V. Director of Income-Tax (Exemption) , Kolkata - [2017] 79 taxmann.com 212 (Calcutta) (ITAT No. 181 of 2016)

1821. The Court upheld the Tribunal's decision of allowing deduction of depreciation to the assessee Trust and dismissed the Revenue's contention that the entire cost of capital expenditure had already been allowed as deduction u/s 11 of the Act in the AYs 2006-07, 07-08 & 08-09 and that consequently allowing depreciation as expenditure would amount to double deduction. The Court observed that the income of the assessee was exempt u/s 11 and hence assessee was not claiming any deduction and thus when depreciation was claimed, assessee in effect was claiming that the depreciation should be reduced from the income for determining percentage of funds which had to be applied for the purpose of trust. It further clarified that the amendment to Section 11 by inserting sub-section (6) which provided that 'income shall be determined without any deduction or allowance by way of depreciation' vide Finance Act (No.2) Act,2014, was prospective in nature and not applicable to the subject AYs.

Commissioner of Income Tax & Ors. Vs Seth Anandram Jaipuria Edu. Society Contonment & Ors. (2107) 98 CCH 0106 AIHC (ITA No. 102 of 2015, 94 of 2015, 41 of 2016)

1822. Where the assessee was carrying out activities in relation to 'propagation of yoga' and had claimed exemption of its activities being in the nature of medical relief, education & relief to the poor, the Tribunal held that the assessee's activities qualified as providing 'medical relief' and 'imparting of education', thus falling under the definition of charitable purpose u/s 2(15). It further held that voluntary contributions made with specific directions viz. donations received from Divya Yog Mandir Trust for construction of Patanjali Yogpeeth-II, in relation to Vanaprastha Ashram, disaster relief fund and in the University of Patanjali did not constitute the trust's income as it was to be treated as part of the corpus. Further, with respect to corpus donation received in the form of immovable property, it rejected Revenue's action of adding the market value of such property as the same did not constitute income of the assessee.

Patanjali Yogpeeth vs. ADIT TS-57-ITAT-2017(DEL) ITA No.2267/Del/2013 dated 09.02.2017

1823. The Tribunal granted exemption u/s 11 to the assessee (a Christian Religious Society) and held that publication and distribution of Christian literature & religious books amounted to a religious activity eligible for exemption u/s 11. It clarified that the dis-entitling provision u/s. 13(1) (b) (which denies Sec. 11 exemption to a charitable trust which benefits a particular religious community or caste) was not attracted as it talks about 'charitable institution' and not religious institutions and that a 'religious purpose' had wider meaning than 'charitable purpose'.

The Christian Literature Society [TS-163-ITAT-2017 (CHNY)]

1824. The assessee was set up as a charitable society (duly registered under Section 12A of the Act) engaged in ensuring time supply of prescribed textbooks at fair prices to school students and to improve the quality of primary and secondary education in schools. The AO denied the assessee benefit under section 11 of the Act observing that the assessee earned huge profit margins of 35.15 percent and that the activity of publishing and selling books could not be considered as a charitable activity. The Tribunal set aside the order of the CIT(A) who provided relief to the assessee and upheld the order of the AO. On appeal the Court noted that the textbooks provided by the assessee to its students were at a subsidized rate and some study material was being distributed free of cost as well and held that the preparation and distribution of books certainly contributed to the process of training and development of mind and character of the students. It also held that the Tribunal had failed to notice that the surplus amounts realized by the assessee was ploughed back into the main activity of education and accordingly held that the Tribunal was incorrect in denying exemption to the assessee under section 11 and 12 of the Act. It also held that the Tribunal erred in upholding the order of the AO and concluding that the activities carried out by the assessee fell under the 4th limb of Section 2(15) i.e. advancement of any other object of general public utility as it was clear that the activities of the assessee were solely for the purpose of education.

Delhi Bureau of Text Books v DIT – (2017) 99 CCH 0005 (Del HC) – ITA 807, 810, 811, 812 / 2015 dated 03.05.2017

1825. The Court held that the assessee viz. Vishwa Hindu Parishad (assessee, 'VHP') was eligible to claim exemption under section 11 of the Act despite its failure to comply with mandatory condition u/s. 12A(b) of filing of audit report. It noted that pursuant to demolition of Babri Masjid in 1992, the assessee was declared as an unlawful organisation under the Unlawful Activities (Prevention) Act, 1967 ('UAPA'), and thus, its books of accounts were seized as a result of which it could neither file its income tax return nor its audit report. It further noted that the assessee filed the audit report along with revised return in March 1996 (after completion of assessment) once the ban imposed under UAPA was lifted in June, 1995. Accordingly, it distinguished Revenue's reliance on co-ordinate bench rulings in Indian National Congress [TS-152-HC-2016(DEL)] and Janata Party [TS-151-HC-2016(DEL)], wherein exemption u/s. 13A was denied for flouting the mandatory condition of filing audit report alongwith return of income and observed that the delay in filing of audit report in the instant case was for bonafide reasons. It also observed that the assessee's audited accounts were not doubted. Accordingly, it held that there was no failure to comply with mandatory condition u/s. 12A(b) of the Act.

Further, it also rejected the Revenue's ground for rejection of exemption on the ground that the assessee was not registered u/s. 12A and noted that for relevant AY, the condition as to registration was not mandatory and mere filing of application for registration was sufficient which was done so by the assessee in 1973.

DIT(E) vs. Vishwa Hindu Parishad - TS-184-HC-2017(DEL) - ITA 14/2004 dated 08.05.2017

1826. Assessee company was formed with charitable objects and was registered u/s 8 of the Companies Act, 2013 (corresponding to Section 25 of the Companies Act, 1956). The Id. CIT (Exemption) had granted registration u/s 12AA(1)(b) of the Act to the assessee company. However, it denied deduction u/s 80G(5)(vi) pointing out that the assessee primarily intended to carry out the activities outside India and Section 80G(5)(vi) only provided deduction with respect to donations to any charitable institutions or funds if it was established in India, unless approval had been received under section 11(1)(c)(i) of the Act, which was not so in the instant case. Further the CIT (Exemption) also contended that the applicant had simply collected funds and had not carried out any significant charitable activities and therefore was not eligible for deduction u/s 80G. The Tribunal concurred with the view of the CIT(E) and held that since the activities of the institution included activities intended to be carried outside of India, its income would be liable to inclusion in its total income under the provisions of sections 11 and 12 of the Act unless it had the necessary approval obtained under section 11(1)(c) of the Act. Since the assessee had not obtained the requisite approval, the Tribunal held that it was not entitled to deduction under section 80G.

Barefoot College International v CIT - (2017) 50 CCH 0024 JaipurTrib - ITA No. 795/JP/2016 dated 11.05.2017

1827. The assessee-trust had claimed cost of the asset purchased towards application of income and had also claimed depreciation on the cost of the asset which was disallowed by the AO on the ground that double deduction could not have been claimed by the assessee. The CIT(A) relied on the decision of DIT(E) Vs. Al Ameen Charitable Fund Trust [(67 taxmann.com 160) (Karnataka)] wherein it was held that while acquiring the capital assets, what was allowed as exemption was the income out of which such acquisition of asset was made and when depreciation deduction was allowed in the subsequent years, it was for the losses or expenses representing the wear and tear of such capital amount that was incurred and further, the term 'income' u/s 11 would mean receipts net of expenses and depreciation being expenditure towards wear and tear of the asset would be allowed as deduction. Accordingly, he deleted the disallowance made by the AO and allowed the claim of the assessee. The Tribunal upheld the order of CIT(A) and allowed the claim of the assessee.

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

1828. The assessee, a charitable institution had applied for grant of registration u/s 12AA, which was rejected by CIT. It filed an appeal before the Tribunal after a delay of 1631 days along with

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

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

1829. The Tribunal accepted Assessee's claim u/s 10(26B) noting that the Assessee had satisfied the conditions stipulated in the said section viz. it was formed primarily for the development and upliftment of the members of the scheduled tribe community in the Union Territory of Lakshwadeep and was wholly financed by the Government.

Lakshadweep Development Corporation Ltd. vs. ACIT (2017) 84 taxmann.com 238 (Coch. Trib.) (ITA No. 18-19/2017 date August 1, 2017)

1830. The Court held that depreciation is neither a loss, expenditure or a trading liability and is therefore, not to be deducted while computing quantum of exempt income from operating warehouse u/s 10(29) (which provides that any income derived from the letting of godowns or warehouses for storage, processing or facilitating the marketing of commodities was exempt) relying on the Apex Court ruling in Nectar Beverages Pvt. Ltd. [TS-110-SC-2009]

Central Warehousing Corporation [TS-327-HC-2017(DEL)] ITA No. 584-589/2017 dated 01/08/2017

1831. The Tribunal held that where gross receipts of the society exceeded. One crore and society had not taken prior approval from Ld. CCIT, u/s 10(23C) (vi) of the Income Tax Act, 1961 which was mandatory for claiming exemption, assessee would not be entitled for exemption u/s. 10(23C)(iiiad) of Act.

SATLUJ SHIKSHA SAMITI vs. ASSISTANT COMMISSIONER OF INCOME TAX - (2017) 51 CCH 0136 DelTrib - ITA No. 777/DEL/2016 dated 29.09.2017

1832. Where the assessee, a charitable society registered u/s 12A, claiming exemption u/s 10(23C) was not allowed depreciation as application of income by the AO since the cost of asset was already allowed as application of income in the year of purchase of asset and granting depreciation again would amount to double deduction, the Court relying on the decision of the Co-ordinate Bench in the case of CIT vs. Karnataka Reddy Janasangha (389 ITR 229)(Kar), held that grant of the claim of depreciation as application of income did not amount to double deduction was allowable and that the amended provisions of section 11(6) (which do not allow deduction of depreciation) were prospective in nature [operative effective from 01.04.2015 would not apply to the impugned AY i.e. AY 2006-07 Accordingly, it held that while in the year of acquiring the capital asset, what was allowed as exemption was the income out of which such acquisition of asset was made and when depreciation deduction was being allowed in the subsequent years, it was on account of the losses or expenses representing the wear and tear of such capital asset incurred.

DCIT vs. CBCI Society for Medical Education (2017) 50 CCH 0256 BangTrib ITA No. 892/Bang/2016 dated 04/08/2017

1833. The Tribunal reversed the order of the CIT(E) and granted Sec. 12A registration to assessee-society involved in the upliftment of farmers and protection of farmers' interests. The Tribunal rejected the contention of the Revenue that Assessee was not carrying out charitable activities and it was merely conferring benefit to a particular section and not public at large by holding that the section of public to whom benefit was intended to be allowed to were farmers which

constitute approx. 60% - 70% of population of the country and the protection of interests of farmers would invariably confer several benefits. It further clarified that at the stage of granting registration u/s 12A, CIT(E) was only required to see the objects of society and was not required to examine the application of income.

Bhartiya Kisan Sangh Sewa Niketan vs. CIT(E) TS-372-ITAT-2017 (ITA No. 6721/Del/2015 dated August 25, 2017)

1834. The Court allowed Revenue's appeal and reversed the order of the Tribunal granting the assessee registration from 2000 onwards, noting that when the assessee originally applied u/s 12AA in 2000, the application was rejected and it was only in 2004 where the representation were filed before CIT was the registration granted. It held that the date of filing the original application for registration had no relevance as the said application was rejected, and the subsequent application/representation moved in September, 2004.

CIT vs Gyan Deep Shiksha Bharti-TS-396-HC-2017(ALL)-ITA No. 534 of 2009 dated 19.08.2017

1835. The Tribunal following its order in the assessee's own case for the prior AY held that the activities carried out by the assessee viz., holding of periodical meetings/conferences of the members and the medical profession in general, to publish and circulate official journals, conduct educational campaigns in India, encourage medical research etc was covered within the definition of charitable purpose for medical relief contained u/s 2(15) and did not involve any trade, commerce or business and accordingly held that the AO erred in denying the assessee exemption u/s 11(1) on the ground that the assessee was engaged in a commercial activity.

Assistant Commissioner of Income Tax vs. Indian Medical Association [I.T.A. No.6076 (2017) 51 CCH 0016 DelTrib]

1836. The Court, reversing the Tribunal order, granted exemption to the assessee u/s 11 for AY 2009-10 and held that the activity of the assessee was not in the nature of trade, commerce or business to trigger rigours for section 2(15) proviso. Referring to the provisions of Gujarat Town Planning Act (under which assessee was constituted), it noted that the assessee was subject to the control of the State Government and the entire amount realized by the assessee either by selling plots or by recovery of some fees/charges was to be utilized only for the purpose of urban development. Accordingly, it rejected Tribunal's view that assessee was involved in profiteering.

Ahmedabad Urban Development Authority vs ACIT-TS-383-HC-2017(GUJ)-ITA No. 425 of 2016 dated 02.05.2017

1837. Where the CIT had revoked registration of charitable trust u/s 12AA(3) on the ground that the activity carried on by the assessee was in the nature of trade, commerce or business and the Tribunal reversed the order of CIT cancelling registration on the ground that the CIT had not given any finding that activity of the trust was not genuine activity or it was not being carried out in accordance with the object of the institution, the Court upheld the order of the Tribunal.

CIT vs. MUMBAI METROPOLITAN REGIONAL IRON AND STEEL MARKET COMMITTEE (2017) 99 CCH 0122 MumHC ITA No. 43 OF 2015 dated 17.07.2017

1838. The Court upheld granting of charity registration u/s. 12AA to assessee-institution engaged in training and guiding Government officials/farmers in the field of water and land management for a fee by categorising the assessee as being engaged in 'preservation of environment including water-sheds, forests' which is one of the charitable activities specified u/s. 2(15). The Court noted that the Revenue had denied Sec. 12AA registration by categorizing assessee's activity as that of 'advancement of any other object of general public utility' and invoking the turnover criteria of Rs. 25L as per proviso to Sec. 2(15). It noted that the Tribunal had allowed the relief relying on Delhi HC ruling in India Trade Promotion Organisation holding that assessee's dominant purpose was not 'profiteering'. The Court upheld Tribunal's final conclusion, however, opined that both Revenue and Tribunal committed 2 mistakes namely, (a) that of overlooking the 5th activity covered by Sec. 2(15) i.e. 'preservation of environment including water-sheds, forests' and wrongly invoking the proviso by focusing on the 7th activity i.e. 'advancement of any other object of general public utility' and (b) is of looking at gross receipts even before grant of registration.

CIT (E) vs. Water and Land Management Training & Research Institute TS-258-HC-2017 (ITTA No. 56 of 2017 dated March 15, 2017)

1839. The Tribunal allowed Revenue's appeal and denied exemption under Section 11 to assessee, an institute formed with an objective to promote Indian Composites Industry through collaboration and exchange of information relating to Fibre Reinforced Plastics or other composites, which was promoted through conferences, publication of journals, books, bulletins, etc.. The Tribunal rejected assessee's stand that its objectives would be covered under 'education' for the purposes of Sec 2(15) since it disseminates useful information and that 'education' cannot be confined to class room teaching i.e. formal school/college education alone. The Tribunal held that the word 'education' may assume different forms, not necessarily confined to class room study, as open universities have come about in recent times, but it had to have elements of scholastic education, discipline, and accreditation, i.e., carried out in an organized manner, which stands recognized in the field of education. The Tribunal observed that assessee did not carry out educational courses, where education was imparted in a systematic and formal manner, duly accredited, The Tribunal further concluded that assessee's objectives fall under the ambit of advancement of general public utility and since its receipts exceeded Rs. 25 lakh threshold no charity exemption was to be granted.

ITO (E) vs. FRP Institute TS-307-ITAT-2017 (ITA No. 1385/Mds/2015 dated March 30, 2017)

1840. The Court held that at the time of registration of a charitable institution u/s 12AA, the CIT is not required to look into the activities, where such activities have not been initiated or are in the process of its initiation and registration cannot be refused on the ground that the trust has not yet commenced the charitable or religious activity. It held that the registration stage, only the genuineness of the objects was to be tested and not the activities, unless such activities have commenced.

CIT v Shreedhar Sewa Trust - INCOME TAX APPEAL No. 33 of 2017 – Allahabad High Court dated 07.09.2017

1841. The Tribunal upheld CIT(A)'s order granting exemption u/s 11 to the assessee engaged in charitable activities. It held that where the main object of the assessee (a charitable trust) was for providing clean environment to society, maintenance of garden, plantation, horticulture etc, which were accepted by the Revenue in the previous years, the objects were clearly in the nature of charitable purpose and specifically fell within the ambit of 'preservation of environment' and therefore the exemption u/s 11 of the Act was valid. Accordingly, it dismissed Revenue appeal against CIT(A)'s order.

ITO vs Gujarat Environment Service Society (2017) 51 CCH 199 AhdTrib. ITA 1233 and 2520/ahd/2015 dated 25.10.2017

1842. The Tribunal held that the assessee was not eligible to claim exemption under Section 10(12) of the Act on interest accrued on accumulated balance in the Employee Provident Fund account from the date of retirement (2002) to date of withdrawal (2011) as the assessee ceased to be an employee from April 2002 onwards and the PF amount was withdrawn after a period of 9 years. It held that as per Section 10(12) of the Act exemption is only available to a person who being an employee withdraws the accumulated fund from the PF account as on the date of retirement and therefore held that accumulated interest post retirement was not eligible for exemption.

Shri Dilip Ranjrekar v ACIT – TS-522-ITAT-2017 (Bang)

1843. Where the assessee had provided scholarship given to Ms. Aarti Rai in foreign currency and had been paid in UK i.e. the application of funds had taken place outside India, the Tribunal held that the AO was correct in denying the assessee Exemption u/s 11 on the ground that the said exemption would only be granted if the application of funds had taken place within India or the approval of Board was obtained granting specific exemption.

IILM FOUNDATION & ORS. vs.ADDITIONAL DIRECTOR OF INCOME TAX (EXEMPTION)- (2017) 51 CCH 0294 DelTrib - ITA No. 1142/Del/2011 dated 08.11.2017

1844. The Apex Court dismissed the appeal of the Revenue and approved the decision of the Bombay High Court in Institute of Banking Personnel Selection wherein it was held that the income of the trust was to be computed on commercial principles after providing for allowance of normal depreciation from the trust's gross income despite the full expenditure being allowed as an application of funds in the year of acquisition of assets. Further, it noted the amendment to Section 11(6) vide Finance Act, 2014 (which provides that depreciation would not be allowed as a deduction) was retrospective in application and could not apply to AYs prior to AY 2015-16. Further, it clarified that once the assessee was allowed depreciation, it would be entitled to carry it forward as well.

Rajasthan and Gujarati Charitable Foundation Poona – TS – 596 – SC-2017 CIVIL APPEAL NO. 7186 OF 2017 dated 13.12.2017

1845. The assessee-trust was formed with object of promotion of interests of non-resident Keralites and filed an application seeking registration under section 12AA. On examination of the application, the Commissioner found that under the cover of promoting interests of non-resident Keralites, assessee was in receipt of income from certification, bank interest, project identity card but there was no expenditure for charitable purpose made from such income generated and therefore held that though technically, the objects of assessee came within ambit of advancement of objects, of general public utility, as described in section 2(15) (as it existed prior to assessment year 2009-10). Accordingly, observing that it had not carried out any such charitable activity he rejected the application for registration, which was upheld by the Tribunal. The Court upheld the order of the Tribunal noting that the findings recorded by the lower authorities being findings of fact, did not require any interference. Accordingly, it dismissed assessee's appeal.

Norka Roots v CIT - [2018] 89 taxmann.com 181 (Kerala) - IT APPEAL NO. 246 OF 2015 dated 07.12.2017

1846. The Tribunal held that though it is permissible for charitable trusts to donate for charitable or religious purposes and apply its income for said purpose, it held that where assessee had given donations to various societies, but had neither established user of donations for charitable purposes, nor demonstrated that said donee society was a charitable society registered under section 12A, the benefit of application of income could not be claimed. Considering that the assessee indulged in the activity of giving donations to other non-charitable institutions which was not in consonance with the approved objects of the assessee-society, it upheld the action of the Commissioner in cancelling the registration granted under section 12A.

Winsome Foundation v CIT - [2018] 89 taxmann.com 131 (Chandigarh - Trib.) - IT APPEAL NO. 397 (CHD.) OF 2013 dated 04.12.2017

Interest / Penalty

Interest

1847. The Court relying on Bombay HC ruling in the case of Rashmikant Kundalia wherein it was held that delay in filing of TDS return has a cascading effect and results in additional burden upon the department with respect to processing deductee's tax status, dismissed assessee's writ challenging the constitutional validity of section 234E (levying mandatory fee for delay in filing TDS returns)

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

1848. The Court dismissed the assessee's writ petition against the CIT's rejection of interest waiver application u/s 220(2A) for want of 'genuine hardship'. It observed that CIT's rejection of 'genuine hardship' plea was not an erroneous exercise of discretion by the CIT and held that the mere fact that the interest u/s. 220(2) was 1.5 times the tax by itself did not have any relevance for determining whether the Assessee was suffering from any genuine hardship. It rejected assessee's contention that the mere fact that it was part of the global conglomerate 'DuPont', which made profits did not mean that it did not suffer any 'genuine hardship' and noted that it had earned operating profits of USD 6.253 billion and that the amount paid by it towards interest u/s.

220 (2) was merely \$0.004 billion (approx). Accordingly, it concluded that the view taken by the CIT was a plausible view and did not call for any interference.

Pioneer Overseas Corporation USA [TS-194-HC-2017(DEL)] - W.P.(C) 5423/2016 dated 17.05.2017

1849. Where the assessee made disclosure of its income only after notice under Section 148 of the Act was issued pursuant to search proceedings carried on in its premises, the Court held that the assessee was not justified in claiming waiving of interest under Section 234A, B & C of the Act based on Circular No. 400/29/2002 as the disclosure made by the assessee could not be considered as a voluntary disclosure.

A Kuberan v CCIT - [2018] 89 taxmann.com 179 (Madras) - W.P. NO. 5622 OF 2007 dated 07.12.2017

1850. Where the assessee had made payments without deducting tax u/s 194J, and the Assessing Officer treating the assessee as assessee in default, levied interest u/s 201(1), the Tribunal, relying on the decision in the case of Kanoi Properties Pvt. Ltd [TS-5044-HC-2003(CALCUTTA)-O] held that interest had to be charged from the date on which the tax was required to be deducted till the date of furnishing of return of income by the deductee. Rejecting the assessee's contention that since the deductee had filed nil return of income and had no tax liability, even after taking into account receipts from the assessee, no interest could be levied, the Tribunal held that the tax liability in the hands of the deductee had no connection with charging of interest u/s 201(1A). It further held that Proviso to Sec. 201(1A) inserted w.e.f July 1, 2012 makes it very clear that even though the assessee is not deemed to be 'assessee in default' under the first proviso to Sec. 201(1), the interest u/s 201(1A) shall be payable from the date on which such tax is deductible to the date of furnishing of return of income by such deductee. Accordingly, it held that interest u/s 201(1A) was payable by the assessee.

Aayush NRI LEPL Health Care Pvt. Ltd vs ACIT-TS-475-ITAT-2017(VIZ)- /I.T.A.Nos.10 & 11/Vizag/2016 dated 18.10.2017

1851. The Tribunal upheld the CIT(A)'s order and held that the assessee was entitled to interest under Section 244A on the refund of the interest paid by it under Section 234B. It rejected Revenue's contention that Section 244A only provides for interest on refund of tax or penalty and not on interest and relying on the decision of the co-ordinate bench in Alembic Glass – TS-5752 – ITAT- 2006 (Ahd) – O, held that the expression 'tax' used in Section 244A(1)(b) would include interest. It further held that the definition of tax in Section 2(43) meaning "income tax" would not be applicable in the context of Section 244A(1) of the Act.

ACIT vs National Dairy Development Board-ITA No. /I.T.A. No.1384/Ahd/2014 dated 21.09.2017

1852. Where pursuant to an order of the Apex Court, HSBC (who owed money to the assessee) was directed to pay to the assessee a sum of Rs. 102 crore as a result of which the assessee was liable to tax u/s 115JB, the Court dismissed the assessee's writ against the order of the CCIT denying waiver of interest u/s 234C for non-deduction of advance tax. It rejected the assessee's contention that interest waiver should be granted as the review petition filed by HSBC against the Apex Court order was pending and therefore the assessee could not anticipate its accrued income while paying the advance tax of quarter ending September 15th and held that as per CBDT circular date June 26, 2006 and sec 234C, waiver could only be granted in respect of income which was neither anticipated nor was in the contemplation of the assessee and the advance tax on the remaining income was duly paid by the assessee and since a favourable order was passed by Apex Court on July 15, 2013 pursuant to which HSBC deposited the amount with the registry, the amount became assessable to tax in assessee's hands.

Canbank Financial Services Limited vs CCIT-TS-427-HC-2017(KAR) WP No. 7276/2017 dated 15.09.2017

1853. The Court rejected the assessee's contention that Section 234E levying a fee for failure to deliver TDS statements as per the prescribed time limit was unconstitutional prior to the

amendment made in Section 200A with effect from June 2015 (providing that while processing TDS statements the AO could make adjustments on account of sum payable under Section 234E) as prior to such date Section 200A did not provide for such adjustment. It held that Section 234E was introduced to ensure TDS compliances were met and was in effect a charging section levying fee for defaults in observing compliances which could not be overridden by Section 200A which was a machinery provision merely providing for the processing of TDS statements. Further, it rejected the contention of the assessee that without a regulatory provision in Section 200A providing for adjustment of fee under Section 234E, no fee under Section 234E could be levied. Additionally, it also dismissed assessee's contention that Rule 31A (prescribing a longer period viz. 15 additional days, for the Government to file TDS statements as compared to others) was discriminatory and unconstitutional and held that Article 14 does not prohibit reasonable classification but only frowns upon class legislation. Considering the complexity, volume and turnover of transactions undertaken by the Government, it held that the extended period was perfectly legitimate.

M/s Rajesh Kourani vs. UOI TS-273-HC-2017 (Special Civil Applicatoin No. 302 of 2014 dated June 20, 2017)

Penalty

1854. Where the assessee had incorrectly claimed set-off of its brought forward business losses against its income based on a legal opinion received from a CA firm, The Court upheld the order of the Tribunal deleting penalty u/s 271(1)(c) wherein the Tribunal noted that there was nothing clandestine in the manner in which the opinion was sought. It held that the rejection of the patently wrong claim of the assessee of setting off of brought forward business loss in its return of income would not amount to furnishing of inaccurate particulars of income/concealment of income and would not be liable for penalty.

Atotech India Ltd. [TS-699-HC-2016(P & H)]

1855. Pursuant to the issue of notice under Section 148 of the Act, the assessee filed a return of income admitting additional income corresponding to certain cash deposits / withdrawals which were not reflected in the balance sheet of the assessee but were present in its bank account, which was accepted by the AO. Subsequently, the AO proceeded to levy penalty under Section 271(1)(c) contending that the assessee had concealed its income and furnished inaccurate particulars. The Tribunal upheld levy of penalty under Section 271(1)(c) observing that but for the issue of notice under Section 148 of the Act, the assessee would not have disclosed the additional income and therefore rejected the contention of the assessee that no penalty could be levied as the AO had not made any addition to returned income. Further, it dismissed the contention of the assessee that the notice under Section 274 of the Act was bad in law as it didn't strike out the appropriate portion, observing that in the instant case, the assessee had concealed particulars of income as well as furnished inaccurate particulars.

Jyothirmoy Yamsani – TS-568-ITAT-2017 (Hyd) - ITA No. 1519/Hyd/2016 dated 28.11.2017

1856. The Court held that since in the present case, the assessing officer had not given any reason as to how he reached the conclusion that "the assessee has concealed its income and furnished inaccurate particulars of its income", merely because the books of account had been rejected it did not in itself establish or prove either of the two circumstance to levy penalty, leave alone both circumstances as the penalty order suggested. It held that the assessing officer, was obliged to reason and state in the penalty order how according to him the assessee had either concealed the particulars of his income or had furnished inaccurate particulars of the same either with reference to the material discovered during the survey proceedings or otherwise. Accordingly, it deleted the penalty levied by the AO absent the his reasoning as to how the assessee either concealed its income or furnished inaccurate particulars or both.

CIT v DEE CONTOL AND ELECTRIC PVT. LTD -(2017) 100 CCH 0185 AIIHC - INCOME TAX APPEAL No. 82 of 2017 dated 19.12.2017.

1857. Where assessee had availed benefit of the KVVS Scheme, 1998 and paid requisite tax thereunder and where u/s 91 of the Scheme, a designated authority was empowered to grant waiver from imposition of penalty and interest in respect of income, which was subject matter of declaration, the Court held that in such a case the Revenue was wrong in levying penalty on a transaction which was subject matter of the scheme and where arrears of tax had already been settled and paid under the Scheme. Accordingly, the orders imposing penalty and interest on the Petitioner were quashed.

S.Narayanan v. Commissioner of Income Tax [2017] 80 taxmann.com (Madras) (WP No. 10791 of 2014)

1858. During search operation it was found that assessee had purchased a software but assessing officer held that the assessee had infact taken bogus bills to inflate their expenditure and consequently disallowed 20% depreciation on cost of software. On CIT(A) confirming the disallowance, the assessing officer started penalty proceedings. The Tribunal noting that as no incriminating material was unearthed during search and no independent enquiry and examination had taken place during assessment proceedings and only post search enquires were made basis of entire penalty proceedings, held that penalty proceedings are independent of assessment proceedings and mere confirmation of addition could not be sole ground to levy penalty. The Assessing Officer was thus directed to delete the penalties and Assessee's appeal was, accordingly, allowed.

Chintels India Ltd vs. Assistant Commissioner of Income Tax (2017) 49 CCH 0134 DelTrib (ITA Nos. 3791,3792,3793/Del/2016)

1859. The Apex Court dismissed assessee's SLP against Rajasthan HC judgment upholding the levy of penalty under section 271D for section 269SS violation, wherein the assessee (engaged in cement manufacturing) had during AYs 1992-93 and 1993-94 accepted unsecured loans from its chairman cum managing director in cash.

Chandra Cement Ltd [TS-8-SC-2017]

1860. Where the assessee after realising that the travel expenditure claimed by her u/s 57 of the Act was not tenable and she could not produce evidence of such expenditure due to absence of her accountant, offered the amounts expended to be added to her income and, accordingly, paid the requisite tax and interest upon the same, the Court held that this did not amount to concealment of income or furnishing of inaccurate particulars by the assessee and accordingly dismissed the Revenue's appeal against Tribunal's judgment deleting penalty levied u/s 271(1)(c) of the Act.

Commissioner of Income Tax vs. Anita Kumaran. (2017) 98 CCH 0089 (Madras HC) T.C.(A) Nos. 139 to 141 of 2017.

1861. Where the appellant-assessee engaged in shipping business debited its foreign exchange fluctuation loss arising from its Tonnage business to compute its Non Tonnage income, the Court held that there was a deliberate attempt on the part of the assessee to furnish inaccurate particulars so as to reduce its taxable income and thus the Court upheld the imposition of penalty u/s 271(1)(c) of the Act. Assessee's argument that it had made a mistake and that it had voluntarily declared the same to the assessing officer was not accepted as the so called disclosure was made by the assessee only after it received notices u/s 142(1) & 143(2) of the Act.

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

1862. The Tribunal upheld concealment penalty u/s 271(1)(c) on the assessee company for failure to pay MAT on book profit u/s 115JB noting that the assessee had filed MAT computation despite normal income being higher in the earlier years but failed to do so in the current year. It rejected assessee's contention that it advertently lost sight of amendment which requires addition to book profit for long term capital gains exempt u/s 10(38) and also observed that the assessee did not adhere to the statutory requirements of filing Form 29B. Further, it held that it was surprising to observe that on one hand assessee accepted the error committed by it and on the other hand it

had not taken any pain to revise the return and to comply with the statutory requirements of filing form 29B r.w.s. 115JB of the Act which clearly raised doubts about its bonafideness.

Indian Chronicle Ltd. vs. ITO TS-55-ITAT-2017(AHD) ITA No.1275/AHD/2012 dated 09.02.2017

1863. The Tribunal held that the AO had rightly levied the concealment penalty u/s 271(1)(c) on the assessee for not disclosing income on account of director's sitting fee and short term capital gains on redemption of mutual fund in the return of income rejecting assessee's stand that he had inadvertently missed the disclosure of the two incomes. The Tribunal also held that the AO recorded detailed well-reasoned satisfaction before invoking penalty in the assessment order rejected the assessee's legal plea that notice issued u/s 274 did not specify the charge under which penalty proceedings were initiated stating that it was not the case wherein the AO had framed charge under one limb of Section 271(1)(c) of the Act and levied the penalty under second limb of Section 271(1)(c) of the Act

Shri Mahesh Gandhi vs. ACIT TS-77-ITAT-2017 ITA No. 2976/Mum/2016 dated 27.02.2017

1864. The Tribunal, deleting the penalty u/s 271(1)(c), held that the Assessee (software engineer) had not deliberately furnished inaccurate particulars in respect of interest income. The Tribunal noted that the explanation of the Assessee was bonafide that as the Assessee was out of India and the Assessee's father who suffered stroke and thereby lost his memory had filed the return of income based on Form No.16 and that by mistake he omitted to include therein the interest on savings and fixed deposits.

Sachidanand Padgaonkar vs. ITO (2017) 49 CCH 0030 Mum Trib (ITA No. 6020/Mum/2014 dated 03.02.2017)

1865. Where the assessee had filed an original return under section 139(1) of the Act and then pursuant to search proceedings conducted in its premises filed a return under section 153A(1) declaring a higher income which had been accepted by the AO, the Court held that the AO was not justified in levying penalty under section 271(1)(c) on the ground that without the search proceedings, it would not have disclosed such additional income. The Court further held that as the return filed under section 153A would render the original return under section 139 of the Act would become non est and therefore there was no concealment of income as the return filed under section 153A had been accepted by the AO.

Pr CIT v Shri Neeraj Jindal – (2017) 98 CCH 0061 Del HC – ITA 463 / 2016

1866. Where addition of Share Capital was made by the AO, as the name of the assessee company did not appear either in the 'schedule of investments' or in the loans and advances' of annual accounts of the shareholder (i.e the company to whom shares were issued by the assessee-company) and consequently penalty proceedings u/s 271(1)(c) were initiated for filing inaccurate particulars of income and penalty was imposed on the assessee-company, the Tribunal held that it could not be said that assessee had withheld any relevant information regarding receipts and income from AO as the amounts added back by AO were amounts disclosed by the assessee itself and the Apex Court had authoritatively laid down that making of claim by the assessee which was not sustainable would not tantamount to furnishing inaccurate particulars for the purpose of imposing penalty u/s 271(1)(c). Accordingly, the issue was restored to the file of the AO.

Gahoi Chemicals Pvt Ltd v Deputy Commissioner of Income Tax - (2017) 49 CCH 0178 DelTrib (ITA No. 1212, 1213/Del/2012)

1867. Addition was made by the AO only on account of dispute pertaining to the value of closing stock of zip fasteners. The AO had taken the value at Rs.59.48 per meter whereas the assessee had offered Rs.33.56 per meter and the CIT(A) finally valued it at Rs.37.96 per meter. Subsequently penalty u/s 271(1)(c) was levied. The Tribunal held that no penalty u/s 271(1)(c) could be imposed with reference to additions made on an estimation basis where assessee had not furnished inaccurate particulars of income and there were no findings of the AO or CIT(A) that the details furnished by the assessee in his return were found to be erroneous or false. Accordingly, the Tribunal deleted the penalty in dispute and quashed the order of CIT(A), allowing appeal filed by the assessee.

Shruti Fastners Ltd vs. Deputy Commissioner of Income Tax - (2017) 49 CCH 0183 DelTrib (ITA No. 5374/Del/2012)

1868. The Tribunal upheld levy of penalty u/s 271(1)(c) on false depreciation claim made by assessee company on a furnace for AY 2004-05. The assessee had argued that the machinery (i.e furnace) was subject to trial run (i.e., at the supplier's premises) in the presence of assessee's engineers and hence it was put-to-use. It held that the test running at supplier's premises was only to confirm if the plant being delivered was in a 'OK' state and could not be regarded as commissioning of it's plant by the assessee. Further it held that even assuming constructive delivery at the sellers' premises, so that the plant stands acquired, it would enter the block of assets only upon being put to use. Since the assessee could not prove that the furnace was delivered / installed at its premises before March 31 of the relevant AY, the Tribunal held that the provisions of section 271(1)(c) were clearly applicable.

Sundaram Fasteners Ltd. vs. ADIT - TS-179-ITAT-2017(CHNY) - /ITA No. 590/Mds/2012 dated 26.04.2017

1869. AO observed that assessee had incurred expenditure on foreign travel of one of its Directors and not filed any evidence to prove purpose of foreign travel to justify assessee's claim expenses as business expenses. The AO also observed that the assessee had shown unsecured loan received from X and failed to prove identity and creditworthiness of party and genuineness of transactions, but only filed confirmation letter purportedly signed by the lender person. Accordingly, the AO levied penalty under section 271(1)(c) of the Act. The Tribunal held that since no other evidence or material was filed to prove genuineness either at assessment stage, appellate stage and during penalty proceedings, the levy of penalty under section 271(1)(c) was justified.

Sharsh finance & investment co. Pvt. Ltd. Vs.ACIT - (2017) 50 CCH 0015 DelTrib - ITA No. 878/Del/2012 – 05.05.2017

1870. Where the CIT(A) had deleted the penalty levied u/s 271(1)(c) by the AO on the ground that related quantum disallowance of head office expenditure had been deleted by the Tribunal, the Tribunal upheld the CIT(A)'s order and rejected the Revenue contention that the CIT(A) should not have deleted the penalties since it had filed the appeal before the High Court against the Tribunal's order in quantum proceedings and was hopeful of succeeding before the High Court. The Tribunal held that even if the penalty u/s 271(1)(c) stood deleted, the Revenue could still impose the penalty under Section 275(1A), (which provides for the possibility of imposition of penalty while giving effect to the order of the appellate authority) if it succeeded in High Court.

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

1871. The AO after the completion of the assessment, noticed that the assessee had violated provisions of Sections 269SS, 269T and 285B by accepting and repaying loans/deposits otherwise than by way of account payee cheques and/or draft and by not filing statements regarding the film production carried on by it. Accordingly, he issued notices for imposing penalty u/s 271D, 271E and 272A (2)(C) [i.e. penalties for contravening Sec. 269SS/T for accepting / repaying loan in cash and for non-furnishing of statement by assessee-producers regarding film production carried on by them]. The assessee's appeal before CIT(A) was pending. The assessee filed a declaration under the Direct Tax Dispute Resolution Scheme, 2016(the Amnesty Scheme) by paying 25% of the minimum penalty levied as also the tax and interest payable on the total income finally determined. The assessee's declaration were not processed on the ground that for the Amnesty Scheme to be applicable penalty necessarily should be linked to total income finally determined under the assessment proceedings whereas in the assessee's case penalties imposed were not linked to any assessment proceedings. The Court allowed the assessee's writ petition and directed the Revenue to process assessee's declarations under the Direct Tax Dispute Resolution Scheme, 2016 ('DRS') with respect to penalties imposed under Sections 271D, 271E and 272A(2)(C) and held that there was no specific exclusion under the scheme for availing the scheme only for the penalties linked to the assessment.

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

1872. The assessee was a registered society and as per the Societies Act, the auditors were to be appointed by Registrar of Societies. There was delay in appointing the auditor by the Registrar. Accordingly, the assessee filed return of income on the basis of provisional accounts audited by Chartered Accountant but did not file audited accounts. The AO issued notice u/s 271D for levy of penalty for non-filing of audit report. The CIT (A), confirmed the order of AO in levying penalty on the assessee. The Tribunal held that the assessee being Govt. organization and Registered Society, had to abide by rules framed under Societies Act and as per said Act, the auditors had to be appointed by Registrar of Societies. Thus, the alleged default in filing audit report was beyond control of assessee. Since the assessee was prevented by reasonable cause for not getting its accounts audited u/s 44AB within prescribed time, the Tribunal deleted the penalty levied by AO.

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

1873. Notice was issued to the assessee u/s 142(1) calling for certain details and thereafter further reminders for hearings were issued. Since the assessee did not comply with the statutory notices, show cause notices for levying penalty u/s 271(1)(b) read with section 274 were issued. In response to the penalty notices, the assessee challenged the legality of the same and claimed that no evidence as alleged was called for by the AO. The AO not being satisfied with the responses, levied the penalty for repetitive default by the assessee. The CIT(A) confirmed the AO's order of levying penalty. The Tribunal observed that the assessee's non-compliance of statutory notice was for more than 3 times in each A. Y. Accordingly, it upheld the CIT(A)'s order confirming the penalty.

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

1874. The assessee was a public charitable trust with the object of providing education, relief to the poor. The DIT observed that during the A.Y 2001-02, the assessee had misapplied the donations received on account earthquake relief donations to its sister concerns. Accordingly, he held that the assessee was not engaged in charitable activities and therefore revoked the registration granted to the trust w.e.f 30.03.2004. The Tribunal held that the DIT was incorrect in withdrawing the registration w.e.f. 30.03.2004 merely on the basis of activities carried on by the assessee during A.Y. 2001-02 and restored the issue to the DIT directing him to consider the activities carried on by the trust in FY 2003-04 as well. The Court noting that the DIT had carried on detailed examination of the activities of the trust during the A.Y.2001-02, held that the Tribunal had erred in rejecting the DIT's order. It held that if the Tribunal was of the view that the findings of the DIT were incorrect, it should have disapproved the findings and that it was not justified in remanding the matter to the DIT to consider activities carried out in other years as well. It held that even if the subsequent year of the Trust was uneventful, it would not mean that the past misdeeds were to be ignored. Accordingly, it set aside the order of the Tribunal and restored the order of the DIT.

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

1875. Pursuant to a survey conducted in the premises of the assessee after the date of filing of return of income, though no incriminating material had been unearthed, the assessee during original assessment proceedings offered an addition sum of Rs.1.65 crores on account of share application money received by it in the earlier years as its income to buy peace and avoid litigation even though it explained the genuineness and creditworthiness of the source of such share application money, the Tribunal held that merely because the assessee had offered the sum, which was received by it in the past, to buy peace of mind and avoid litigation, it could not be held that the assessee had concealed income and furnished inaccurate particulars. Accordingly, it upheld the order of CIT(A) deleting the penalty levied u/s 271(1)(c) of the Act.

Assistant Commissioner of Income Tax vs. Varia Engineering Works Pvt Ltd (2017) 51CCH 0167 AHD trib. ITA No. 1379/ahd/2012 dated 06.10.2017

1876. Where the assessee while claiming deduction u/s 10B, netted interest earned on income tax refund against interest paid which was accepted by the CIT(A) though subsequently reversed by the Tribunal wherein it upheld the order of the AO taxing the interest earned as income from sources, the Tribunal held that the AO erred in levying penalty under Section 271(1)(c) alleging that the assessee had furnished inaccurate particulars as the assessee's claim was bonafide (as was evident from the notes to the statement of total income filed along with the return wherein it relied on the decision of Commissioner of Income Tax v. Haribhai Estate (P) Limited wherein similar income was treated as business income). It held that the bonafides of the assessee were further enhanced by the fact that the CIT(A) had allowed the assessee's appeal in quantum proceedings. Accordingly, it held that no penalty under Section 271(1)(c) of the Act could be levied.

DEPUTY COMMISSIONER OF INCOME TAX vs.AMERICAN EXPRESS INDIA PVT. LTD- (2017) 51 CCH 162 DelTrib. ITA No. 4422/del/2014 dated 6.10.2017

1877. Where the AO, after rejecting the assessee books of accounts under Section 145(3) of the Act made an addition in the hands of the assessee @12.50 percent of its gross profit receipts alleging that the assessee had inflated its expenses and the CIT(A) and Tribunal reduced the addition to 6 percent and 3 percent respectively, the Tribunal held that the AO was not justified in levying penalty under Section 271(1)(c) of the Act as there was no concealment of income by the assessee since the addition by the AO was computed on a mere estimated basis and was substantially reduced by the Tribunal in quantum proceedings. Further, the Tribunal noted that the AO had not recorded a specific satisfaction as to whether penalty was issued on account of concealment of income or furnishing of inaccurate particulars of income.

Naresh Katrare Contractor v ACIT – (2017) 51 CCH 0316 (Agra – Trib) – ITA No 53 / Agr / 2016 dated 09.11.2017

1878. The Tribunal held that concealment of particulars of income and furnishing of inaccurate particulars of income referred to in section 271(1)(c) denote two different connotations and it was imperative for the AO to make the assessee aware in the notice issued u/s 274 r.w.s 271(1)(c) as to which of the two limbs are being put-up against him. Accordingly, it held that failure to do would render the penalty proceedings invalid. The argument that the assessee was made aware of the specific charge during the proceedings would not save the penalty proceedings from being declared void. Accordingly, it directed the penalty proceedings to be deleted.

Orbit Enterprises vs ITO – ITA No. 1596 and 1507 / mum / 2014 dated 01.09.2017

1879. The Court, dismissing the appeal of the Revenue, upon reading of Sec. 221 conjointly with the definition of "tax" as provided u/s 2(43) held that the phraseology "tax in arrears" as envisaged in Sec.221 would not take within its realm the interest component since tax u/s 2(43) was defined as income tax, super tax and/ or FBT, as the case may be and not the interest component. The Court noted that tax, penalty and interest are different concepts under the IT Act. The Court further stated that provisions imposing penalty should be strictly construed and anything which was not clearly included within the scope of the language of the provision had to be treated as excluded. The Court also made reference to sec. 156 notice of demand which also referred to tax, interest, penalty, fine etc. separately.

CIT vs. M/s Oryx Finance & Investment Pvt. Ltd. TS-260-HC-2017 (ITA No. 1 of 2015 dated June 1, 2017)

1880. The Court held that, if the delay in filing the return is completely attributable to the revenue for non-furnishing of copies of the documents and not giving inspection of the documents seized within a reasonable time after making the demand, the interest has to be waived. Though section 158BFA(1) does not confer the power to waive interest, it has to be read in on equitable construction because the subject cannot be made to pay for the negligence of the Officers of the State.

Mahavir Manakchand Bhansali vs CIT-ITA No. INCOME TAX APPEAL No.42 OF 2007 dated 29.06.2017

1881. The Court held that no penalty u/s 271AAA can be levied in respect of undisclosed income found during a search u/s 132 if the AO did not put a specific query to the assessee by drawing his attention to section 271AAA and asking him to specify the manner in which the undisclosed income, surrendered during the course of search, had been derived.

Pr.CIT vs Emirates Technologies Pvt Ltd- ITA no. ITA 400/2017 dated 18.07.2017

1882. The Court quashed prosecution proceedings u/s 276B initiated against the assessee on account of failure to deposit the tax withheld by it on interest and commission payments within the specified time (i.e. 7th of the month following the month when deduction is made) which occurred due to oversight of its accountant as the assessee had reasonable cause for such delay u/s 278AA. Moreover, it noted that upon the defect being noted, the assessee had deposited the TDS along with interest u/s 201(1A).

Sonali Autos Private Limited [TS-312-HC-2017(PAT)] Criminal Miscellaneous No.16498 of 2014 dated 02/08/2017

1883. The Court dismissed the appeal of the Assessee and held that where the claim of the Assessee Trust that publishing of newspapers and periodicals would fall within the definition of general public utility and, therefore, would be charitable in nature was rejected by the department for the last forty years and affirmed by the Tribunal, penalty levied u/s 273(2)(a) for furnishing untrue estimate of advance tax and 140A(3) for non-payment of SA tax based on NIL return so filed was to be upheld. It observed that the length of the period during which the Assessee was denied the benefit of the exemption does not permit to hold that the Assessee had a reasonable belief that its income was exempt from tax and consequently NIL estimate of advance tax was filed and no self-assessment tax was paid based on NIL Return.

Trustee of Saurashtra Trust vs. Director of Income tax (2017) 99 CCH 0164 Mum HC (IT Reference No. 66/2000 dated August 4, 2017)

1884. The Tribunal deleted penalty levied by the AO u/s 271(1)(c), absent malafide intent to conceal income or furnish inaccurate particulars. It noted that penalty was levied on account of two additions i) disallowance of 50% depreciation, on car which was forgone by the assessee due to unavailability of documentary evidence to prove purchase was made before September 30th and ii) erroneous debit of loss on sale of assets to P&L instead of reducing the same from WDV. It held that the disallowance of depreciation was a mere deferral of depreciation and that the addition on account of sale of assets was due to an accounting error. Further, observing the huge quantum of income declared and taxes paid by assessee, it held that it was evident that the assessee intended to be tax compliant and therefore there was no malafide intention to conceal an income of Rs. 13.09 lacs (not even 0.4% of returned income).

Harish Narinder Salve vs ACIT-TS-414-ITAT-2017(DEL) I.T.A no. 100/del/2015 dated 21.09.2017

1885. Where the assessee showed reasonable cause for failure to comply with the statutory notice issued u/s 143(2)/142(1), the Tribunal deleted penalty imposed under section 271(1)(b) of the Act. Noting that for the preceding two AYs the CIT(A) had deleted the penalty imposed being satisfied with the reasoning of the assessee, the Tribunal, applying the principle of consistency, set aside the order of CIT(A) and cancelled the penalty.

Neeru Gupta vs ACIT (2017) 51 CCH 77 delhi Trib.- ITA No. 6569, 6570 & 6571/Del./2014 dated 01.09.2017

1886. The Tribunal, relying on the decision in the case of Reliance Petroproducts Ltd held that where the assessee had not suppressed any facts and its claim u/s 80IB and additional depreciation, though disallowed by the AO had been made on basis of audited accounts and on basis of audit report duly furnished by AO, penalty under section 271(1)(c) on account of concealment of particulars of income could not be levied.

Deputy CIT vs GSC Toughened Glass P Ltd (2017) 51 CCH 0023 Delhi Trib. ITA no. 6392 / del / 2013 dated 01.09.2017

1887. The Court, dismissing the Revenue's appeal, held that provisions of sec. 271(1)(c) could only be invoked only when the conditions laid down in that section are satisfied i.e. furnishing of inaccurate particulars or concealment of income. The Court observed that assessee had disclosed LTCL of Rs 80 Cr. on purchase and sale of share on which STT was paid in its ROI and that it had also filed a note with the ROI reserving right to carry forward the loss and to set it off against future gains as the assessee had not set off the said LTCL with the LTCG on sale of shares, which were exempt u/s 10(38). The Court stated that assessee under a bonafide belief, through the note, carried forward the losses on sale of shares on which STT had been paid. Thus, HC held that assessee acted in good faith with regards to interpretation of Sec. 10(38) and Tribunal was correct in deleting the penalty.

DIT (IT) -II vs. M/s Nomura India Investment Fund Mother Fund TS-262-HC-2017 (ITA No. 1848 of 2014 dated June 15, 2017)

1888. The Court upheld Tribunal's order deleting levy of penalty u/s. 271(1)(c) as the show-cause notice did not specify as to whether the assessee defaulted on account of concealment of particulars of income or furnishing of inaccurate particulars of income.

PCIT vs. Smt. Baisetty Revathi TS-299-HC-2017 (ITTA No. 648/2016 dated July 13, 2017)

1889. Where the assessee had not paid the self assessment tax under section 140A, while filing the return of income, but paid tax at the time of filing revised return of income, the Court held that the payment of admitted tax liability at the time of revised filing of return of income u/s 139(5), does not affect the lapse committed at the time of filing the original return of income even though claims made in such original income tax return stand supplanted by the claims made in the revised income tax return. Accordingly, it held that the assessee was liable to pay penalty u/s 221(1) of the Act.

Claris Life Sciences Limited vs DCIT- ITA No.498/Ahd/2011 dated 26.09.2017

1890. The Tribunal held that penalty u/s 271(1)(c) could not be levied unless there is evidence beyond doubt that there was concealment of particulars of income or furnishing inaccurate particulars thereof on the part of the assessee. The fact that the assessee did not voluntarily furnish the return of income, and that the merits were decided against it, does not per se justify the levy of penalty. The bonafides of the explanation of the assessee for not complying with the law have to be seen.

DDIT vs Metapath Software International Ltd-ITA No. 1393 /del/2011 dated 28.04.2017

1891. The Court dismissed the Revenue's appeal and confirmed the deletion of penalty levy u/s 271(1)(c) as the basis of penalty on which the penalty was initiated by the AO and the basis on which the quantum was confirmed on merits by Tribunal was different.

Indermal vs CIT-INCOME TAX REFERENCE NO.10 OF 2001 dated 06.07.2017

1892. The Tribunal held that where Assessee had duly come out with bonafide explanation to support transactions for sale and purchase of flat which was supported by its books of accounts, bank statements and confirmatory letter, merely because registered agreement for sale and purchase of flats were not entered in name of assessee, it would not sufficient to saddle assessee with liability to pay penalty u/s 271(1)(c).

LATE SH. JHAMU SUGHAND vs.ASSISTANT COMMISSIONER OF INCOME TAX - (2017) 51 CCH 0127 MumTrib - ITA No. 5730/Mum/2013 dated 25.09.2017

1893. The Tribunal held that when addition on basis of which penalty u/s 158BFA(2) was imposed, had been restored back to AO for fresh adjudication, penalty imposed u/s 158BFA(2) would not survive.

NIRMAL C. JHURANI & ANR. vs. ASSISTANT COMMISSIONER OF INCOME TAX & ANR. -2017) 51 CCH 0086 MumTrib - IT(SS)A No. 5/Mum./2011, 50/Mum./2008 dated 19.09.2017

1894. The Court reversed the Tribunal's order and held that assessee-firm was liable to penalty under Sec. 271D for contravention of section 269SS as it had accepted deposits, otherwise than by account payee cheque / draft. It held that a plain reading of Sec. 271D establishes that it was a mandatory provision and since its language is crystal clear, the object or the purpose of the enactment of said provision had no say in the matter. In the absence of 'reasonable cause' proved by assessee u/s. 273B no immunity from penalty was available to the Assessee.

CIT vs. M/s Sunil Sugar Co. TS-353-HC-2017 (ITA No. 652/2012 dated July 27, 2017)

1895. Where penalty u/s 271E was levied by the AO and upheld by the Tribunal as the assessee had contravened provisions of section 269SS and 269T of the Act and had failed to substantiate its claim that the value of transaction undertaken by it were less than Rs. 20,000, the Court held that the issue raised before it being factual did not constitute a substantial question of law. Accordingly, it dismissed the assessee's appeal.

Najardhanam Balaji vs. Add. CIT (2017) 99 CCH 0177 ChenHC Tax Case Appeal Nos. 413 and 414 of 2017 and C.M.P.No. 10330 of 2017 dated 02/08/2017

1896. The assessee engaged in the business of Draft Discounting had earned commission. The AO held that the assessee had failed to prove that he carried on the business of draft discounting and earned commission and he estimated the income @ 5% of the total deposits in bank. The AO then levied penalty u/s 271(1)(c) for concealment of income. The CIT(A) upheld the order of the AO. The Tribunal upheld the contention of the assessee that he carried on the business of Draft Discounting and earned commission. The Court observed that the Tribunal accepted the assessee's contention and therefore, very basis of the Penalty Proceedings was set aside by the Tribunal. Therefore, it held that penalty u/s 271(1)(c) would not be levied on the assessee.

INDERMAL MANAJI vs. CIT (2017) 99 CCH 0132 MumHC INCOME TAX REFERENCE NO.10 OF 2001 dated 06/07/2017

1897. The Court, allowing the writ petition of the Assessee, directed the Pr. CIT to process the declaration filed by the Assessee expeditiously by holding that Pr. CIT was incorrect in rejecting the application made by the Assessee under the Dispute Resolution Scheme, 2016 ("DRS") by concluding that it applied only to penalty linked to the total income finally determined through assessment order and not to penalty u/s 271D, 271E and 272A(2)(C) (penalty for violation of sec 269SS, 269T and 285B) as they are transaction specific and not linked with assessment proceedings. The Court opined that the DRS contemplates the making of a declaration of tax arrears, which is defined as meaning an amount of tax, interest or penalty determined, inter alia, under the Act, and in respect of which an appeal is pending before the appellate authority as on 29.02.2016.

M/s Grihalakshmi Films vs. JCIT & Others TS-251-HC-2017 (WP(C) No. 6417 of 2017 dated May 26, 2017)

1898. The Court held that a Chartered Accountant who is accused of offering a bribe to an Income Tax Officer for performing an official act can be tried under section 7 and 13(1)(d) of the Prevention of Corruption Act and Section 120-B of the Indian Penal code and the fact that the CA is not a public servant is irrelevant.

H.Naginchand Kincha vs Superintendent of Police-ITA No.- INCOME TAX APPEAL NO.487 OF 2014 dated 13.09.2017

Method of Accounting

1899. Where method of accounting followed by the Assessee was "Project Completion Method" as against "Percentage of Completion Method" reflected in the orders passed by the Assessing

Officer, the Court held that the mere fact that there does exist a method of accounting for profits of each year was no justification for rejecting an equally recognized method of accounting whereby the profits of the project were determined when the whole project was completed. The Assessing Officer having not drawn any finding that the accounts of assessee suffered from any defect nor that from the method of accounting followed by assessee, true/correct profits of assessee could not be deduced and the assessee having been following the "completed project" method consistently, which being recognized method of accounting, the assessee's method of accounting could not be rejected. The Court, accordingly, upheld order of the Tribunal and dismissed Revenue's appeal.

Principal Commissioner of Income Tax v. Santha Build-Tech India Pvt. Ltd - (2017) 98 CCH 0143 ChenHC (TCA Nos. 161 to 164 of 2017)

Minimum Alternate Tax

1900. The Tribunal held that the assessee's share of income from association of persons even though credited to Profit and Loss account was to be reduced while calculating book profits for the purpose of MAT calculation on the ground that relief under clause (iic) to explanation 1 to Sec 115JB introduced vide Finance Act 2015 was to be applied retrospectively. Observing that there was already a deduction under Explanation 1 to Section 115JB for exclusion of share of partners income credited to P&L a/c, the Tribunal held that the intention of the legislature was to provide similar remedy to share of AOP as well. Further, clarifying that the purpose of Sec 115JB was not to tax any income which is otherwise not taxable, it held that it was a settled proposition that an explanatory Act which was curative in nature or any remedial statute was brought in the statute either to remedy unintended consequence or to provide benefit which was applicable to particular class of assessee and was extended to other class of assessee, was to be declared retrospective in operation .

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

1901. The Tribunal held that waiver of amount of loan **credited to the P/L A/c was** not be included for calculation of 'Book Profit' on the ground that surplus resulting in the books of accounts of the Assessee Company upon waiver of a loan **was** not required to be credited to the profit and loss account of the Assessee and in any case the same **could not** be treated as working result of the Assessee during the period covered by the Accounts, so as to treat it as part of the 'Book Profit' of the Assessee. The Tribunal clarified that the object of enacting of section 115J, 115JA & 115JB was never to fasten any tax liability in respect of something which was not an income at all or even if it was income but was not taxable under the normal provisions of the Act. **Further**, the provisions of section 115JB **could not** be so interpreted so as to require accounting of what in substance **was** capital in nature to the credit of the profit & loss account and get indirectly taxed **as** book profit. The Tribunal relied on the ruling of the Special Bench in the case of Sulej Cotton Mills Ltd. (45 ITD 22). The Tribunal **further** held that waiver of interest on loan as well could not be included for the purpose of determining 'Book Profit' since it was not taxable u/s 41(1) as the Assessee had never claimed a deduction of the said interest in view of the provisions of section 43B nor was it a remission of trading liability. Further, the Tribunal clarified that waiver of interest dues was a capital surplus item and following the same analogy for waiver of loan it could not be included for determining 'Book Profit'. Also, 41(1) is a deeming fiction and the same could not be extended to section 115JB. The Tribunal further rejected the contention of the Department (that the Assessee itself had included the said amounts while computing 'Book Profits', therefore, the same cannot be tinkered with) on the ground that the Assessee had specifically given a caveat with the computation of income that out of abundant caution it had included the said amounts in 'Book Profit', that the Assessee had reserved the right to exclude the said sums and contest **the same** during the assessment proceedings.

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

1902. The assessee had earned dividends and long term capital gains which were exempt u/s 10(34) and 10(38) respectively. The assessee paid MAT on book profits u/s 115JB. The AO observed

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

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

1903. The Court held that clause (i) to the explanation was inserted to supersede HCL comnet (305 ITR 409) and accordingly, a mere provision for bad debts has to be added back for computation of book profit u/s 115JA/JB. However, in terms of Vijaya Bank [323 ITR 155(SC)], if there is a simultaneous reduction from the loans and advances on the asset side of the balance sheet, the provision amounts to a write off of the debt which is not hit by clause (1) of the explanation to section 115JB.

CIT vs Vodafone Essar Gujarat Ltd-ITA No.749 of 2012 dated 04.08.2017

1904. The Court dismissed the Revenue's appeal and upheld the order of the Tribunal where it was held that the AO is not entitled to add to the 'book profits' the amounts arising from the sale of land which are directly credited to the Capital Reserve Account in the balance sheet.

Pr.CIT vs Bhagwan Industries Ltd [2017]- INCOME TAX APPEAL NO.436 OF 2015 dated 18.07.2017 Bombay High Court

Refund

1905. The Department recovered interest due from the Petitioner under section 220(2) of the Act by appropriating the amounts from the property of the Petitioner which had been attached and from the refunds due to the Petitioner. However, subsequently, the CCIT had waived of all the interest payable by the Petitioner pursuant to which the Petitioner filed an application to the AO for refund of the amount wrongly claimed and interest on such refund. The same was denied by the AO on the ground that the refund arising to the Petitioner by way of waiver of interest under section 220(2) was due to discretion exercised by the CCIT and not due to the fact that the tax paid by the Petitioner exceeded the demand. The Court held that the language contained in section 244A(b) (providing for refund of interest in any other case) was to be read along with the expression 'refund of any amount becomes due' occurring in Section 244A of the Act. Therefore, it held that interest on refund would be payable even where the refund arose out of waiver of interest by the CCIT.

Preeti N Aggarwala v CCIT – (2017) 99 CCH 0001 (Del HC) – WP C 1011, 1012, 1183 / 2016

1906. Where the assessee filed a petition under Section 119 of the Act praying for condonation of delay in filing of return wherein it claimed a refund, which was denied by the Commissioner who held that the return was invalid and that the refund could not be granted, the Court set aside the order of the Commissioner refusing to condone the delay and denying refund and held that the Revenue was under an obligation to effect refund, without calling upon assesseees to apply for refund claim. Accordingly, it held that the assessee was entitled to the refund claimed by it.

Gopalan Thygarajan v CIT - [2018] 89 taxmann.com 187 (Madras) - W.P. NOS. 10726 & 10727 OF 2011 dated 11.12.2017

1907. Despite the fact that the assessee, a co-operative bank was exempt from tax on income derived from securities by virtue of Section 80(P)(2)(a)(i) of the Act, certain Central, State organisations had wrongly deducted TDS on the assessee's interest income. Though there was a delay in filing of returns by the assessee, it made a claim of refund and interest on refund of the excess tax deducted (exceeding Rs. 1 Lakh) in its returns. The assessee also made a petition for the refund and interest on refund before the CBDT u/s 119(2)(b) (which was also delayed), wherein the CBDT condoned the delay in filing of return and allowed the refund to the assessee but denied the assessee interest on refund. The Court, relying on the Supreme Court ruling in Tata Chemicals Ltd (2014) 6 SCC 335 and P&H Court ruling in National Horticulture Board (2002) 125 Taxman 922 (P&H). held that the assessee was entitled to interest on refund under section 244A but held that the interest was to be allowed from the date of making petition to CBDT and not before. Further it rejected the assessee's compensation claim in the form of 'interest on interest', distinguishing its reliance on SC ruling in Sandvik Asia Ltd, it noted that the assessee therein was made to wait for refund of interest for decades and was hence greatly prejudiced for inordinate delay on the part of the Revenue and that in present case, the initial long delay in filing returns and application to CBDT was attributable to the petitioners themselves. Therefore it held no interest on interest could be granted.

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

1908. The Court held that that mere issuance of notice u/s. 143(2) claiming extended period for processing of refund u/s. 143(1) would not be sufficient reason to withhold tax refund claimed by the assessee. Assessee had filed tax returns for both the years AY 2015-16 and 16-17 declaring high amount of tax losses and claimed tax refunds arising on account of TDS and for one of years i.e AY 2015-16 notice u/s Sec 143(2) was issued but the assessment was not complete. Further, the Court stated that it would be 'wholly inequitable' for the AO to merely sit over the petitioner's request for refund citing the availability of time up to the last date of framing the assessment u/s 143(3). Applying the reasonable interpretation of the provisions, it observed that the AO was expected to take up an expeditious disposal of the processing of return u/s 143(1) once the assessee requests for release of the refund and send an intimation to the assessee if he wishes to withhold the refund. For AY 2015-16, the Court directed the AO to complete the process by Oct 31, 2017 and for AY 2016-17, it noted that the time limit for processing return u/s 143(1) was not over.

Corrtch International Pvt. Ltd. vs. DCIT [TS-434-HC-2017(GUJ)] SPECIAL CIVIL APPLICATION NO. 13987 of 2017 dated 16.09.2017

Set off of losses

1909. Where assessee ventured into the business of banking and money lending and advanced loans to various parties, without having a banking licence and the RBI asked assessee to wind up its business and permitted it to continue it only for the purpose of realization of its assets, the Court, rejected the Tribunal's view (that since during relevant AYs, assessee did not advance any loans and it continued its existence only for the purpose of winding up, its income should be considered as income from other sources) and held that the moneys received by the assessee during the relevant AYs were fruits of the activity of money lending and that since the assessee was engaged in advancing moneys in an organised manner it ought to be categorised as a business activity. Accordingly, set-off of business losses of earlier years was also allowed as deduction in the relevant A.Y.

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

1910. The Tribunal allowed set-off of foreign exchange derivative loss against normal business profits of assessee-company and rejected Revenue's stand that since the contract was settled otherwise than through delivery, Sec. 43(5) was attracted, and accordingly loss was to be treated as speculative loss, which could not be set off against normal business income. The Tribunal noting that all the derivative transactions were specific hedging transactions against assessee's foreign exchange transactions and were integral part of assessee's business, held that

Explanation 2 to Sec. 28, clarified that it was only when speculative transactions are of such a nature as to constitute business on standalone basis, the income and losses from such transactions were to be treated as distinct and separate from any other normal business and that speculative transactions which were incidental to assessee's main business could not be treated as speculation loss. It, accordingly, directed the AO to delete the disallowance and allow deduction u/s 37(1).

Soma Textiles & Industries Ltd [TS-151-ITAT-2017 (Ahd)] (ITA No. 472/Ahd/2014)

1911. Where assessee suffered speculation loss and carried forward the same to succeeding A.Y for setting off against speculation profit and AO denied claim of assessee for impugned loss on ground that no prudent businessman would indulge in such loss, the Tribunal observed that the Revenue had not pointed out any defect in documents for purchase and sale of shares and the assessee was amalgamated in subsequent year and the impugned loss was not carried forward and thus had lapsed. Further, on similar facts, the Apex Court in Union of India v. Azadi Bachao Andolan had held that transaction of sale of shares could not be considered as sham or device to avoid tax. In view of the aforesaid facts the Tribunal reversed the order of CIT(A) and allowed the claim of the assessee.

Sudera Services Pvt Ltd v. Income Tax Officer - (2017) 49 CCH 0176 KolTrib (ITA No. 724/Kol/2015)

1912. The Court reversed the order of the Tribunal and held that the assessee had rightly characterized the loss arising on sale of foreign cars as business loss which was eligible to be set off against business income. The AO held that the foreign cars being capital assets would be covered under section 50 of the Act and therefore the loss arising from its sale would be capital loss which could only be set off against capital gains and not against income from any other head of income. On appeal, the CIT(A) reversed the order of AO and held that since the assessee had not claimed any depreciation on the foreign cars they would not fall under a block of assets and section 50 of the Act would not apply. He also affirmed the fact that assessee used cars in his business. On further appeal, the Tribunal reversed the order of CIT(A) on the basis that assessee was not a dealer in foreign cars. The Court held that Section 50 of the Act applies to capital assets forming part of block of assets w.r.t. which depreciation is allowed. However, the Court observed that, in the given transaction the foreign cars did not form part of a block of assets due to which depreciation was not claimed on them for the given period and therefore Section 50 was inapplicable. Accordingly, it upheld the CIT(A)'s view and concluded that the loss on sale of foreign cars amounting to Rs 5 lakhs was rightly claimed as business loss by the assessee.

K D Madan vs. ITO- TS-177-HC-2017(MAD) - T.C.A.Nos.613 and 614 of 2008 dated 27.04.2017

1913. Assessee had incurred short term capital loss on sale of shares in the prior assessment year which it had carried forward to the relevant year and set off the same against short term capital gains earned during the relevant year which was chargeable to tax at 30 percent. Noting that the assessee had also earned short term capital gains chargeable to tax at 10 percent, the AO contended that the assessee ought to have set off the brought forward losses against the STCG chargeable to tax at 10 percent as opposed to 30 percent as done by the assessee. The Tribunal held that there was no provision providing for the sequence in which different categories of short term capital gains had to be adjusted while setting of brought forward losses and therefore held that the preference of assessee would prevail. Accordingly, it allowed the appeal of the assessee.

Action Financial Services India Ltd v ACIT – (2017) 50 CCH 0008 (Mum Trib) – ITA NO 1823 / Mum / 2012 dated 03.05.2017

1914. During the relevant AY, AO ignored the manual return filed by assessee within section 139(1) due date and denied carry forward of losses on the ground that the return filed electronically was belated return. Relying on the decision in the case of Nicholas Applegate South East Asia Fund Ltd [117 ITD 299], the Tribunal allowed assessee's claim of carry forward and set-off of business losses and unabsorbed depreciations for AY 2011-12. It held that as the original return was filed within the due date u/s 139(1) of the Act, it was a valid return as per the provisions of section

292B of the Act. It rejected Revenue's stand that the assessee was mandatorily required to file return of income electronically and held that the claim for set off and carry forward of losses could not be denied on a too technical reason. Noting that the assessee was unable to file the return online due to problem of login password, it held that it was a curable defect.

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

1915. The assessee for A.Y. 1998-99 had claimed set off of unabsorbed depreciation after 8 years. The AO did not allow the set off beyond eight (8) years taking into consideration the amendment made in Finance (No.2) Act, 2006 introducing the time limit of 8 years. CIT(A) deleted the AO's disallowance following the decision of the Hon'ble Gujarat High Court in the case of General Motor (I) Pvt. Ltd 354 ITR 244 wherein it was held that if any unabsorbed depreciation or part therein could not be set off till AY 2002-03, it would be carried forward till the time of set off against profit and gains of subsequent years without any limit whatsoever. The Tribunal upheld the CIT(A)'s order.

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

1916. The Court, setting aside the order of the order of the Tribunal, remanded the matter back to the AO to decide Assessee's claim of carry forward and set off of losses afresh **even though the ROI was not filed within the time limit prescribed**. The Court held that the Assessee, a PSU, was liable to get its accounts audited by the CAG and without such exercise being carried out it was unable to file its ROI with requisite documents. The Court opined that the embargo in sec. 80 i.e. that ROI had to be filed in accordance to sec 139(3) which inturn provided that ROI was to be filed within time limit prescribed u/s 139(1) could not be treated as a straitjacket one which could be applied without reference to different provisions included in sec. 139 and other sections in the Act which provided for a larger time limit for filing return. The Court allowed the Assessee to take recourse to the powers of the CBDT in obtaining clarifications/ directions /orders which would enable to seek leniency where the returns were not filed in time for bonafide reasons.

M/s. Chhattisgarh State Civil Supplies Corporation vs. CIT TS-261-HC-2017 (Tax Case No. 33 of 2015 dated May 12, 2017)

1917. The assessee, a member of BSE, engaged in business of shares and stockbroking, purchase /sale of shares, suffered loss on sale of shares held by it as an investment which the AO held to be speculation loss as against short term capital loss as claimed by the assessee. The Tribunal held that since assessee was not covered by exclusions contemplated under provisions of Explanation to section 73 (excluding companies whose Gross Total Income mainly consisted of income from securities, income from house property, capital gains, IFOS or a company engaged in banking), assessee-company would be deemed to be carrying on a speculative business to extent to which assessee's business consisted of purchase and sale of shares of other companies and, therefore, loss on sale of shares held by it as an investment would be speculation loss eligible to be set off against speculation profit only as per provision contained in section 73 and not a short term capital loss.

Amol Capital Markets Pvt [TS-461-ITAT-2017(Mum)] - I.T. APPEAL NO. 1974 (MUM.) OF 2016 dated 21.08.2017

Settlement Commission

1918. The Court allowed assessee's writ and set-aside the order of the Settlement Commission ('SC') which rejected assessee's application on the ground that assessee failed to fulfill conditions u/s 245C(1) (which requires the Applicant to make full and true disclosure of income not disclosed before the AO and the manner in which it was earning). The Court rejected view of the SC that since the amounts which were earlier claimed in the returns filed before the AO as deductions, were now sought to be taxed, there was no fresh issue or income being offered for tax which had not been 'declared before the AO'. The Court held that where an income which was not earlier offered to tax, such as an excessive claim for depreciation, was subsequently

withdrawn it would lead to income being offered to tax before the SC and the same would satisfy the requirement of Section 245C (1). Accordingly, it restored the application of the Assessee back to SC.

Unitech Wireless (Tamil Nadu) Pvt. Ltd. vs. Pr. CIT TS-342-HC-2017(WP(C) No. 11256/2016 dated August 11, 2017)

1919. The Court dismissed the writ filed by the revenue against the order of the Settlement Commission (SC). The Court held that where the Revenue failed to establish any linkage between material seized during search conducted on the Assessee and Uttar Pradesh Distiller's Association (UPDA), of which Assessee was a member, in respect of alleged clandestine payments made to UPDA which was allegedly used to bribe public officials and politicians, no addition could be made. The Court opined that Revenue was under obligation to establish through materials relatable to the Assessee, what it alleged against the Assessee.

CIT vs. Radico Khaitan Ltd. (2017) 83 taxmann.com 375 (Delhi) (WP(C) No. 7007/2008 dated July 13, 2017)

1920. The Court, noting that nothing was brought on record substantiating that Settlement Commission's order was vitiated by fraud or malice or contrary to provisions of law, dismissed Revenue's writ challenging Settlement Commission order which held that non-resident entities were not liable to tax in India with respect to equipment/plants sold to Indian Companies offshore. Rejecting Revenue's contention that since the sale stood concluded in India, sale proceeds were taxable in India, the Court held that the Settlement Commission had after considering the contracts in details and provisions of Sale of Goods Act, passed a detailed order holding that sale took place offshore. Accordingly, the Court declined to interfere with the order.

Income Tax Settlement Commission vs DIT(International Taxation)-TS-395-HC-2017(CAL) W.P. W.P. No. 742 of 2013 dated 12.09.2017

1921. The Court upheld the constitutional validity of Sections 245D(2A), 245D(2D) and 245HA which introduced payment of additional tax with interest at the time of filing of Settlement application itself and also provided for two months window to pay the taxes due upto July 31 in respect of old applications pending as on June 1, 2007, failing which the settlement proceedings would abate. The Assessee-individual had filed settlement applications (dated May 27, 2007) for seven years and made tax payments for 5 years but could not make the tax payments for two balance years before July 31 as a result of which the Settlement Commission had abated the application for settlement for all the seven years. The Court noted that even pre-amendment, the assessee always had the liability to pay the tax on additional income disclosed in the application for settlement filed before the Commission however, there was no abatement of proceedings on such failure. Accordingly, noting that the legislative intent behind amended provisions was to bring a degree of seriousness and promptness in pursuing the settlement cases, it held that the statute could not be declared as unconstitutional merely because it is likely to work harshly against some sections of the citizens. However, as the assessee had made payment for five years and payment of additional tax was not made only for two years owing to financial difficulty, it stated that the assessee's application need not be seen as one composite application and held that abatement of settlement application should be confined to those AYs for which assessee was unable to make payment of additional tax with interest

Ashish Prafulbhai Patel vs Income Tax Settlement Commission-TS-401-HC-2017(GUJ)-SPECIAL CIVIL APPLICATION NO. 6379 of 2008 dated 07.09.2017

Stay of demand

1922. The Court taking into consideration the provisions of section 35C(2A) of the Central Excise Act, 1944 which is pari materia to section 245(2A) of the Income tax Act, relying on the decision of the Court in the case of Commissioner of Central Excise Rohtak vs M/s Voice Telesystem held that where the appeal could not be decided by tribunal due to pressure of pendency of cases and delay in disposal of appeal was not attributable to the assessee in any manner, the interim stay would continue beyond 365 days in deserving cases.

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

1923. The Tribunal granted stay to the assessee for AY 2013-14 beyond a period of 365 days on the ground that if the delay in disposal of the appeal was not attributable to the assessee, then, further extension could be granted beyond one year. Further, the court observed that against the total demand of Rs 129.42 Cr including interest, assessee had already made payment of Rs 70 cr. It was also submitted that after expiry of stay in Nov 2015, the department agreed for not enforcing the demand in view of the pending appeal, however, as per letter dated 10.11.2016, the AO again forced recovery. Accordingly, the court granted extension of stay for a period of three months or till disposal of appeal whichever is earlier.

Google India Private Limited [TS-21-ITAT-2017(Bang)]

1924. The AO had granted the assessee 85 percent stay of demand subject to pre-deposit of 15 percent (Rs. 63 crore) in accordance with CBDT Instruction in its office Memorandum dated 29.2.2016. The assessee filed a writ petition before the Court contending that the condition of 15 percent pre-deposit could be relaxed as 1) the AO had not considered a credit adjustment 2) license fee adjustment on account of the Apex Court ruling in the 2G spectrum case was treated as capital and 3) there was a refund due to the extent of Rs.27 crore. The Court remitted the matter to the AO to evaluate the same, pursuant to which the AO considered the issue afresh and directed the assessee to pay Rs. 203 crore, The assessee filed second writ petition wherein the Court held that once the matter was remitted to the AO, he had to confine the focus of his inquiry only and only to whether to grant relief in excess of 85 percent exemption was possible and that he could not revisit the merits of the matter. It held that the scope of remand by a higher authority limits and circumscribes the jurisdiction of the lower authority. Accordingly, it directed the assessee to deposit 15 percent demand subject to adjustment of refund.

Telenor (India) Communications Pvt Ltd – TS-124-HC-2017 (Del) - W.P.(C) 2539/2017, C.M. APPL.10957-10958/2017 dated 29.3.2017

1925. The Tribunal dismissed assessee's Stay petition on collection of income tax demand as the assessee directly approached the Tribunal without exhausting alternate remedies available. Taking note of assessee's plea that since it was the end of Financial Year there was considerable pressure on the Revenue to achieve their annual revenue collection target and that it was not practical to approach all administrative authorities, the Tribunal observed that it was a harsh reality that sometimes the income tax authorities behave in such a high handed manner so as to, in effect, render the right to seek remedies against recovery of such demands nugatory and infructuous. Thus, striking a balance between procedural requirements and assessee's substantive legal rights, the Tribunal directed the assessee to approach the Pr. CIT and instructed the Pr.CIT to consider assessee's request in a judicious manner.

Sun Pharmaceutical Industries Ltd. [TS-99-ITAT-2017 (Ahd)] (S.P No. 58/Ahd/17) dated 02/03/2017.

1926. The Court allowed assessee's writ by setting aside order of the Assessing Officer and the Pr. CIT refusing to stay collection of demand and directing the assessee to deposit 15% of the total disputed demand. The Court observed that in the review petition against the stay order of the AO, the Pr. CIT failed to consider whether the assessment order suffered from being unreasonably high pitched or whether any genuine hardship was likely to be caused to the assessee in case it was required to deposit 15% of the disputed demand in spite of assessee's submission that it had suffered loss from the very inception of the business. Accordingly, the Court directed Pr.CIT to re-decide the review petition filed by the assessee.

Flipkart India Private Limited [TS-97-HC-2017(KAR)] (W.P.Nos 1339-1342 of 2017) dated 23/02/2017.

1927. The Court held that the AO erred in rejecting the stay application filed by the Petitioner on the ground that the Petitioner had not deposited 15 percent of the disputed demand as a pre-deposit before his application for stay. It held that the AO's interpretation for reasons of rejection was made absolutely on misconception and/or misreading of the modified instructions dated February 29, 2016. Accordingly, it set aside the order of the AO, rejecting the stay application without looking into the merits contained therein for want of 15 percent deposit.

**Jagdish Gandabhai Shah v Pr CIT – TS-171-HC-2017(GUJ) - SPECIAL CIVIL APPLICATION
No. 5679 of 2017 dated 28.03.2017**

1928. Assessee's assessment proceedings were reopened on the basis of information gathered about Praveen Kumar Jain group ('PKJ Group') which was said to be operating a web of shell entities providing various kind of accommodation entries for bogus loans, bogus share capital and bogus sales. During the reassessment proceedings, the AO found that the assessee had sold shares of Rs. 10 each, to six shell companies (which were part of PKJ group), at a premium of Rs. 140 each and all these shares were eventually sold at Rs. 10 each to Nityanand Industries Limited, and the directors and majority shareholders of the assessee were also directors and majority shareholders of Nityanand Industries Ltd. Both the transactions took place on the same day. The Tribunal dismissed the stay application filed and noted that the assessee did not have such a strong prima facie case to deserve to jump the queue of other litigants and be granted an out of turn hearing. It opined that the whole situation cannot be a case of a mere coincidence, and accordingly held that such cases of financial manoeuvrings, with the help of shell companies, deserve no sympathy from the judicial forums and should not, as a matter of course, be allowed to jump the queue of ordinary litigants.

Gujarat Infrapipes Private Limited - TS-201-ITAT-2017(Ahd) - SP No.101/Ahd/17 dated 26.05.2017

1929. The Tribunal granted further extension of stay of demand to Vodafone Mobile for a period of 6 months or till appeal disposal, whichever is earlier, beyond the original stay of 365 days as the delay in disposal of appeal was not on account of reasons attributable to the assessee. The Tribunal rejected Revenue's contention that Tribunal did not have the power to extend stay beyond 365 days as it was bound by powers conferred by Sec 254(2A), even if the delay was not attributable to assessee and its reliance on Jurisdictional HC ruling in Ecom Gill Coffee (362 ITR 204). The Tribunal observed that that constitutional validity or the vires of 3rd proviso to Section 254(2A) were not tested in the Jurisdictional High Court decision and further placed reliance on the Delhi HC ruling in Pepsi Foods (376 ITR 87). The Tribunal noted that HC in Pepsi Food case, while affirming Tribunal's power to extend stay beyond 365 days in deserving cases, had observed that 3rd proviso to Sec 254(2A) was violative of Article 14 of the Constitution as it had an element of hostile discrimination against the assessee to whom the delay is not attributable vis-a-vis assessee who had caused delay in adjudication of appeal. Further, observed that the said decision had had attained finality post Revenue's SLP disposal by SC.

Vodafone Mobile Services Ltd. vs. DCIT TS-286-ITA-2017 (SP 261 – 262/Bang/2016 dated June 28, 2017)

1930. The Court dismissed the Revenue's appeal and held that the Tribunal was justified in extending the stay granted to the assessee beyond a period of 365 days as the delay in disposal of appeal was not attributable to the assessee. It held that the third proviso to Section 254(2A) of the Act stating that the stay would be vacated after a period of 365 days was merely directory and would apply only if the assessee is responsible for procrastinating the decision of the appeal.

Vodafone Mobile Services Ltd [TS-477-HC-2017(AP)] - I.T.T.A.Nos.331, 336, 346, 386, 389 and 707 of 2017 dated

1931. The Tribunal dismissed assessee's stay petition seeking stay of demand of Rs. 59.42 cr. for AY 2013-14, arising on account of non-deduction of TDS in respect of 'Ad-words' payment made to Google Ireland on the ground that though Tribunal on earlier occasions had extended stay beyond 365 days, there was a change of the circumstances from the first stay order as it cannot be said that there is prima facie case in favour of assessee, Relying on the parameters in the decision of the Apex Court in the case of Dunlop India Ltd. for granting stay of demand, viz. i) Existence of prima facie case ii) Financial hardship, and iii) Irreparable injury and balance of convenience, it held that the assessee had fairly conceded that none of the parameters were met in the present case. Noting that assessee was seeking extension only on the ground that it was proposing to appeal against the recent co-ordinate bench order before the High Court and also intended to file miscellaneous application before the Tribunal, it held that the same could not be a valid ground for stay of demand.

Google India Private Limited vs DyCIT-TS-508-ITAT-2017(Bang) – Stay Petition no. 229/ bang / 2017 dated 07.11.2017

Unexplained income / expenses / investments

1932. The Court directed fresh investigation into Kalaingar TV's 2G matter involving Rs 200 cr 'unexplained cash credit' addition under section 68, where the assessee had submitted that it received 25 cr towards share application money from Cineyug Media Entertainment Rs. 175 cr towards inter-corporate deposits ('ICDs') from the same concern, and despite producing supporting documents, Revenue had disbelieved the same and made addition u/s 68 based on CBI investigation in 2G spectrum case; ITAT observes that lower authorities simply relied on CBI charge sheets /Enforcement Directorate report in 2G case and failed to examine the officials from Cineyug and the signatories to the share application/ICDs agreements; Similarly, ITAT observes that instead of examining the bank statements of Cineyug, AO simply relied on the assessment done on Cineyug to hold that they had no sufficient funds for giving credits to assessee, further limited time was given to assessee for producing voluminous details. ITAT remarked that "No doubt the assessee can always say that it need not prove source of source", however this cannot be so extrapolated to mean that source cannot be a farce. The onus is always on the assessee to show the genuineness of transactions and AO can always go into trail of transactions for accepting/rejecting claim of genuineness.

Kalaingar TV Pvt. Ltd [TS-689-ITAT-2016 (CHNY)

1933. The Court upheld Tribunal's order deleting unexplained cash credit addition u/s 68 of the Act with respect to share premium received by the assessee during A.Y 2008-09. The Court held that the assessee had satisfied the three essential tests under the pre-amended sec.68, namely genuineness of the transaction, identity and capacity of the investor. It further held that the Revenue wrongly invoked proviso to Sec.68 inserted vide Finance Act,2012 and disbelieved assessee's justification (being future business prospects) for charging share premium as the said proviso was prospective in nature.

Gagandeep Infrastructure Pvt. Ltd. [TS-132-HC-2017 (BOM)] (ITA No. 1613 of 2014)

1934. The HC of Madras set aside the writ petition on the grounds that since no opportunity was given to the assessee to explain as to how the amount stood to his credit with Indusind bank
Lakshmanan Magendrian [(2017) 98 CCH 0015 Chen HC]

1935. Where the AO treated the amount received by the assessee from Singapore based viz. Biometrix Marketing Pvt. Ltd as consideration for issue of CCPS as unexplained cash credit u/s 68 and subsequently in his remand report conceded that the source of Biometrix investment was loan from ICICI bank, the Tribunal rejected the claim of the Revenue that Biometrix was a shell company and deleted the addition made in the hands of the assessee. It further held that the subsequent sale of CCPS by Biometrix at lower than market value disclosed to ICICI Bank was not relevant for determining source, nature and genuineness of transaction.

Dy.CIT vs. Reliance Utilities Ltd. TS-41-ITAT-2017(Mum) ITA No.223 & 224/Mum/2016 dated 03.02.2017

1936. The Court, upholding the order of the Tribunal, upheld the order of the Commissioner u/s 263 directing the AO to carry out thorough and detailed enquiry about the various layers through which the share capital had been rotated to the Assessee (source of source), even without going into the question as to the retroactivity of the proviso to section 68 inserted by Finance Act 2012. The Court followed the decision of the division bench in the case of Rajmandir Estrate Pvt. Ltd. vs. PCIT (GA No. 509 of 2016) wherein the Court rejected the argument of the Assessee that no further enquiry is required as the sum was received on capital account and held that the unamended section 68 of was wide enough and the AO was not precluded from making enquiries as to the true nature and source even if the sum was credited share application money. The Court further held that though the Tribunal had decided that proviso to section 68 is retrospective in nature and held against the Assessee the said question need not be decided upon in view of the division bench decision of Rajmandir Estate.

Pragati Financial Management Pvt. Ltd. & Ors. vs. CIT (2017) 98 CCH 0109 – Cal HC (ITA No. 178 of 2016 dated March 7, 2017)

1937. The Tribunal upheld addition u/s 68 made in the hands of the assessee-company with respect to unexplained share application money. The Tribunal rejected assessee's claim that it had discharged the initial burden cast upon it u/s 68 by providing name and addresses of share applicants, on the ground that the assessee received cheques from the same cheque book which was impossible seeing that there were different applicants residing in different villages. Also the fact that the alleged share applicants who were agriculturists were not going to derive any benefits in the future by appreciation in the market value of shares of an unlisted company, made it clear that the said money was nothing but the unaccounted income of the assessee.

Deepak Petrochem Ltd. [TS-101-ITAT-2017 (Ahd)] (ITA No: 739/AHD/2011) dated 02/03/2017

1938. The Court, reversing the Tribunal's order, upheld addition u/s 68 made in the hands of the assessee-company with respect to unexplained credits from its sister concern in Nepal. The Court observed that the three conditions required to be established by the assessee u/s 68 viz i) the identity of the creditor ii) genuineness of the transactions and iii) credit worthiness of the creditor were not examined by the Tribunal and that the Tribunal had erroneously assumed that the assessee had produced audited accounts (where it actually had not). Further, it held that the mere fact that the transactions were routed through a bank account was not conclusive proof of the genuineness of a transaction and the Tribunal was not correct in concluding so. Thus the Court concluded that the Tribunal erroneously deleted addition u/s 68 by putting the burden of proof entirely on the Revenue.

Universal Empire Educational Society [TS-104-HC-2017 (KER)] (ITA No. 104 of 2013) dated 25/01/2017.

1939. Where the assessee had failed to discharge onus cast upon it under section 68 of the Act, to prove the creditworthiness and genuineness of the cash credits (i.e share capital and share premium) and accordingly the assessing officer made an addition, the Tribunal observed that though the assessee had submitted the basic details of parties, it was apparent that none of them were shown to be creditworthy of depositing the sums in cash with the assessee and that how CIT (A) got satisfied with the existence of cash in the books of the companies when they are known entry providers was unknown. Also there was not a single word in the order of CIT (A) about the source of such cash and reasons for depositing them with the assessee at huge premium when they did not have any other sources of income. Tribunal not agreeing with the casual manner in which CIT(A) dealt with the whole issue when the nature of transactions, shareholders creditworthiness and genuineness of the share issued were of dubious nature, held that CIT(A) should have looked at the totality of the facts instead of deleting the addition on flimsy grounds and accordingly set aside the whole matter back to the file of the CIT (A).

Income Tax Officer v. Onflow Agro Pvt Ltd - (2017) 49 CCH 0152 DelTrib (ITA No. 5458/Del/2012)

1940. The AO made an addition in the hands of the assessee under section 69C of the Act contesting that the assessee had made payment to American Express Banking Corporation [AEBC] against credit card payment which was not reflected in the books of accounts. The Tribunal, noting that the discrepancy in the payment occurred due to erroneous reporting by AEBC which had been subsequently confirmed by AEBC, deleted the addition made under section 69C stating that the assessee had discharged its obligation and there was no basis for such addition.

Empire Industries Ltd v Add CIT - (2017) 50 CCH 0036 MumTrib - ITA No. 4065/Mum/2013 dated May 17, 2017

1941. Where the assessee made purchases made from parties other than those mentioned in books of account and the assessee failed to prove with adequate evidence that the purchases were made from those parties, the Tribunal held that the AO was justified in making an addition on account of bogus purchases but could not make addition of the entire purchase price but only to the extent of the profit element embedded in such purchases. Accordingly, it directed the AO to make an addition at the rate of 12 percent of the value of purchases from these parties.

ITO v Manish Kanji Patel & Anr – (2017) 50 CCH 0037 (Mum Trib) – ITA NOS. 7299/Mum/2014, 7154/Mum/2012 & 7300/Mum/2014, 7627/Mum/2014 dated 18.05.2017

1942. The assessee had disclosed long term capital gains exempt under section 10(38) of the Act in its return of income. The AO alleged that the said long term capital gains was merely a fall out of an accommodation entry taken by the assessee from the share broker for converting unaccounted funds into accounted funds and therefore treated the long term capital gains as income from unexplained and undisclosed sources under section 68 which he assessed under the head 'Income from Other Sources'. The Tribunal noting that the assessee had submitted documentary evidence reporting the entire chain of events of purchase and sale which was not rebutted by the AO on the basis of any concrete evidence held that the assessee had discharged its onus. Accordingly it held that the adverse inferences drawn by the lower authorities could not be accepted to dislodge the genuineness of the transaction and therefore deleted the addition made by the AO / CIT(A).

Kamala Devi Doshi v ITO – (2017) 50 CCH 0053 (Mum Trib) – ITA No 1957 / Mum / 2015, 3018 / Mum / 2015, 3019 / Mum 2015 dated 22.05.2017

1943. The Tribunal confirmed the addition made by the AO under section 68 where the assessee received unsecured loans, but could not produce lenders for verification. It held that since the said lenders were found to be shell companies, said loan transactions could not be said to be genuine merely because assessee filed loan confirmations, copies of ledger account and other supporting evidences to justify transactions at fag end of assessment proceedings.

Pavankumar M Sanghvi v ITO [2017] 81 taxmann.com 308 (Ahmedabad - Trib.) - IT APPEAL NO. 2447 OF (AHD.) 2016 dated May 17, 2017

1944. The assessee had obtained an unsecured loan of Rs. 23 Lakhs from 3 parties but could not furnish any proof except ITR and statement of affairs of only 1 creditor (pertaining to loan of Rs. 10 Lakhs) and accordingly, the AO treated these loans as unexplained cash credit. The Tribunal held that to the extent of loan of Rs. 13 Lakhs, genuineness of the loans could not be established since the loans were neither reflected in the return of the donor nor in the return of the assessee. However, in respect of loan of Rs. 10 Lakhs, where the ITR and statement of affairs of creditor was produced, the Tribunal deleted the addition on the ground that these documents were sufficient to establish the genuineness of the transaction and the creditworthiness of the loan creditor.

Vimal Kumar vs. ITO (2017) 50 CCH 0066 Del Trib ITA No. 2839/DEL/2012

1945. Pursuant to a survey conducted on a CA engaged in providing accommodation entries, it was found that he had provided accommodation entries to the assessee as well and the assessee had failed to produce any documentary evidence regarding nature and genuineness of transactions or credit worthiness of parties involved. The Tribunal reversed the order of the CIT(A) and held that the mere fact that the share transaction of the assessee were subjected to capital gains tax and were through a/c payee cheque, would not make the entries genuine. Accordingly, it upheld the AO's order adding the impugned transaction as unaccounted income in the hands of the assessee.

Esha Securities Pvt. Ltd vs DCIT-TS-402-ITAT-2017- ITA No. 3357 and 3358/Del/2013 dated 13.09.2017

1946. Where pursuant to a search carried out in the premises of the assessee (engaged in manufacturing and selling of polyester films etc) the Department recovered laboratory registers containing date wise samples of materials tested in the laboratory, which, as per the employees reflected every item produced and tested, which did not tally with the excise registers maintained by the assessee, the Court held that the Settlement Commission was justified in confirming an addition under Section 69A on account of unaccounted production. It further noted that the number of employees at the premises were far in excess of the number recorded in the books of the accounts of the assessee and that the registers of the earlier years were destroyed as per the directions of the assessee and therefore held that the Settlement Commission had rightly estimated the addition for earlier years based on the actual data available.

SUMILON INDUSTRIES LTD. vs. INCOME TAX SETTLEMENT COMMISSION (2017) 99 CCH 0112 GujHC SPECIAL CIVIL APPLICATION NO. 13218 of 2013 dated 05/07/2017

1947. The Court reversed the order of the Tribunal and restored unexplained credit addition u/s. 68 in respect of loans/advances received from four parties as assessee failed to discharge the 'initial' onus of establishing creditworthiness and genuineness qua the creditors. The Court clarified that merely establishing creditors' identity and routing the transaction through cheque, could not by itself mean that the transactions were genuine. The Court observed that the Tribunal ignored evidence on record and did not even examine the genuineness of the transaction or the financial strength of the creditor as required in law and further held that none of those four individuals had the financial strength to lend such huge sums of money to Assessee. The Court further remarked that the transactions in the present appeal were yet another example of the constant use of the deception of loan entries to bring unaccounted money into banking channels.

Pr. CIT vs. Bikram Singh TS-355-HC-2017 (ITA No. 55/2017 dated August 25, 2017)

1948. The Court dismissed Revenue's appeal and upheld Tribunal's order which restricted unexplained expenditure addition u/s. 69C to 5% of amount incurred on purchases. The Court rejected Revenue's stand that in terms of Sec. 69C, where no explanation was provided by assessee, the entire amount was liable to be taxed u/s. 69C. It clarified that use of the word 'may' in Sec. 69C makes the deeming provision discretionary and not mandatory. The Court further observed that as explanation could not be submitted within the time allowed due to the death of the Assessee and the fact that the legal heirs were unable to explain the same as they had no knowledge of their deceased father's (Assessee's) business, there was sufficient good cause for not submitting explanation.

Pr. CIT vs. Late Rama Shankar Yadav TS-351-HC-2017 (ITA No. 195/2016 dated August 18, 2017)

1949. The Court dismissed the appeal of the Assessee and confirmed the addition made by the AO u/s 68 on certain sum received by it as the Assessee offered no explanation / unsatisfactory explanation about the nature and source of the credits in the books of account. The Court rejected the argument of the Assessee that since it was not maintaining BOA, the amounts so received could not be brought to tax and held that when Assessee was doing business, then it was incumbent on him to maintain proper BOA and if the Assessee had not maintained it, then it could not be allowed to take advantage of its own wrong. It held that the burden to explain the source & nature of amount received lay on the Assessee.

Arunkumar J. Muchhala vs. CIT (2017) 99 CCH 0206 Mum HC (ITA No. 363/2015 dated August 24, 2017)

1950. The Court reversed the order of the Tribunal and held that the benefit of restricting addition u/s 68 to the extent of peak credit could only be granted to the Assessee who provided clear details of all the facts within its knowledge concerning the credit entries in its accounts with sufficient details of the source of all the deposits as well as the corresponding destination of all payments. Noting that the Assessee was unable to explain the source of all deposits and ultimate destination, it held that the benefit of peak credit could not be granted. Accordingly, it upheld the order of the AO.

CIT vs. D K Garg TS-334-HC-2017 (ITA 115/2015 dated August 4, 2017)

1951. The Tribunal allowed Assessee's (engaged in export, import and manufacture of precious stones and jewellery) treatment of excess stock / investment found in search as 'business income' and rejected Revenue's stand that the excess stock surrendered during search was to be treated as undisclosed investment u/s. 69B against which no set off of business loss would be available while computing tax liability u/s 115BBE. The Tribunal noted that the excess stock/investment was part of assessee's business and nothing was brought on record to suggest that it was not a regular item of stock. It held that there was no specific provision which restrict set off of business losses against income brought to tax u/s. 69B and observed that the amendment to Sec. 115BBE denying set-off was introduced by Finance Act, 2016 with effect from April 1, 2017 and hence was not applicable to the subject AY 13-14.

ACIT vs. Sanjay Bairathi Gems Ltd. TS-332-ITAT-2017 (ITA No. 157/JP/2017 dated August 8, 2017)

1952. The Tribunal allowed the appeal of the Assessee and held that where the Assessee had submitted complete details before the AO for substantiating that she had sufficient cash in hand generated out of her trading business and the same was only deposited in here bank by furnishing Cash Flow Statement, copies of invoices of purchases in cash alongwith corresponding cash sales as well as confirmations from various parties from whom cash was received no addition could be made by the AO u/s 69A(unexplained money) by merely relying upon AIR statement. The Tribunal noted that the Assessee had explained source of complete cash deposits made during the year and, therefore, no addition could be made on the ground of unexplained cash deposit.
Kanika Rathi vs. ITO (2017) 50 CCH 0258 Del Trib (ITA No. 6628/Del/2013 dated August 22, 2017)
1953. Where the Assessee was not able to substantiate the creditworthiness of the four parties from whom it had received share application money and there were discrepancies in the submissions made by the said four parties, the Tribunal held that the AO's addition u/s 68 was to be sustained.
Sumadhura Technologies vs. ACIT (2017) 50 CCH 0247 Hyd Trib (ITA No. 380/Hyd/2014 dated August 11, 2017)
1954. Where the assessee failed to prima facie demonstrate that the intrinsic value of shares was at par with the exorbitant premium of Rs. 90 per share received, the Tribunal, in the second round of proceedings, held that share premium received by assessee amounted to an unexplained cash credit and accordingly made an addition u/s 68 of the Act. It held that since the assessee was unable to produce even a single party out of 13 subscribers despite them being based locally, it had not made any effort in discharging its initial onus so as to satisfy the basic conditions of identity, capacity, genuineness and creditworthiness of the parties in question.
Umiya Pipes Pvt. Ltd vs ACIT-TS-393-ITAT-2017(Ahd)-ITA No. 1679/ahd/2014 dated 12.09.2017
1955. The Tribunal set aside order of the CIT(A) deleting addition made by the AO on account of unexplained cash credits u/s 68 and remitted the matter to the file of AO for fresh consideration observing that the assessee failed to give satisfactory explanation about nature and source of amount credited in its bank accounts and therefore did not discharge its onus of proving genuineness of transactions and creditworthiness of parties from whom amount had been received.
ITO vs Lokesh Secfin Pvt Ltd (2017) 51 CCH 0005 Delhi Trib. ITA no. 460 / del / 2011 dated 01.09.2017
1956. The Tribunal deleted the addition made by the AO on account of unexplained cash credit vis a vis share application money received by assessee (a private limited company) from one of its shareholder (who was daughter of one of the assessee's directors). Rejecting Revenue's stand that the source of funds in the hands of shareholder and creditworthiness was not proved, the Tribunal held that the assessee's had submitted earning statements and bank account details of the shareholder and her husband which was prima facie evidence of the credit worthiness of the shareholder. Further, noting that the amounts were received through banking channels, it held that receipts from shareholder could not be treated as unexplained cash credit.
Namision Powertech Pvt Ltd vs ACIT-TS-432-ITAT-2017(AHD)-ITA No. 218/ahd/2015 dated 21.09.2017
1957. The Petitioner had purchased a bungalow for consideration of Rs.60 lakhs and while registering the sale deed paid an additional stamp duty. In the order of assessment u/s 143(3), the AO did not make any addition. However, he made reference to the District Valuation Officer (DVO) u/s 142A for his opinion on the fair market value of the property in question. The DVO estimated the fair market value as on the date of the sale at Rs.1.71 crore. After receipt of the valuer's report, the AO issued the notice u/s 148 for re-opening the assessment with the reason to believe that the assessee had undervalued the property and had made investment in excess

of the amount declared. Accordingly, he held that the assessee had unaccounted investment as per the provisions of section 69 of the Act. The Court based on the judgment of Division Bench of the Court (wherein the reference to the DVO was held as invalid) held that the report of the DVO was also invalid. Further, it observed that the same information was available with the AO at the time of original assessment which was noticed by the AO, but which did not prompt him to make any addition except for calling of DVO's report which by itself could not form a ground for reopening of the assessment.

ANAND BANWARILAL ADUKIA vs. DCIT (2017) 99 CCH 0109 GujHC SPECIAL CIVIL APPLICATION NO. 6660 of 2013 dated 04/07/2017b

1958. The AO made addition u/s 68 in the hands of the assessee on the ground that the parties to whom the assessee had issued shares did not appear before the AO and the summons could not be served on parties since the addresses were not traceable. The Court observed that the assessee had produced before AO the entire record regarding issuance of share i.e. PAN of all creditors along with their bank statements and books of accounts, share certificates etc.. Accordingly, it held that no addition u/s 68 could be made merely on the ground that the parties to whom the share certificates were issued had not appeared before the AO where the assessee had discharged his onus by submitting adequate evidence to substantiate the genuineness of the transaction.

CIT vs. ORCHID INDUSTRIES PVT. LTD. (2017) 99 CCH 0108 MumHC ITA No. 1433 OF 2014 dated 05/07/2017

1959. Where assessee failed to furnish satisfactory explanations towards excess gold found from employees of assessee, the Tribunal held that addition under section 69 justified.

FUSION JEWELS OF SOUTH & ORS. vs. DEPUTY COMMISSIONER OF INCOME TAX & ORS. -(2017) 51 CCH 0097 BangTrib - ITA No. 198/Bang/2015 dated 20.09.2017

1960. When assessee had received advances from prospective buyers but he failed to give any names and details, the Tribunal held that amount should be treated as unexplained investment and same should be brought to tax under head "income from other sources".

S. SANYASI NAIDU vs. INCOME TAX OFFICER - (2017) 51 CCH 0063 VishakapatnamTrib - ITA No. 40/Vizag/2015 dated 13.09.2017

1961. Where i) the AO had not rejected the books of accounts of the assessee and only doubted the genuineness of the suppliers but not the genuineness of the purchases ii) the payments made by the assessee to the suppliers were through account payee cheques iii) there was no evidence that the suppliers had withdrawn cash immediately after the cheques issued by the assessee were deposited iv) the addition proposed to be made was on the basis of vague statements of alleged hawala dealers where no specific reference to the assessee was established for which no opportunity of cross examination was provided to the assessee, the Tribunal held that the AO was incorrect in making addition on account of bogus purchases under Section 69C of the Act. It held that the pre-condition for applying Section 69C is that the expenditure incurred by the assessee should be outside the books of account and would not apply where all purchase and sales transactions were a part of the regular books of accounts of the assessee.

Fancy Wear v ITO - ITA No.1596/Mum/2016 dated 20.09.2017

1962. The Court held that where the source of expenditure incurred by the assessee was the 'on money' received by it, the question of making addition under Section 69C on the said expenditure would not arise as the source of the money was duly explained. It held that only the amount received as 'on money' could be taxed and once it was considered as a revenue receipt, then any expenditure out of such money could not be treated as unexplained expenditure as it would lead to double addition in the hands of the assessee.

CIT v Golani Brothers ITA No 17 of 2015 (Bom) dated 29.08.2017

1963. The Tribunal held that where the AO had not disputed the genuineness of sales and the quantitative details and the day to day stock register maintained by the assessee, a trader, he could not make an addition in respect of peak balance of the bogus purchases. It held that at worst he could only make addition on account of the element of profit embedded in the bogus

purchases. Considering the facts of the case, it restricted the addition to 2% of the bogus purchase.

ACIT v Steel Line (India) - ITA No.1321/Mum/2016 dated 29/08/2017

1964. Where the AO, based on the DRP Directions for AY 09-10 & the tax evasion petition filed by the Assessee's share holder raising issues of tax evasion by NDTV, issued notice u/s 148 contending that Rs. 405.09 Cr. invested by the Assessee in Step Up Coupon Bonds of its UK subsidiary was income that escaped assessment & represented the Assessee's unaccounted money, the Court dismissed the Assessee's contention that the documents pertaining to the impugned investment were submitted during original assessment & held that mere disclosure of a transaction at the time of the original assessment proceedings does not protect the assessee from a re-assessment u/s. 147 if AO has information that indicates that the transaction is sham or bogus. Further, it upheld the provisional attachment of the Assessee's immovable properties, non-current investments and refund of Rs.19.88 crores due to NDTV for AY 2008-09 & held that the AO was justified in exercising its extra ordinary power keeping in mind the estimated position of demands that would likely arise from re-assessment for AY 2008-09 and assessment proceedings for AYs 2010-11 to 2013-14 as well as the declining net worth of NDTV & tax evasion allegedly conducted by NDTV by floating paper companies to raise approximately Rs.1100 crore and later dissolving them.

NDTV vs. DCIT TS-333-HC-2017 (W.P.C 9120 & 11638/2015 dated August 10, 2017)

1965. The Court upheld the order of the Tribunal and deleted the AO/CIT(A)'s disallowance of commission paid by the assessee to its agent @ 5% of invoice price noting that the assessee had only received 95% of the invoice price and therefore, could not be taxed for income which it had not received. Accordingly, it dismissed the contention of the Revenue that the existence of the agent was doubtful.

CIT vs. Olam Exports (India) Ltd. (2017) 99 CCH 0170 KerHC ITA.No. 1623 of 2009 dated 03/08/2017

1966. The assessee formed a subsidiary company in Netherlands viz. NNBV and subsequently formed another subsidiary viz. NNIH wherein 68.6 percent of its capital was held by NNBV and the balance by another company viz. USBV, which had been acquired at a premium of 642.54 crores. Noting that i) NNIH had paid dividend of Rs.642.54 crores out of its premium account to NNBV and that no premium was paid to USBV ii) NNHI merged with another subsidiary company of the assessee which in turn merged into NNBV which was ultimately liquidated within 2 /3 years of formation iii) the subsidiary companies did not have any business activity / operations iv) USBV's source of funds was from Bermuda (a questionable jurisdiction) v) the directors of USBV did not object to the fact that it did not receive any dividend vi) there was no justification of the valuation based on which USBV invested in NNIH, the Tribunal upheld the addition made by the AO in the hands of the assessee under Section 69A. It held that the AO had correctly made addition of the amount invested by USBV in the assessee's subsidiary as the same was merely routed to the coffers of the assessee who entered into a series of mergers and liquidation by payment of extra-ordinary dividend.

M/s New Delhi Television Ltd. vs. ACIT TS-283-ITA-2017 (ITA No. 1212 /Del/2014 dated July 14, 2017)

1967. Where the assessee an AOP had received deposits from its constituents on the first day of its business and had furnished copies of confirmation of accounts of the constituents, their PAN numbers, copies of their assessment orders, ITRs etc, the Court upheld the order of the Tribunal and deleted the addition made by the AO under Section 68. It specifically noted that since the entries occurred on the first day of business of the assessee, the same could not have been unaccounted money of the assessee.

CIT v Lal Mohar – (2017) 100 CCH 0106 (All HC) – ITA NO 9 of 2015 dated 28.11.2017

1968. The Tribunal deleted the addition made by the AO under Section 68 of the Act with respect to share capital received by the assessee from an entity based in Mauritius noting that the AO had relied on the initial communication from the Mauritius Revenue Authority which did not indicate

investment in the assessee without appreciating that subsequently the Authorities provided details (viz. return filed by the Mauritian company, address and citizenship of the directors, copy of share certificate issued by the assessee, bank statement and financial statements) which established the identity and genuineness of share capital.

Majari Stud Farm Pvt Ltd – TS-528-ITAT-2017 (Mum) - I.T.A No.3842/Mum/2012 dated 10.11.2017

1969. The Assessing Officer had made an addition on account of share premium/share application money / unexplained cash credit u/s 68 holding it to be mere accommodation entries, based on the statement of Praveen Kumar Jain (who accepted that he had provided accommodation entry to various parties). The Tribunal noted that since the details of share applicants along with their ITR acknowledgement, Audited accounts report, PAN cards and relevant extract of bank account of share applications and held that once the assessee had produced documentary evidence to establish the existence of such companies, the burden shifted to the Revenue to establish their case. It held that mere reliance on statements of third parties who had not been subjected to cross examination was not permissible. Accordingly, it held that since the AO had failed to demonstrate with specific evidence that the assessee has obtained accommodation entries, the addition made u/s 68 was not sustainable.

ITO vs Shreedham Construction Pvt Ltd-ITA No. 3754 / mum / 2017 dated 14.11.2017

1970. The Tribunal held that companies which invest share capital cannot be treated as bogus if they are registered and have been assessed. Once the assessee had produced documentary evidence to establish the existence of such companies, the burden shifted to the Revenue to establish their case. Reliance on statements of third parties who have not been cross examined is not permissible. Accordingly, it dismissed Revenue's appeal and confirmed the order of CIT(A) deleting the addition of share capital made u/s 68 of the Act.

Pr.CIT vs Paradise Inland Shipping Pvt. Ltd dated 10.04.2017

1971. The Tribunal reversed CIT(A)'s order and held that the assessee-company (allegedly engaged in the business of purchase and sale of fabric) introduced undisclosed income under the garb of purchases/ sales of fabric for AY 2009-10. It noted that the assessee transacted purchases of Rs.35 crore which were subsequently converted as loans and advances and opined that whole transaction had been carried out by the assessee company as a conduit for the companies who have shown the loans and advances from the assessee and also got deduction of the purchase cost. Further, it observed that the parties to whom majority of the purchases and sales were recorded existed at the same address which created doubt over genuineness of the transaction. It held that the CIT(A) had miserably failed to look into these various allegations made by the AO. It rejected the CIT(A)'s view that since accounts were audited no addition could be made and held that the CIT (A) did not look into the facts of the case that the purchases had never been paid, the sales had never been realized, there was no bank account of the company and there were no expenditure incurred by the assessee for the purchases and sales entered into.

Ganpati Hydro Power Pvt. Ltd - TS-579-ITAT-2017(DEL) - ITA No. 5629/Del./2012 dated 30.11.2017

1972. The Court upheld the Tribunals order making addition u/s 68 in the hands of assessee-company during AY 2007-08 with respect to share capital subscribed by investors. Noting that the assessee was private limited company and alleged investors were close friends and business associates of its directors and shareholders, it held that the burden to prove genuineness and credit worthiness rested squarely on the assessee. It noted Tribunal findings that the investors either did not exist or effectively denied the fact of making investment and that the PAN details of investors also did not establish their identity and therefore held that the finding of the Tribunal that the assessee failed to discharge its burden was based on evidence and application of the correct principle/rule of evidence. Accordingly, it held that once identity of investors could not be established there could be no question of establishing genuineness of transaction or credit worthiness of the parties.

Prem Castings (P) Ltd - TS-580-HC-2017(ALL) - INCOME TAX APPEAL No. - 34 of 2016 dated 29.11.2017

1973. The Court held that the AO was unjustified in making addition in the hands of the assessee alleging that he had contributed to purchase of property by his wife and not disclosed the same as an investment in his books. The Court observed that the agreement to sell property was duly registered in the name of the assessee's wife, the assessee's wife was separately assessed to income-tax and had declared acquisition of the property in her books of accounts. It further noted that the AO did not make any specific adverse observations against the assessee to suggest his contribution towards the purchase of property and accordingly deleted the addition made.

Pr CIT v SHRI OM PRAKASH CHANDNA - (2017) 100 CCH 0157 DelHC - ITA 1164/2017, CM APPL.46236/2017 dated 19.12.2017

1974. The Court held that since the assessee has not tendered cogent evidence to explain how the shares in an unknown company worth Rs.5 had jumped to Rs.485 in no time and there was no reasoning behind the sale price arrived at and there was no economic or financial basis to justify the price rise, it would be reasonable to conclude that the assessee had indulged in a dubious share transaction meant to account for the undisclosed income in the garb of long term capital gain. Accordingly it held that the AO was justified in making addition under section 68.

SANJAY BIMALCHAND JAIN v CIT - INCOME TAX APPEAL NO. 18/2017 (Bom)

1975. Pursuant to a search and seizure operation carried out at the premises of assessee, the AO made addition in the hands of the assessee on the ground that receipts of purchase of gold ornaments in name of assessee were found, but purchases were not entered in cash books of assessee. The Court appreciating the assessee's explanation i.e. that though receipts were in assessee's name but they were in respect of jewellery belonging to his wife and amounts in receipts related to disclosed income of his wife, held that the Tribunal was justified in deleting the addition made by the AO under Section 69B of the Act.

CIT v Dilip Singh - [2018] 89 taxmann.com 4 (Calcutta) - IT APPEAL NO. 222 OF 2000 dated 07.12.2017

Miscellaneous

1976. The Apex court dismissed petition filed by Shanti Bhusan & Prashant Bhushan, seeking constitution of special investigation team to direct investigation of the alleged incriminating material seized in CBI/Tax departments raid conducted on Birla & Sahara group of companies on the ground that entries in loose papers/sheets were irrelevant and not admissible. Further, **it held that** entries in books of accounts alone would not constitute sufficient evidence to implicate a person since the same was only corroborative evidence.

Common Cause (A Registered Society) [TS-22-SC 2017]

1977. The Court allowed assessee's writ and sets-aside Chief Commissioner's order refusing to consider assessee's compounding application u/s 279(2) filed pursuant to prosecution launched u/s 276B for failure to deposit TDS amount deducted from contractor payments. Noting that the assessee's compounding application was rejected by Revenue on the ground that compounding was not permissible in view of CBDT guidelines of 2014, considering the ongoing CBI investigations of the assessee, the Court held that the power to grant or refuse compounding was essentially discretionary. Considering that the assessee was faced with genuine difficulties (i.e seizure of books of accounts and documents etc. by CBI) which prevented assessee from making necessary TDS payment, the Court directed the Chief Commissioner to consider assessee's application in light of relevant facts.

Sport Infratech pvt Ltd [TS-25-HC-2017(Del)]

1978. Where, during the relevant year, the Assessee-Trust, settled by IL&FS Trust Co. Ltd, filed its return of income declaring total income at Nil, showing interest income of Rs. 21,49,72,486/-, from Yes Bank on behalf of 7 mutual funds to whom it had issued pass through certificates which was disclosed under the head "other income" and also reflected a deduction of the same amount

on account of Distribution to the mutual funds / Beneficiaries and the AO sought to bring this interest income to tax in the Assessee's hands contending that the Assessee was not a genuine Trust as the contributor and the beneficiaries were the same, hence Sec 160/161(1) was not applicable & 2) Assessee's activity was in the nature of business and therefore Sec 161(1A) was attracted, pursuant to which Assessee was assessable as AOP and taxed at maximum marginal rate, the Tribunal held that the Assessee was a valid trust as all the necessary ingredients for the formation and existence of the trust were fulfilled and further the securitization process was carried out in accordance with RBI Guidelines. It also accepted the contention of the Assessee that interest received from Yes Bank was for and on behalf of the MFs [whose income is exempt u/s 10(23D)] and hence was not chargeable to tax in Assessee's hands in terms of provisions of Sec 160(1)(iv)/161(1) which was applicable to a trustee as a representative Assessee. Further noting that the Assessee-Trust was a revocable Trust, it held that the income would be taxed in the hands of the beneficiaries, i.e. MFs who purchased PTCs from the Assessee Trust and further that irrespective of whether the Assessee was regarded as a 'Trust' or an 'AOP', the doctrine of "diversion at source by overriding title" would apply so as to render the amount not taxable as Assessee's income as even before the money was to flow to the Assessee, it was always clearly intended to be passed on to and only to the beneficiaries, i.e., the PTC holders in proportion to their interest in the receivables (underlying assets). Accordingly, it ruled in favour of the Assessee.

Indian Corporate Loan Securitisation vs. ITO [TS-71-ITAT-2017(Mum)] (ITA No. 3986/Mum/2013 dated 17.02.2017)

1979. Where the AO, pursuant to search proceedings conducted in the premises of the assessee and its group concerns, concluded that the payments by the assessee and other concerns to its other group concern viz. M/s Swastic Corporation as commission was sham, the Court noting that the assessee had explained that the group had streamlined its activities and appointed Swastic Corporation Ltd as the sole selling agent for the group and had provided several communications to establish that the customers had placed orders on Swastic Corporation, held that the AO was unjustified in making a disallowance of the payments. It held that the AO had merely proceeded on the basis of suspicion and had not brought any material on record to prove that the transaction was in fact sham.

CIT v L Parameswari – (2017) 98 CCH 0073 Chen HC – TCA Nos 700, 701, 702

1980. The Court allowing assessee-company's writ, directed the Revenue to grant credit of advance tax paid and TDS deducted against the tax payable under the Income Declaration Scheme, 2016 (IDS). The Court accepted that IDS had to be interpreted on a stand-alone basis but held that there was nothing in the IDS Scheme which provided that such past amounts were not to be reckoned for the purpose of payments under IDS.

Kumudam Publications (P.) Ltd. V. Central Board of Direct Taxes [2017] 79 taxmann.com 466 (Delhi) (WP (C) No. 11216 of 2016)

1981. Where the Assessee failed to pay full amount of 25% of tax payable on undisclosed income declared under the Income Declaration Scheme, 2016 on or before 30-11-2016 due to demonetization of Rs. 500 and Rs.1000 currency notes on 08-11-2016 and requested the Revenue to accept the balance amount of tax payable after the said due date, the Court held that there was no provision under the scheme which permitted the Authorities to accept part payment of tax after the specified date had passed. It further observed that the Scheme was optional, date of payment was known at the time of declaration and above all it was a facility made available to the parties who had failed to disclose their income under the Income Tax Act, 1961, to come clean. Hence, there was no reason for exercising extraordinary writ jurisdiction in these facts and accordingly assessee's writ was dismissed.

Nandu Atmaram Wajekar [TS-141-HC-2017 (BOM)] (WP No. 3578 of 2017)

1982. The Court held that the Income-tax Department cannot reject an application for compounding of offences u/s 279(2) of the Act, either on the ground of limitation or on the ground that such application was not accompanied by compounding fees as prescribed by CBDT circular. The Court notes that Revenue levied 'compounding charges' of nearly Rs.70 lakhs for considering assessee's application and subsequently rejected it on ground of delayed filing of application. It

held that the CBDT circular did not stipulate a limitation period and there was nothing in Sec. 279 or the Explanation thereunder to permit CBDT to prescribe such an onerous and irrational procedure of insisting an upfront compounding fee even before considering the compounding application on merits. Accordingly, the Court set aside CCIT's order and directed the Revenue to decide the application afresh on merits.

Vikram Singh [TS-148-HC-2017 (DEL)] (WP(C) 6825/2016)

1983. The Court, upheld Income Tax Settlement Commission's (ITSC) order accepting assessee's settlement application u/s 245D for AYs 2010-11 to 2014-15 and rejected the Revenue's contention that the further disclosures of Rs. 50 lakhs per AY made by the assessee represented a substantial rise from the original disclosure made in the settlement application, and that therefore the assessee's initial disclosures were not true and full. The assessee (i.e. multiple parties involved who had filed the application for settlement) in the settlement applications made additional disclosures of undisclosed income admitting receipt of money through sale of constructed properties. It was contended by the assessee that the unaccounted income would comprise of the profit element embedded in such sale of constructed properties and projected 15% profit on the turnover. On this basis, the assessee made disclosures of additional income which was accepted by Commission and immunity was granted to the assessee from prosecution and penalty. The Revenue contended that further inquiry was necessary as the 15% profit was on lower side compared to similar business. The Revenue relying on the decision in the case of Ajmera Housing Corporation [326 ITR 642 (SC)] and Nilkanth Developers [TS-6013-HC-2016(GUJ)-O] had contended that since the assessee had after making initial disclosures, made further substantial disclosures, the initial disclosures were not true and full. Distinguishing the Apex Court's ruling in the case of Ajmera Housing Corporation [326 ITR 642 (SC)] it held that the facts of the case were different since in that case the assessee had at a belated stage, made fresh and further disclosures. Noting that the Commission had considered that assessee had made a voluntary disclosure of additional sum of Rs. 2 crores i.e 50 lakhs in case of each assessee to put an end to the issue, it held that both the cases relied upon by Revenue were not applicable in the said cases as there was a substantial and drastic difference in original disclosure made in the application compared to the further disclosures.

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

1984. Where the Petitioner's case was transferred from Mumbai to Chennai u/s 127(2) without giving any reasons for the same, the Court remitted the matter back to the AO for passing fresh order u/s 127(2) after issuing notice to the Petitioner and after hearing the Petitioner.

ADITYA BIRLA MONEY LIMITED vs. PCIT & ANR (2017) 99 CCH 0043 ChenHC dated 05.06.2017

1985. The assessee had adopted market value of the polished diamonds as the value of its opening and closing stock. However, since the assessee was not able to produce the stock records, the AO revalued the closing stock and made additions in the income of the assessee. The CIT(A) and the Tribunal upheld the AO's order. The assessee filed the rectification application before the Tribunal the assessee contending that when the methodology was changed for the closing stock, same should have been applied for the opening stock. However, the Tribunal rejected the assessee's application since the same was not raised at the time of hearing of the appeal. The Court held that when the Revenue modified the method of valuation of closing stock of the assessee in a particular year, the same methodology should have been applied for the purpose of computation of the opening stock for that year also. It further held that the Tribunal erred in rejecting the rectification application on the ground that no such issue was canvassed before the Tribunal at the time of hearing of original appeal. It held that the issue could have been adjudicated by the Tribunal on its own account while disposing of the Tax Appeal irrespective of whether it was argued by the assessee and more so when the assessee had applied for rectification. Accordingly, it granted the Petitioner's request for rectification of the Tribunal's order to the extent of providing direction to the AO that the valuation of the opening stock of polished diamonds was to be done on the same basis as applied for valuation of the closing stock.

VEERA EXPORTS vs. ACIT (2017) 99 CCH 0067 GujHC dated 05.06.2017

1986. Where the assessee owned ground floor of a house property and purchased the first floor of the said house and claimed exemption for both the ground floor and the first floor under section 5 of the Wealth Tax Act by treating both the floors as one single residential unit, the Tribunal, relying on the decision in the case of Shiv Narain Choudhari vs CWT held that two different floors of one house property owned by assessee had to be regarded as single residential unit and exemption was allowable in respect of the same u/s 5(1)(iv).

ITO vs Nathamuni Krishnaswany Balaji 85 taxmann.com 201 – W.T Appeal No. 17 of 2017 dated 01.09.2017

1987. The Court dismissed Assessee-individual's writ and refused to interfere with the order passed by Tax Recovery officer TRO u/s. 159 (proceedings against the legal representative of the deceased). The Court rejected the contention of the Assessee that although he is the son of the deceased, he could not be considered as legal representative as he had not succeeded to the estate due to severance of relationship with the deceased by holding that the definition of legal representative as provided in Sec. 2(11) of the CPC and Sec. 2(29) of IT Act was an inclusive and wider in scope definition which not only included heirs but also persons who represented the estate of the deceased and the Petitioner was undoubtedly, as a matter of fact, one of the heirs and legal representatives of the deceased.

Arvind Kayan vs. UOI & Ors. TS-373-HC-2017 (WP No. 504/2017 dated August 30, 2017)

1988. Pursuant to the order of the Delhi High Court, (ultimately upheld by the Supreme Court), the assessee was liable to pay tax on payments received by it under the Race Promotion Contract for which the Department had attached the assessee's letter of credit u/s 281B. The assessee invoked such letter of credit which had to be honored by the bank. The Apex Court directed the assessee to remit the amount received under the said LC towards the tax liability on consideration received under the Race Promotion Contract.

The Royal Bank of Scotland PLC vs. Axis Bank Ltd. & Ors. TS-376-SC-2017 (Civil Appeal No. 11064-65/2017 dated August 25, 2017)

1989. The Court allowed the further writ filed by Revenue and set aside the writ court's order (Single Judge) which had allowed writ of the land purchaser's (Petitioner in the first Writ) and lifted the attachment on immovable property sold to it by the vendor who had defaulted in payment of tax arrears. The Court setting aside the Single Judge Order upheld the action of Revenue of attaching the property and held that no sale deed was registered in favour of land purchaser (Petitioner in the first Writ) on the date of the attachment of property. In the absence of a deed of conveyance, duly stamped and registered, no right, title or interest in an immovable property can be said to be transferred to the Petitioner land purchaser. The Court referred to sec 281 and noted that any assessee, though after completion of any proceedings, but before the service of notice under Rule 2 of the Schedule, creates a charge on, or parts with the possession (by sale, mortgage etc) of any asset in favour of any person, such charge shall be void as against any claim in respect of any tax. The Court, therefore, held the action of the Revenue was valid in attaching the property. The Court further observed that unless the property was transferred in the name of the land purchaser, it had no locus standi to question the order of attachment by filing the first mentioned Writ as a Petitioner.

TRO vs. M/s Sree Foundation & Others TS-271-HC-2017 (Writ Appeal No. 95 of 2016 & CMP No. 1111 of 2016 dated April 18, 2017)

1990. The Court dismissed assessee's writ and upheld recovery proceedings against garnishee-Bank (with which assessee had an account) with respect to non-payment of tax arrears by assessee u/s 226(3)(i). The Court rejected assessee's stand that tax recovery proceedings were illegal as it was incumbent upon the Department to have issued notice u/s. 226(3)(iii) to assessee simultaneously with or prior to the issue of notice to the Bank u/s. 226(3)(i) for attaching assessee's bank account and held that the requirement u/s. 226(3)(iii) was only that a copy of the notice should be 'forwarded to the assessee' and not that a copy should be served on the assessee in advance or simultaneously. Further, it observed that the assessee was fully aware of consequences of failure to pay tax within 30 days of receipt of demand notice u/s 156 and also noted that the assessee had not filed any application for stay of demand till date.

GECAS Services India Pvt. Ltd. vs. ITO & Others TS-290-HC-2017 (WP (C) 3127/2017 dated July 11, 2017)

1991. The assessee claimed deduction of interest accrued on NPAs according to the guidelines of National Housing Bank (NHB) as per which the debts or loan in respect of which interest had not been received beyond a period of more than 90 days were classified as NPA. The AO, however, as per Section 43D r.w. rule 6EB (which provides that only if interest in respect of a debt or loan was due for more than six months would a loan be treated as NPA) held that the NPA was to be classified as per Rule 6EB of the Rules and not as per the guidelines of NHB and therefore, deduction was not allowable. The Court held that for the permissibility of deduction for the purposes of computing the taxable income is concerned, it is the Act that applies and the purpose of classification of debts as NPA by the NHB was not applicable. Accordingly, it held that deduction was not allowable to the assessee.

HOUSING AND URBAN DEVELOPMENT CORPORATION LIMITED vs. ACIT (2017) 99 CCH 0073 DelHC ITA Nos.440/2016, 442/2016, 444/2016, 445/2016 & 446/2016 dated 03/07/2017

1992. Where the Central Board of Direct Taxes (CBDT) issued a Circular under Section 119 of the Income Tax Act, 1961, which amended the provisions contained in Rule 68B of the IIInd Schedule to the Income Tax Act, 1961, the Apex Court upheld the decision of the High Court in quashing the circular as ultra vires and held that the legislative provisions cannot be amended by CBDT in exercise of its power under Section 119 of the Act.

The CIT v SV Gopala – Civil APPEAL NO(S). 4901/2010 dated 13-07-2017

1993. Where in July 2008, SAIL awarded the contract for installation of cooling pads, pliers and other equipments to the consortium of assessee (a company incorporated under the law of Czech Republic and engaged in steel production and supply of heavy machinery) and BEC (a company incorporated in India), the Tribunal observed that there was a clear demarcation in the work and cost between the consortium members and also noted that the contract provided for consideration to be paid member-wise as well as component-wise and accordingly held that the contract was clearly divisible and therefore the consortium comprising of assessee and BEC, could not be treated as AOP

DCIT vs Vitkovice Machinery A.S-TS-497-ITAT-2017(mum) ITA No. 1673/mum/2015 dated 27.10.2017

1994. Pursuant to Government's demonetization move, the assessee had deposited Rs. 40 crore into its current bank account in December 2016, which was almost entirely seized by the department (to the tune of 37crore) pursuant to search and seizure operation and immediately thereafter, the assessee declared Rs. 20 crore under the Pradhan Mantri Garib Kalyan Yojna ('PMGKY') out of which 75 percent (i.e. Rs. 15 crore) had already been appropriated by the Government towards tax / penalty. The assessee requested for a refund of the balance Rs. 5 crore which was denied by the Revenue authorities on the ground that the assessee was not entitled to refund since seizure was made under Section 132B. The Court held that though there is force in Revenue's stand that in view of section 132B, assessee was not entitled to the release of 5 crore, especially when the declaration was made under PMGKY scheme after the seizure was effected, it allowed assessee's request of refund of 5 crore on grounds of mercy/bankruptcy as no prejudice would be caused to the department as even if the declaration was not accepted under the PMGKY scheme, 30 percent of the amount seized would have to be returned. Accordingly, it directed the release of 5 cr to assessee of excess cash seized by department.

Jaya Balajee Real Media Pvt Ltd-TS-470-HC-2017(AP) Writ Petition No.25470 of 2017 dated oct 11, 2017

1995. The Court, dismissed assessee's (individual) writ petition seeking permission for filing income-tax return without Aadhaar number and also the plea to direct the tax department not to initiate coercive action against the assessee. Rejecting assessee's stand that by virtue of partial stay from operation of Sec. 139AA proviso, granted by SC in Binoy Viswam, assessee should be

permitted to file returns without production of the Aadhaar number either manually or through appropriate e-filing facility, it held that petitioner's plea was a mis-reading of the SC judgment, which infact upheld the validity of Sec. 139AA and the limited stay granted by the SC was only with respect to certain other transactions mentioned in Rule 114B of Income tax Rules (transactions, in relation to which, PAN is to be quoted in all documents for the purpose of Clause (C) of Sub-Section (5) of Section 139A of the Act). Accordingly, it dismissed Assessee's appeal.

Mr.Thiagarajan Kumararaja vs UOI-TS-505-HC-2017(MAD) W.P.No.28181 of 2017 &WMP.No.30311 of 2017 dated 06.11.2017

1996. The Court, in order to preserve the constitutionality of ICDS, restricted the power of Central Government to notify ICDS so as to ensure that they do not override binding judicial precedents or provisions of the Act. It Struck down ICDS I, II, III, VI, VII, Part A of ICDS VIII as ultra vires of the Act/contrary to settled position of law as laid down by Supreme Court and relying on a catena of Apex Court decisions, observed that a tax cannot be levied by way of an executive action. It further held that tax could not be levied by way of administrative instructions as observed by the Supreme Court. It held that Section 145(2) does not permit changing the basic principles of accounting changing the basic principles of accounting unless corresponding amendments are carried out to the Act itself.

THE CHAMBER OF TAX CONSULTANTS & ANR vs UNION OF INDIA & ORS-TS-499-HC-2017(DEL)- W.P.(C) No. 5595/2017 dated 08.11.2017

1997. Where the assessee purchased IRFC bonds owned by Harshad Metha and sold the same back to him within a short period of 15 days and in this process claimed loss and also received tax free interest from these IRFC bonds, transactions of purchase and sale of bonds in question not being carried on during course of business was not a business activity, hence, provisions of section 94(4) (which only apply in cases where the buying and selling of securities was the business of the assessee) would not be applicable in the case of the assessee and the assessee's claim of short term capital loss could not be denied. It further held that Section 94(4) would apply in the case of the assessee only if the AO applied Section 94(1) in the case of Harshad Metha which was not done so in the instant case.

DCIT v Growmore Leasing & Investment Ltd - [2017] 87 taxmann.com 294 (Mumbai - Trib.) - IT APPEAL NOS. 1807, 2192 (MUM.) OF 2015 dated 17.11.2017

1998. The Court rejected the Petitioner's claim that the AO erred in issuing summons under Section 131 to him without appreciating that he had immunity from responding to such summons as per Section 8 of the Diplomatic Relations (Vienna Convention) Act, as he was appointed as Honorary Consulate of Federal Democratic Republic of Ethiopia. It held that as per Section 131 of the Act, the AO had power vested under the Code of Civil Procedure 1908 and the said section does not carve out any exemption for any designation of office held by a person to whom summons are issued. Further it noted that the Petitioner himself had violated the provisions of the Diplomatic Relations (Vienna Convention) Act by carrying on business activities in the same premises in which he carried on his consular activities.

Sri Sai Ramakrishna Karuturi v UOI - TS-536-HC-2017 (KAR) - WRIT PETITION No.22849/2017 (T-IT) dated 08.11.2017

1999. The Petitioner had wrongly claimed depreciation on land in its balance sheet. It submitted that it was a clerical error and that while finalizing books of accounts for the subsequent year, the auditor noticed the error and rectified it. It further submitted that as soon as the error came to its notice it suo moto intimated the AO vide letter dated 8.12.2009. The AO initiated proceedings under Section 277 on account of falsification of accounts, which was confirmed by the Additional Chief Metropolitan Magistrate. During writ proceedings, the Court observed that as per the assessment records, the AO had made two order sheet notings requesting the assessee to justify its claim of depreciation of land and that it was only pursuant to such notings that the assessee filed letter dated 8.12.2009. Accordingly, it held that the assessee's claim that it had suo moto intimated the AO of the error was not correct. Further, it noted that as per the statement of the assessee's Director (recorded by the AO) the Director stated that the mistake

was noticed by them in August 2008. The Court held that where the mistake was noticed in August 2008 but the assessee took steps to rectify the same only on 8.12.2009, absent justification in such delay, it upheld the order of Additional Chief Metropolitan Magistrate. Accordingly, it dismissed Assessee's petition.

Ambience Hospitality Pvt Ltd vs DyCIT (2017) 100 CCH 100 DeIHC – CRL.REV.P 16/2015 dated 23.11.2017

2000. The Court dismissed the assessee's writ petition challenging transfer of its case u/s 127 from DCIT, Corporate Circle-1(1), Chennai to the Central Circle-1(1), Chennai noting that the reason for transfer as recorded by Revenue was centralisation of cases relating to search and seizure operations on Vasam Health Care to facilitate smooth and easy proceedings. It rejected assessee's contention that reasons for transfer should have been communicated to assessee and held that no opportunity of hearing was required to be given u/s 127(3) as it excluded certain procedure contemplated u/s 127(1) and 127(2) when both the transferee and transferor officers are situated in the same city, locality or place. It also noted that that two Heads of Department for Company Circle and Central Circle had concurred and reasons for transfer had been duly recorded, thus, the requirement u/s 127(2)(a) was satisfied; Regarding assessee's contention that its case was not related to Vasam Health Care group of cases, it holds that the administrative exigencies and the manner in which the investigation has to proceed are all matters into which this Court would refuse to probe into under Article 226 of the Constitution.

Advantage Strategic Consulting Pvt Ltd v PR CIT - TS-576-HC-2017(MAD) - W.P.No.35408 of 2016 & W.M.P.No.30475 to 30478 of 2016 dated 05.12.2017

DISCLAIMER

The contents of this publication should not be construed as legal opinion. It provides general information existing at the time of preparation. It is intended as a news update and SML tax chamber and its members neither assume nor accept any responsibility for any loss arising to any person acting or refraining from acting as a result of any material contained in this update. It is recommended that professional advice be taken based on the specific facts and circumstances. The Digest does not substitute the need to refer to the original pronouncements. This is not a Spam mail. In case this mail doesn't concern you, please unsubscribe from mailing list by writing to us at office@smltaxchamber.com.