2015
DIGEST OF CASE LAWS
DIRECT TAXES

Supreme Court
High Courts
Tribunals
Authority for Advance Ruling
Allied Laws
Reference to CBDT Circulars and Articles

(For Private Circulation)
Compiled by Research team

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Compiled by Research team of AIFTP Journal Committee and KSA LEGAL CHAMBERS

ACKNOWLEDGEMENTS

Sincere thanks to the research team and to the editorial team of the Journal Committee of the All India Federation of Tax Practitioners (AIFTP), the editorial team of www.itatonline.org and the research team of KSA Legal Chambers, staff members of the AIFTP, ITAT Bar Association, Mumbai and KSA Legal Chambers.

Sincere thanks to the Editorial and Research teams of the AIFTP Journal Committee

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PREFACE

2015 – Digest of Case Laws on Direct Taxes

We are glad to present **"2015 – Digest of case laws on direct taxes"**. This year's digest is the fourth year of our private publication for the reference of professional colleagues who regularly appear before High Courts, the Tribunal and Commissioners of Income-tax (Appeals).

In this publication, our research team has digested section-wise, 2,590 cases which are reported in the year 2015 in various reports, journals, magazines and online media. The cases are digested in the descending order of relevance, i.e. Supreme Court, High Courts, Tribunal and Authority for Advance Ruling.

We have made an attempt to make editorial notes in some of the cases where the judgment of Tribunal is affirmed or reversed by High Courts or where an SLP is granted or rejected by the Supreme Court against the judgments of High Courts.

Important case laws on allied laws and interpretation of taxing statutes are also digested. A separate chapter on reference to circulars and articles is also provided which are arranged section wise and subject wise.

The index to case laws is prepared in alphabetical order. For instance, where the Revenue is the petitioner/appellant, the index is shown as under:

Case	**Presented in index of case laws as ;**
CIT v. Sarkar Builders	Sarkar Builders; CIT v. *
DIT(IT) v, Citibank	Citibank; DIT(IT) v. *
ACIT v. Mosaic India (P) Ltd.	Mosaic India (P) Ltd.; ACIT v.*
Dy. CIT (TDS) v. Zee Entertainment Enterprises Ltd.	Zee Entertainment Enterprises Ltd.; Dy. CIT (TDS) v. *
CWT v. Nazin Zachitia	Nazin Zachitia; CWT v.*

This digest is for private circulation in print form with the objective of facilitating quick reference for professional colleagues. The entire publication is hosted on www.itatonline.org for the benefit of tax professionals and public at large. Those who desire to refer to digest may download and store the same on their desktops/laptops mobiles and iPads.

In the year 2012, we have published **"Digest of case laws – Direct taxes – (2003-2011) – A Tax Companion"** to commemorate 150 years of the Bombay High Court, which was published jointly with the AIFTP and the ITAT Bar Association. To commemorate the Platinum Jubilee of the Tribunal and the Golden Jubilee of the ITAT Bar Association,

we desire to publish digest of cases from 2003 to 2015, jointly with the AIFTP and the ITAT Bar Association. The publication could be in print form or in the form of a CD. We desire to have your valuable guidance and support in successfully bringing out the proposed publication. Your valuable suggestion may be sent to ksalegal@gmail.com. While referring to the digest, if any error or mistake is noticed by readers, they are requested to inform us by e-mail or in writing, which will enable us to take corrective measure in our next publication. We hope this publication will serve as a useful reference to busy professionals.

For Research and Editorial team,

Yours sincerely,

Dr. K. Shivaram
Senior Advocate

5th September, 2016

ABBREVIATIONS

Journals, Reports, Magazines and online

Ahmedabad Chartered Accountants Journal	– ACAJ
All India Federation of Tax Practitioners Journal	– AIFTPJ
All India Tax Tribunal judgements	– TTJ
All India Reporter	– AIR
The Bombay Chartered Accountant Journal	– BCAJ
Bombay Law Reporter	– Bom.L.R.
The Chamber of Tax Consultants	– The Chamber's Journal
Company Cases	– Comp-Cas
Current Tax Reporter	– CTR
Direct Taxes Reporter	– DTR
Excise Law Times	– E.L.T.
Goods and Service Tax Reports	– GSTR
Income-tax Tribunal Decisions	– ITD
ITR's Tribunal – Tax Reports	– ITR (Trib.)
Income-tax Reports	– ITR
Supreme Court Cases	– SCC
Selected Orders of ITAT	– SOT
Taxman	– Taxman
VAT and Services Tax cases	– VST

Online

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Abbreviations – Authorities

Additional Commissioners of Income-tax	– Addl. CIT
Authority for Advance Rulings	– AAR
Assistant Commissioner of Income-tax	– ACIT
Assistant Directors of Income-tax	– ADIT
Assessing Officer	– AO
Appellate Tribunal	– ITAT
Central Board of Direct Taxes	– CBDT
Chief Commissioner of Income-tax	– CCIT
Commissioner of Income-tax	– CIT
Commissioner of Income-tax (Appeals)	– CIT(A)
Deputy Commissioner of Income-tax	– Dy. CIT
Director of Income-tax	– DIT
Director General of Income-tax	– DGI
High Court	– HC
Income-tax Officer	– ITO
Income-tax Settlement Commission	– ITSC
Joint Commissioner of Income-tax	– JCIT
Joint Directors of Income-tax	– JDIT
Principal Chief Commissioner of Income Tax	– PCIT
Principal Director General of Income Tax	– PDGI
Supreme Court	– SC
Tax Recovery Officer	– TRO
Transfer Pricing Officer	– TPO
Union of India	– UOI

Courts

Supreme Court	– (SC)
High Court	– (HC)
Allahabad	– (All.)
Andhra Pradesh	– (T&AP)

Abbreviations

Assam	– (Guwahati)
Bombay	– (Bom.)
Bombay	– Aurangabad
Bombay	– (Nagpur)
Bombay	– (Panaji-Goa)
Calcutta	– (Cal.)
Chhattisgarh	– (Chhattisgarh)
Delhi	– (Delhi)
Gauhati	– (Gauhati)
Gujarat	– (Guj.)
Himachal Pradesh	– (HP)
Jammu & Kashmir	– (J&K)
Jharkhand	– (Jharkhand)
Karnataka	– (Karn.)
Kerala	– (Ker.)
Madhya Pradesh	– (MP)
Madhya Pradesh (Gwalior)	– (MP)
Madras	– (Mad.)
Orissa	– (Orissa)
Patna	– (Patna)
Punjab & Haryana	– (P&H)
Rajasthan	– (Raj.)
Sikkim	– (Sikkim)
Uttarakhand	– (Uttarakhand)
Uttar Pradesh	– (UP)

Tribunal Benches

Agra	– (Agra)
Ahmedabad	– (Ahd.)
Allahabad	– (All.)
Amirtsar	– (Asr.)

Bangalore	– (Bang.)
Bilaspur	– (Bilaspur)
Calcutta	– (Kol.)
Chandigarh	– (Chd.)
Chennai	– (Chennai)
Cochin	– (Cochin)
Cuttack	– (Cuttack)
Delhi	– (Delhi)
Guwahati	– (Gau.)
Hyderabad	– (Hyd.)
Indore	– (Indore)
Jabalpur	– (Jabalpur)
Jaipur	– (Jp.)
Jodhpur	– (Jodh.)
Lucknow	– (Luck.)
Mumbai	– (Mum.)
Nagpur	– (Nag.)
Panaji	– (Panaji)
Patna	– (Patna)
Pune	– (Pune)
Raipur	– (Raipur)
Rajkot	– (Rajkot)
Ranchi	– (Ranchi)
Vishakhapatnam	– (Vishakhapatnam)

Case Laws Index

Section wise Index

Income-tax Act, 1961

Arrangement of Section

Income-tax Act, 1961

Section 1 : Short title, extent and commencement

S.1 : Application of the Act – After extension of Income-tax Act, 1961 to State of Sikkim with effect from 1-4-1990, Sikkim State Income-tax Manual, 1948, stands repealed and assessments made thereunder for assessment years 1997-98 to 2005-06 were without authority of law, nonest and nullity. [Sikkim State Income-tax Manual, 1948, S.17] 1

The assessee university was established in the year 1995 by an enactment of the Sikkim State Government. On 7-7-2006, the AO passed an assessment order under the Sikkim State Income-tax Manual, 1948, for the assessment years 1997-98 to 2005-06. The assessee filed an appeal before the Special Commissioner for cancellation of the assessment order, claimed refund of the *ad hoc* payment with interest and also claimed exemption u/s. 17 of the Sikkim State Income-tax Manual, 1948. The Special Commissioner upheld the order of AO.

On a Writ Petition by the assessee, the High Court observed that the Sikkim State Income-tax Manual, 1948, stood repealed after extension of the Income-tax Act, 1961, in the State of Sikkim with effect from 1-4-1990. It further observed that the assessee was claiming its rights as an assessee under the Income-tax Act, 1961. The High Court held that after extension of the Income-tax Act, 1961 to the State of Sikkim, the Sikkim State Income-tax Manual, 1948, stands repealed and the assessments made thereunder are without authority of law, non est and nullity. (AY. 1997-98 to 2005-06).

Sikkim Manipal University v. State of Sikkim (2014) 369 ITR 567 / (2015) 113 DTR 23 / 232 Taxman 360 / 273 CTR 25 (Sikkim)(HC)

Section 2 : Definitions

S.2(1A) : Agricultural income – Tilling of land, weeding, watering etc. – Sale proceeds from said business of nursery carried on by assessee constitute income from agriculture. [S. 10(1)] 2

Assessee HUF had carried out operations such as tilling of land, weeding, watering, etc. upon land owned by it and when plants were established in soil they were shifted in suitable containers for sale. Sale proceeds from said business of nursery carried on by assessee constitute income from agriculture. (AY. 1986-87, 1991-92)

Puransingh M. Verma v. CIT (2015) 230 Taxman 470 (Guj.)(HC)

S.2(1A) : Agricultural income – Selling only sun dried coffee seeds and was not engaged in other processing activities, its income from coffee estate had to be computed by applying, Rule 7B. [R.7B] 3

The assessee filed his return declaring agricultural income from coffee estate. The Assessing Officer by applying rule 7B took income from agriculture and income from business in the ratio of 75 per cent and 25 per cent respectively. The CIT(A) found that

the assessee was not marketing any coffee product and he was only an agriculturist, he allowed assessee's claim of agricultural income exempt from tax. The ITAT held Rule 7B(1) says that when the assessee derived income from sale of coffee grown and cured by seller in India, 25 per cent of income shall be treated as from business and 75 per cent shall be treated as income from agriculture. However, if the assessee derives income from sale of coffee grown, cured, roasted and grinded with or without mixing chicory or other flavouring ingredients, then 40 per cent of income shall be treated as from business for the purpose of taxation under the Act. The balance 60 per cent has to be treated as income from agriculture. If the assessee was selling only cured coffee seeds, the provisions of rule 7B(1) would come into operation. Consequently, income from coffee estate has to be computed by applying rule 7B of Income-tax Rules, 1962. Appeal of revenue was allowed. (AY. 2006-07)
ITO v. T. C. Abraham (2015) 155 ITD 861 / 43 ITR 422 (Chennai)(Trib.)

4 **S.2(1A) : Agricultural income – Growing of mushroom – Within municipal limits – Income from growing of said mushroom to be treated as non-agricultural income. [S.10(1)]**
Assessee claimed growing of mushroom as agricultural income. AO denied the exemption. On appeal the Tribunal held that there was no land on which tilling operations etc., was carried out, and same was basic operation for carrying out agricultural activities, further, entire activity was carried on in residential area within municipal limits and mushrooms were grown under controlled conditions, since assessee had failed to explain basic agricultural operations carried out in mushroom production, income from growing of said mushroom to be treated as non-agricultural income. (AY. 2003-04, 2004-05)
Chander Mohan v. ITO (2014) 52 taxmann.com 203 / (2015) 67 SOT 28 (Chd.)(Trib.)

5 **S.2(14)(iii) : Capital asset – Agricultural land – Measurement – Distance to be measured from agricultural land to outer limit of municipality by road – Not by straight line or aerial route. [S.45]**
Dismissing the appeal of revenue the Court held that for the purposes of section 2(14)(iii)(b), the distance had to be measured from the agricultural land in question to the outer limit of the municipality by road and not by the straight line or the aerial route. The distance had to be measured from the land in question itself and not from the village in which the land is situated. (AY. 2006-07)
CIT v. Vijay Singh Kadan (2015) 378 ITR 71 / 63 taxmann.com 22 / 128 DTR 292 / (2016) 283 CTR 421 (Delhi)(HC)

6 **S.2(14)(iii) : Capital asset – Agricultural land – Land situated within prescribed distance from municipal limit – Measurement of distance for purpose of agricultural land – Amendment in 2014 providing that distance should be measured aerially – Prospective and not to apply to earlier years. [S. 28(1), 45]**
Held, dismissing the appeals, (1) that the amendments in the taxing statute, unless a different legislative intention is clearly expressed, shall operate prospectively. If the assessee has earned business income and not the agricultural income, section 11 of

the General Clauses Act, 1897, will prevail unless a different intention appears to the contrary. The relevant amendment prescribing that the distance to be counted must be aerial came into force with effect from April 1, 2014. The need for the amendment itself showed that in order to avoid any confusion, the exercise became necessary. This exercise to clear the confusion, therefore, showed that the benefit thereof must be given to the assessee. In such matters, when there is any doubt or confusion, the view in favour of the assessee needs to be adopted. Circular No. 3 of 2014, dated January 24, 2014, (2014) 361 ITR 1 (St.) dealing with applicability expressly stipulates that it takes effect from April 1, 2014, and, therefore, prospectively applies in relation to the assessment year 2014-15 and subsequent assessment years. Hence, the question whether prior to the assessment year 2014-15 the authorities erred in computing the distance by road did not arise at all.

(ii) That the capital gains arising from the transaction in respect of agricultural land could not be considered as business income. (AY. 2009-10)

CIT v. Nitish Rameshchandra Chordia (2015) 374 ITR 531 / 126 DTR 116 / 231 Taxman 724 (Bom.)(HC)

S.2(15) : Charitable purpose – If the definition of "charitable purpose" is construed literally, it is violative of the principles of equality & unconstitutional. Merely charging of fee does not destroy the character of a charitable institution. [S.10(23C)(iv), Constitution of India, Article 14]] 7

The DGIT(E) passed an order stating that though the assessee is engaged in "the advancement of any other object of general public utility" as per s. 2(15) of the Act, its object could not be regarded as "charitable purposes" due to the new proviso to s. 2(15) and that it was not eligible for exemption u/s. 10(23C)(iv). It was held that as the assessee had huge surpluses in banks, it had given its space for rent during Trade Fairs and Exhibitions, it had received income by way of sale of tickets and income from food and beverage outlets in Pragati Maidan, etc, the assessee was rendering service to a large number of traders and industrialists in relation to trade, commerce and business and was, therefore, hit by the expanded list of activities contained in the proviso to Section 2(15). It was further observed that the service of allotting space and other amenities like water, electricity and security, etc. to the traders to conduct their exhibitions fell within the ambit of any activity of rendering any service in relation to trade, commerce or business. The assessee filed a writ petition claiming that the First Proviso to s. 2(15), as amended by the Finance Act, 2008, is arbitrary and unreasonable and violative of Article 14 of the Constitution of India. HELD by the High Court:

(i) It is apparent that merely because a fee or some other consideration is collected or received by an institution, it would not lose its character of having been established for a charitable purpose. It is also important to note as to what is the dominant activity of the institution in question. If the dominant activity of the institution was not business, trade or commerce, then any such incidental or ancillary activity would also not fall within the categories of trade, commerce or business. It is clear from the facts of the present case that the driving force is not the desire to earn profits but, the object of promoting trade and commerce not for itself, but for the nation – both within India and outside India. Clearly, this

is a charitable purpose, which has as its motive the advancement of an object of general public utility to which the exception carved out in the first proviso to Section 2(15) of the said Act would not apply;

(ii) If a literal interpretation were to be given to the said proviso, then it would risk being hit by Article 14 (the equality clause enshrined in Article 14 of the Constitution). It is well-settled that the courts should always endeavour to uphold the Constitutional validity of a provision and, in doing so, the provision in question may have to be read down;

(iii) Section 2(15) is only a definition clause. The expression "charitable purpose" appearing in Section 2(15) of the said Act has to be seen in the context of Section 10(23C)(iv). When the expression "charitable purpose", as defined in Section 2(15) of the said Act, is read in the context of Section 10(23C)(iv) of the said Act, we would have to give up the strict and literal interpretation sought to be given to the expression "charitable purpose" by the revenue;

(iv) The correct interpretation of the proviso to Section 2(15) of the said Act would be that it carves out an exception from the charitable purpose of advancement of any other object of general public utility and that exception is limited to activities in the nature of trade, commerce or business or any activity of rendering any service in relation to any trade, commerce or business for a cess or fee or any other consideration. In both the activities, in the nature of trade, commerce or business or the activity of rendering any service in relation to any trade, commerce or business, the dominant and the prime objective has to be seen. If the dominant and prime objective of the institution, which claims to have been established for charitable purposes, is profit making, whether its activities are directly in the nature of trade, commerce or business or indirectly in the rendering of any service in relation to any trade, commerce or business, then it would not be entitled to claim its object to be a 'charitable purpose'. On the flip side, where an institution is not driven primarily by a desire or motive to earn profits, but to do charity through the advancement of an object of general public utility, it cannot but be regarded as an institution established for charitable purposes.

India Trade Promotion Organization v. DGIT(E) (2015) 371 ITR 333 / 229 Taxman 347 / 274 CTR 305 / 114 DTR 329 (Delhi)(HC)

8 **S.2(15) : Charitable purpose – Society set up by Government of India and disbursing subsidies – Society charging fees for processing subsidy applications – Not business activity – Society's activities do not cease to be charitable – Entitled to exemption. [S.10(23C)(iv)]**

Allowing the appeal the Tribunal held that; the authorities were in error in invoking the first proviso to section 2(15), particularly as it was not their case that the assessee was carrying out any business activity in charging the processing fees or service fees, even if the receipts on account of application forms could be construed as such, from the applicants for subsidy. The assessee had charged fees for processing subsidy applications and charging processing fees or service charges which was not a business activity of the assessee and the activities did not cease to be charitable activities under

section 2(15) and the assessee was entitled to exemption under section 10(23C)(iv). (AY. 2009-10)
National Horticulture Board v. ACIT (2015) 40 ITR 710 / 67 SOT 410 / 168 TTJ 362 (Delhi)(Trib.)

S.2(15) : Charitable purpose – When business activities are carried by assessee trust 'in course of actual carrying out of such advancement of any other object of general public utility benefit of S. 11 cannot be declined. [S. 11] 9
Allowing the appeal of assessee the Tribunal held that; Proviso to S.2(15) as substituted by Finance Act, 2015 is applicable with prospective effect; even post insertion of proviso to S. 2(15) but before 1-4-2016, when business activities are carried by assessee trust 'in course of actual carrying out of such advancement of any other object of general public utility, benefit of S. 11 cannot be declined. (AY. 2004-05 to 2007-08, 2009-10 to 2011-12)
Hoshiarpur Improvement Trust v. ITO (2015) 155 ITD 570 / 45 ITR 682 / 173 TTJ 273 (Asr.)(Trib.)

S.2(15) : Charitable purpose – Activities carried out by a Trust for providing employment to rural poor cannot be held as commercial activities – Activities of Trust is eligible for exemption.[S.11] 10
The assessee-trust contemplates to organize milk societies for facilitating sale of milk; the underlying intention is to get good price for the milk sold by the villagers and also to encourage them to rear their own milch animals. The villagers can earn a decent livelihood by engaging themselves in rearing of milch animals and selling of milk without middlemen and exploitation, through the societies formed under the guidance of the assessee trust. This is the same case with other proposed activities like ginning, spinning, fruit processing etc., where labour of the village women-folk can be fruitfully deployed, to keep away exploitation. The Hon'ble Appellate Tribunal held that the economic activities in the above nature cannot be treated as activities in the nature of trade, commerce or business as contemplated in proviso to section 2(15). Therefore, we find that the Director of Income-tax (Exemptions) has characterized the activities of the assessee trust as commercial in nature without going into the circumstances in which the activities are contemplated to be carried on by the assessee trust.
Thamizh Thai Seva Trust v. DIT (2015) 67 SOT 166 (URO) / 53 taxmann.com 215 (Chennai)(Trib.)

S.2(15) : Charitable purpose – Advancement and development of trade, commerce and industry in India, income earned from incidental activities is eligible for exemption under section 11. [Ss.11, 12A] 11
Assessee Association was set up for the purpose of promotion and protection of Indian Business & Industry and was registered u/s. 12A. The purpose for which the assessee association was established is a charitable purpose within the meaning of section 2(15). The assessee is carrying out activities which are incidental to the main object of the Association and which are conducted only for the purpose of securing the main object which is the advancement and development of trade and commerce and industry in India. The activities are not in the nature of business and there is no motive to earn

profit. Thus, the incidental activities were well covered by the section 2(15) and were thus 'charitable' in nature. In such an eventuality, the application of the section 11(4A) which applies only to business activities stands absolutely negated. Thus the income of the assessee is exempt from tax under section 11. (AY. 2008-09)
Indian Chamber of Commerce v. ITO(E) (2015) 67 SOT 176 (URO) / 167 TTJ 1 / 37 ITR 688 / 113 DTR 153 (Kol.)(Trib.)

12 **S.2(15) : Charitable purpose – Receiving fees simpliciter is not reason enough to hold that the activity is not a charitable activity. The fundamental essence of the activity has to be seen. [Ss.12A, 12AA]**
The assessee institution is set up by the Indian Army and it seeks to promote the well being of their personnel after their retirement from the service, as also of the widows and dependents of the brave army men who sacrifice their lives, and help them integrate in the civil society by taking up suitable employment. This is surely an activity of general public utility, and, therefore, covered by the definition of 'charitable purposes' under section 2(15). The true test for deciding whether an activity is business activity is (i) whether the said activity undertaken with a profit motive, or (ii) whether the said activity has continued on sound and recognized business principles, and pursued with reasonable continuity. Clearly, therefore, in a situation in which an activity is not undertaken with a profit motive or on sound and recognized business principles, such an activity cannot be considered to be a business activity.
Army Welfare Placement Organization v. DIT(E) (2015) 168 TTJ 588 / 53 taxmann.com 442 / 38 ITR 1 / 68 SOT 535 (Delhi)(Trib.)

13 **S.2(22)(e) : Deemed dividend – Company was substantially carrying on business of lending money which was its main business – Loan to shareholder could not be treated as deemed dividend.**
Allowing the appeal the Court held that ; where Company was substantially carrying on business of lending money which was its main business, Loan to share holder could not be treated as deemed dividend. (AY. 2003-04)
Ravi Agarwal v. ACIT (2015) 235 Taxman 560 (All.)(HC)

14 **S.2(22)(e) : Deemed dividend – No accumulated profits – Addition cannot be made as deemed dividend. [Companies Act, S.78]**
Dismissing the appeal of revenue the Court held that; instant case it was never contention of revenue that any accumulated profit was lying with company instead company was having a reserve created from out of share premium. Since assessee-company created a reserve out of share premium, provisions of section 2(22)(e) would not be applicable as same would be governed by section 78 of Companies Act, 1956. (AY. 2001-02)
CIT v. Mahesh Chandra Mantri (2015) 234 Taxman 158 (Cal.)(HC)

15 **S.2(22)(e) : Deemed dividend – Lending money is substantial part of business – Amount could not be assessed as deemed dividend.**
During year under consideration, assessee received certain loans from company JMC Securities Pvt. Ltd. wherein he was holding more than 10 per cent shares. It was found

that lending of money was substantial part of business of company hence loan amount could not be taxed in assessee's hands as deemed dividend.(AY. 2006-07)
CIT v. Jayant H. Modi (2015) 232 Taxman 337 (Bom.)(HC)

S.2(22)(e) : Deemed dividend – Loan or advance – Recipient of loan, was not a shareholder of SIPL, provisions would not apply. 16
Assessee had received a sum by way of loan or advance from SIPL. As two shareholders of SIPL had a beneficial ownership of shares of assessee, Assessing Officer held that payment by way of loan or advance was a dividend under section 2(22)(e). Tribunal deleted the addition. On appeal by revenue, dismissing the appeal the Court held that, since recipient of loan, namely, assessee was not a shareholder of SIPL, provisions of section 2(22)(e) would not apply. (AY. 2006-07)
CIT v. N. S. N. Jewellers (P.) Ltd. (2015) 231 Taxman 488 (Bom.)(HC)

S.2(22)(e) : Deemed dividend – Advance in the course of business – Addition cannot be made as deemed dividend. 17
BDPL, a closely held company, advanced money to assessee who was holding 99 per cent shares of BDPL. According to assessee, in Karnataka, companies were not allowed to buy land which was of agricultural status and, therefore, funds were given by BDPL to procure land in name of directors and hold same in form of capital asset and then transfer back to company after obtaining conversion order. Whether since balance sheet and journal entries in books of account amply made it clear that funds were provided during course of business, advances made by BDPL to assessee would not fall within the definition of 'dividend' as contained in section 2(22)(e). (AY. 2002-03 to 2007-08)
Bagmane Constructions (P.) Ltd. v. CIT (2015) 119 DTR 49 / 277 CTR 338 / 231 Taxman 260 (Karn.)(HC)
CIT v. Chandra Developers (P) Ltd. (2015) 119 DTR 49 / 277 CTR 338 (Karn.)(HC)

S.2(22)(e) : Deemed dividend – Advance in the course of business – Business expediency – Not assessable as deemed dividend. 18
Assessee was a substantial shareholder in a company. Company received certain export orders but was not in a position to execute these orders as its manufacturing facility was situated in a remote area and was beset with labour problems and erratic supply of electricity. Company, therefore, entered into an agreement with assessee to install plant and machinery at premises of assessee to enable assessee to do job work for company. Assessee also received certain sum as advance from said company to do job work at interest rate below prevailing market rate. Tribunal found that advances were received by assessee in normal course of business as a matter of business expediency and, hence, said advance was not covered by section 2(22)(e). On appeal by revenue the Court held that finding of facts recorded by Tribunal could not be interfered with.
CIT v. Amrik Singh (2015) 231 Taxman 731 (P&H)(HC)
Editorial : SLP of revenue was dismissed, CIT v. Amrik Singh (2015) 234 Taxman 769 (SC)

19 **S.2(22)(e) : Deemed dividend – Mistake in ROC return – Deletion of addition was held to be justified.**

Assessee, a director of Frontier Cycles Pvt. Ltd. who received certain loan from said company. During relevant year, Assessing Officer downloaded annual return of Frontier Cycles Pvt. Ltd. from website of ROC and found that assessee was holding 38.8 per cent shares in said company. He thus treated amount of loan as deemed dividend. It was found from records that assessee had already gifted 30 per cent of its shareholding in Frontier Cycles Pvt. Ltd. to his wife and son in earlier assessment year and it was only on account of mistake on part of concerned employee of Frontier Cycles Pvt. Ltd. ROC could not give effect to share transfer agreement in annual returns. Tribunal held that addition could not be made as deemed dividend. High Court affirmed the view of Tribunal and held that impugned addition made by Assessing Officer was to be deleted. (AY. 2008-09)

CIT v. Paramjit Singh (2015) 231 Taxman 450 (P&H)(HC)

20 **S.2(22)(e) : Deemed dividend – Loan to shareholder by closely held company – Assessee owning 60% shares of company – Company possessing accumulated profits – Amounts taken as loan from company and payments also made to company – Assessing Officer directed to verify each debit entry and treat only excess as deemed dividend.**

Held, the assessee was admittedly a shareholder and director of KIPL. Therefore, any amount paid to the assessee by the company during the relevant year, less the amount repaid by the assessee in the same year, should be deemed to be construed as "dividend" for all purposes. However, the Assessing Officer had taken the entire amount of ₹ 76,86,829 received by the assessee from the company as dividend, while computing the income but had lost sight of the payments made. In such circumstances, the Commissioner (Appeals) had rightly come to the conclusion that the position as regards each debit would have to be individually considered because it may or may not be a loan. The Assessing Officer, was, therefore, directed to verify each debit entry on the aforesaid line and treat only the excess amount as deemed dividend under section 2(22)(e) of the Act. Such a direction issued by the Commissioner (Appeals), as upheld by the Tribunal, was in consonance with the provisions of section 2(22)(e) of the Act and only those amounts, which were reflected in the debit side of the books of account of the company falling under the definition of loans and advances with regard to the shareholder, in the relevant year, would be liable to be taken as deemed dividend. (AY. 2009-10)

Sunil Kapoor v. CIT (2015) 375 ITR 1 / 235 Taxman 279 (Mad.)(HC)

21 **S.2(22)(e) : Deemed dividend – Loan to shareholder by closely held company – Assessee managing director of company and also partner of firm – Firm acting as agent of company – Amount advanced by firm to assessee – Firm had independent existence – No evidence that funds of company were used for advance – Amount not assessable as deemed dividend.**

Held, dismissing the appeal, that the Tribunal held that there was no material on record to show that the funds of the company were utilised by the firm to advance the loan

to the assessee. The firm had advanced ₹ 1,88,96,202 out of the total available funds of more than ₹ 60 crores; which belonged to different parties though available with it, i.e. the firm. The factual findings did not disclose any error or infirmity. The contention that the two transactions one from S to the firm and the second from the firm to the assessee should be treated as one, was not based on any valid justification. The firm had a legal existence separate and independent of S. It carried on significant commercial activity and collected substantial amounts (crores of rupees). Therefore, the finding that the two transactions, i.e. one of advancing loan (by the firm to the assessee) and the other of the use of funds of S by the firm being in reality one transaction was without any basis. The presumption was drawn without any material to support the case of the Revenue that funds of the company were utilised to advance the loan. Neither did S give him the money nor did it advance the amount to the firm. The firm had an independent existence and it had over ₹ 60 crores in its account. It was also a matter of record that the firm had over 290 branches or units and collections by it exceeded on an average ₹ 10 crores per month. Therefore, it could not be legitimately held that the amount retained by the firm was for the assessee's benefit. The amount was not assessable as deemed dividend under section 2(22)(e). (AY. 1992-93)

CIT v. Subrata Roy (2015) 375 ITR 207 / 278 CTR 176 / 231 Taxman 42 / 119 DTR 113 (Delhi)(HC)

Editorial : SLP of revenue was dismissed, CIT v. Subrata Roy (2016) 236 Taxman 396 (SC)

S.2(22)(e) : Deemed dividend – Not a shareholder – Individual borrowing amounts from assessee – Not a deemed dividend. 22

HK, a shareholder in PD, borrowed amounts from the assessee-company. The Assessing Officer brought the amounts to tax under section 2(22)(e) as deemed dividend on the ground that HK had more than 10 per cent stake in the assessee-company. The assessee contended before the Commissioner (Appeals) that HK was a shareholder in PD and could not be considered a shareholder in the assessee-company, that the individual could not be considered even a beneficial shareholder of the assessee. Both the contentions were accepted by the Commissioner (Appeals) and the Tribunal.

Held, dismissing the appeals, (i) that in the absence of any finding that HK owned shares in terms of section 2(22)(e) or was a beneficial owner in terms of such provision-on both counts-the findings being adverse to the revenue, no question of law arose. (AY. 1999-2000, 2000-01, 2001-02)

CIT (TDS) v. C. J. International Hotels P. Ltd. (2015) 372 ITR 684 / 231 Taxman 818 / (2016) 285 CTR 43 (Delhi)(HC)

S.2(22)(e) : Deemed dividend – Not a shareholder – Not liable to tax. 23

Assessee was not liable to tax unless it was a shareholder. AY. 2007-08)

CIT v. Karnataka Turned Components (P.) Ltd. (2015) 229 Taxman 465 (Karn.)(HC)

S.2(22)(e) : Deemed dividend – Current account – Subsidiary company – In the course of business – Deeming provision is not attracted. 24

When both the Assessee Company and its subsidiary company maintain current accounts and the subsidiary company advances on behalf of Assessee Company for the

purchase of raw materials resulting into credit lying with the latter company and as these transactions were made during the course of business, the deeming provision u/s. 2(22)(e) is not attracted. (AY. 1993-94)
CIT v. India Fruits Ltd. (2015) 274 CTR 67 / 228 Taxman 243 (Mag.) / 114 DTR 109 (AP) (HC)

25 **S.2(22)(e) : Deemed dividend – No flow of fund or any benefit – Provision would not be applicable.**
Assessee was director in company SEPL, and partner in firm 'SE'. One 'M', who was employee of SEPL, was also proprietor of PSC. SEPL gave loan or advance to PSC on 24-10-2005. On that day itself PSC gave a loan of said amount to SE which gave back money to SEPL on that day itself. Tribunal concluded that section 2(22)(e) was not attracted inasmuch as transaction was a circuitous and money which initially belonged to SEPL was returned to same company on very same day through PSC and there was no flow of fund or any benefit from 'SEPL' to 'SE' or its partner, assessee. On facts finding of Tribunal could not be said to be perverse and section 2(22)(e) would not be applicable. (AY. 2006-07)
CIT v. Pravin Bhimshi Chheda (2015) 228 Taxman 340 (Mag.)(Bom.)(HC)

26 **S.2(22)(e) : Deemed dividend – Security deposit – Business transaction – Firm was not a shareholder – Deposit could not be treated as deemed dividend.**
Assessee-firm entered into an agreement with its sister concern to supply its generator sets against a floating security deposit by said concern. In turn, sister concern would supply electricity to assessee at concessional rate. AO treated security deposit as deemed dividend in hands of assessee. Since deposit made by sister concern was a business transaction arising in normal course of business between two concerns and assessee. Firm was not a shareholder in said company, said deposit could not be treated as deemed dividend. (AY. 2006-07)
CIT v. Atul Engineering Udyog (2015) 228 Taxman 295 / 125 DTR 219 (All.)(HC)

27 **S.2(22)(e) : Deemed dividend – Trade advance – Not a registered or beneficial shareholder – Not liable to be assessed as deemed dividend.**
Assessee company received a sum from another company and on same date, assessee paid certain amount to one 'TR' who was director of both companies. AO found that assessee showed received amount as trade advance and amount so paid to 'TR' was utilised by him for repayment of housing loan, accordingly AO held that 'trade advance' was nothing but loan received from company and he made addition under section 2(22)(c). On appeal Court held that the assessee company was not a registered or beneficial shareholder, therefore assessee was not liable to pay tax. (AY. 2005-06)
CIT v. Printwave Services (P.) Ltd. (2015) 373 ITR 665 / 228 Taxman 378 (Mag.)(Mad.)(HC)

S.2(22)(e) : Deemed dividend – Assessee holding more than 10% of equity capital of two private limited companies – Lending of money not part of business of companies nor substantial part of business – No organised course of activity involving dealings with anyone else except for assessee – Loan to assessee – Assessable as deemed dividend. 28

The Legislature has not used the expression "major part of the business" but has designedly used the expression "substantial part of the business of the company". The expression "business" contemplates an organised course of activity which is actually continued or contemplated to be continued with a profit motive and not for sport or pleasure. In each case, the true test is whether the lending of money constituted a substantial part of the business of the company. Within the purview of the exclusionary provision, the advance or loan must be, firstly, to a shareholder; secondly, the payment must be in the ordinary course of business; and, thirdly, the lending of money must constitute a substantial part of the business of the company. What constitutes a substantial part of business is a question of fact.

The assessee held more than 10% of the shareholding of two private limited companies. He received loans and advances from the two companies. Held, neither of the companies, admittedly, lent any money to any entity, save and except to the assessee. The lending of money was not a part of the business of the company, nor for that matter, could it constitute a substantial part of the business. There was no organised course of activity involving dealings with anyone else, save and except for the assessee. The assessee was, therefore, unable to establish that the exclusion was attracted.(AY. 2007-08)

Shashi Pal Agarwal v. CIT (2015) 370 ITR 720 / 229 Taxman 307 (All.)(HC)

S.2(22)(e) : Deemed dividend – Not a shareholder – Provision has to be construed strictly. If assessee is not a shareholder of lending co., S. 2(22)(e) does not apply even if funds are ultimately paid by Co. in which assessee is a shareholder. 29

The assessee received loan from one NS Fincon Pvt. Ltd. The Revenue seeks to tax this loan as deemed dividend. The case of the Revenue was that one Lafin Financial Services Pvt. Limited had advanced money to NS Fincon Pvt. Ltd. who in turn advanced money to the Assessee. The Assessee a 50% shareholder of Lafin Financial Services Pvt. Limited and in view thereof, loan advanced by NS Fincon Pvt. Ltd. to the Assessee is to be treated as a dividend in the hands of the Assessee. It is the admitted position that the Assessee is not a shareholder in NS Fincon Pvt. Ltd. The AO brought to tax the amount of loan received by the Assessee from NS Fincon Pvt. Ltd. as deemed dividend under Section 2(22)(e) of the Act. This was deleted by the CIT(A) and the Tribunal. On appeal by the department to the High Court HELD dismissing the appeal:

The submission on behalf of the Revenue made before us is that one has to look at the substance of the transaction and that if one looks at the substance, then the Assessee would be chargeable to tax. This is not acceptable as fiscal status have to be interpreted strictly. Section 2(22)(e) of the Act creates a fiction by bringing to tax an amount as dividend when the amount so received is otherwise than dividend. On a strict interpretation of Section 2(22)(e) of the Act, unless the Assessee is the shareholder of the company lending him money, no occasion to apply it can arise (AY. 2007-08)

CIT v. Jignesh P. Shah (2015) 372 ITR 392 / 274 CTR 198 / 229 Taxman 302 / 114 DTR 249 (Bom.)(HC)

30 **S.2(22)(e) : Deemed dividend – Loans and advances to shareholder – Being a registered shareholder is a condition precedent for invoking section**
AO treated the loans and advances as deemed dividend. Tribunal held that since the assessee itself was not a registered shareholder of company from loan amount was received such amount could not be taxed in hands of assessee as deemed dividend. (AY. 2006-07)
ITO v. Biotech Ophthalmic (P.) Ltd. (2015) 173 TTJ 625 / (2016) 156 ITD 131 (Ahd.)(Trib.)

31 **S.2(22)(e) : Deemed dividend – Loans advances – Not a shareholder cannot be assessed as deemed dividend.**
Assessee, an individual, receives advance from a company but he is not a shareholder in said company, said amount cannot be assessed as deemed dividend in hands of assessee. (AY. 2008-09)
Dy. CIT v. Rajeev Chandrashekar (2015) 68 SOT 312 (URO)(Bang.)(Trib.)

32 **S.2(22)(e) : Deemed dividend – Reimbursement by company to shareholder of payments made for business purposes cannot be treated as deemed dividend – Matter remanded.**
Dismissing the appeal of revenue the Tribunal held that ; the Commissioner (Appeals) was right in holding that the payments made by the assessee on behalf of the company for its business purposes and the reimbursement by the company could not be treated as deemed dividend under section 2(22)(e) of the Act. Though some of the payments made using his credit card were towards his personal expenditure such payments for personal expenditure, if reimbursed by the company, were to be treated as loans or advances under section 2(22)(e) of the Act. The Assessing Officer could treat only the personal expenditure reimbursed by the company to the assessee as deemed dividend under section 2(22)(e) of the Act. Matter remanded. (AY. 2009-10)
Dy. CIT v. Tobby Simon (2015) 155 ITD 609/ 40 ITR 250 (Bang.)(Trib.)

33 **S.2(22)(e) : Deemed dividend – Loans or advances to shareholder – Substantial interest – Ownership of sharesholder alone to be considered and not the relatives. [S.2(32)]**
Dismissing the appeal of revenue the Tribunal held that in order to determine substantial interest of a shareholder it is ownership of shareholder alone in company to which loan /advance has been made by assessee company and not his or her relative or family members which determine factor. (AY. 2009-10)
ACIT v. Maharishi Ayurveda Products (P) Ltd. (2015) 68 SOT 332 (URO) (Delhi)(Trib.)

34 **S.2(22)(e) : Deemed dividend – Not a shareholder of company – Deemed dividend not to be assessed in hands of assessee.**
The assessee was not a shareholder of hence, the amount could not be taxed in the hands of the assessee. (AY. 2005-06)
IAG Promoters and Developers P. Ltd. v. ACIT (2015) 41 ITR 1 / 70 SOT 459 (Delhi)(Trib.)

35 **S.2(22)(e) : Deemed dividend – Loans and advances given for business transaction between the parties does not fall within the definition of "deemed dividend".**
Payments made by a company through a running account in discharge of its existing debts or against purchases or for availing services, such payments made in the ordinary

course of business carried on by both the parties could not be treated as deemed dividend for the purpose of Section 2(22)(e). The deeming provisions of law contained in Section 2(22)(e) apply in such cases where the company pays to a related person an amount as advance or a loan as such and not in any other context. The law does not prohibit business transactions between related concerns, and, therefore, payments made in the ordinary course of business cannot be treated as loans and advances. (AY. 2005-06)

Ishwar Chand Jindal v. ACIT (2015) 171 TTJ 436 / 70 SOT 109 (Delhi)(Trib.)

S.2(24) : Income – Editor of magazine – Award received from third person for excellence in journalism – Not assessable as income. [S.4] 36

Held, the amount of ₹ 1 lakh received by the assessee as an award from B. D. Goenka Trust for excellence in journalism being purely in the nature of a testimonial would be a capital receipt. The *causa causans* in the present case was not directly relatable to the carrying on of vocation as a journalist or as a publisher. It was directly connected and linked with the personal achievements and personality of the person, i.e. the assessee. Further, the payment in this case was not of a periodical or repetitive nature. The payment was also not made by an employer; or by a person associated with the "vocation" being carried on by the assessee; or by a client of his. The prize money had been paid by a third person, who was not concerned with the activities or associated with the "vocation" of the assessee. It being a payment of a personal nature, it should be treated as capital payment, being akin to or like a gift, which did not have any element of *quid pro quo*. The prize money was paid to the assessee on a voluntary basis and was purely *gratis*. The amount would be a capital receipt and, hence, not income taxable.(AY.1991-92)

Aroon Purie v. CIT (2015) 375 ITR 188 / 231 Taxman 349 / 277 CTR 1 / 118 DTR 105 (Delhi)(HC)

S.2(28A) : Interest – Deduction at source – Additional compensation paid to the purchaser of flat on cancellation of booking of flats is not interest – Not liable to deduct tax at source. [Ss.194A, 201] 37

Purchaser has made payment while booking the flat, however subsequently dropping out of agreement. Builder has sold the flat to third person at higher rate and refunded the amount paid by the purchaser and part of excess price received. Tribunal held that the excess price was interest and liable to deduct tax at source. On appeal, allowing the appeal the Court held that additional compensation paid to the purchaser of flat on cancellation of booking of flats is not interest hence not liable to deduct tax at source. (AY.2012-13, 2013-14)

Beacon Projects P. Ltd v. CIT (2015) 377 ITR 237 / 234 Taxman 706 (Ker.)(HC)

Editorial: Order of Tribunal in ITO v. Beacon Projects (P) Ltd. (2014) 49 Taxmann. com 173 (Cohin)(Trib.) is reversed.

S.2(28A) : Interest – Capital gains – Ruling of AAR holding that the transaction was sham was set aside – Gain arising on subsequent sale of CCDs was held to be exempt from tax in terms of DTAA – DTAA-India-Mauritius. [S. 45, Article 11] 38

'Vatika', an Indian company, was engaged in real estate business. Vatika promoted a subsidiary company 'JV' for development of land owned by it. Assessee, a Mauritius

based company, agreed to acquire 35 per cent ownership interest in JV by subscribing to its equity shares and Compulsorily Convertible Debentures (CCDs). In terms of Shareholder's Agreement (SHA), Vatika exercised a call option and purchased a part of equity shares and CCDs from assessee. AAR opined that transaction between assessee and Vatika was a sham transaction and was essentially a transaction of loan to Vatika which had been camouflaged as an investment in shares and CCDs of JV company. It was thus concluded that gains arising on sale of CCDs was taxable as interest under section 2(28A). On writ by assessee the Court held that, since terms of arrangements between Vatika and assessee revealed that JV was a genuine commercial venture, in which both partners had management rights, there was no reason to ignore legal nature of instrument of CCD or to lift corporate veil to treat JV and Vatika as a single entity, therefore, impugned ruling of AAR holding gain to be taxable, was to be set aside.
Zaheer Mauritius v. DIT (2014) 270 CTR 244 / 230 Taxman 342 (Delhi)(HC)

39 **S.2(28A) : Interest – Usage charges – Liable to deduct tax at source. [Ss.10(15), 40(a)(i), 195]**
Assessee company was manufacturing wooden furniture's and trading of timber. It paid usance charges to non-resident on import purchases. The AO held that usance charges paid to the non-resident was the income arising to the non-resident reckoning within the meaning of provisions of section 5(2)(b), read with section 9(1)(v)(c)(b) and therefore, the assessee was liable to deduct TDS in accordance with the provisions of section 195. Accordingly, he disallowed same under section 40(a)(i).
On appeal, the CIT(A) held that the usance charges paid by the assessee were nothing but increased purchase price paid to the foreign sellers. Further, he held that TDS was not deductible on usance charges, as the same was not in the nature of interest and the recipient was a foreigner, whose income was not taxable in India at all.
On appeal by revenue it was contended that in view of Explanation (2) to section 10(15)(iv)(c) the usance charge in question was to be considered as deemed interest. Tribunal held that said charges would be considered as 'interest' and liable to TDS. (AY. 2007-08)
ACIT v. Bhavan Enterprises (2015) 152 ITD 339 (Panaji)(Trib.)

40 **S.2(29A) : Long-term capital asset – Capital gains – Agreement with builder – Purchase of undivided share and construction – Date of allotment of undivided share in land was to be adopted as date of acquisition for computing capital gain instead of date of sale deed. [Ss. 2(42A) 45]**
The assessee had entered into an agreement dated 22-2-2005 for purchase of undivided share of land as well as for construction of home by a project promoted by VHPL. Thereafter, the assessee sold the entire unit by a sale deed dated 10-4-2008 and claimed the difference between the cost of acquisition and sale consideration as long term capital gains. AO took a view that the undivided share of land was registered on 4-8-2005 and since the property was purchased in the month of August, 2005 and sold in April, 2008, the capital gains arising from sale would be assessed as short term capital gains only and accordingly, denied benefit of section 2(29A) made addition. Appeal claim of assessee was allowed. On appeal by revenue the Court held that on the basis of the admitted facts, the Tribunal placed reliance on *Mrs. Madhu Kaul v. CIT [2014] 363 ITR*

54 (P&H)(HC) where an identical issue arose as to whether the date of capital gains should be reckoned from the date of allotment or it should be reckoned from the date of actual sale, which is subsequent to the date of allotment. In effect, the High Court held that the allottee gets the title to the property on issuance of allotment letter and the payment in instalments is only a consequential act upon which delivery of possession to the property flows. Circular No. 471 dated 15-10-1986 speaks about the right of an allottee over a property that has been allotted. The other issues like payment of balance installments, delivery of possession, which takes place after the allotment only, relates back to the original allotment, in the present case, agreement. Therefore, the principle on which long term capital gains should be determined has been clearly indicated in the circular. Appeal of revenue was dismissed. (AY.2009-10)
CIT v. S.R. Jeyashankar (2015) 373 ITR 120 / 228 Taxman 289 (Mad.)(HC)

S.2(31) : Association of persons – Finding that joint venture formed only to secure contract – Each partner's task distinctly outlined – Entire work split between two partners – Partners completing task through sub-contracts – Partners responsible for satisfaction of contract – Joint venture not to be treated as association of persons liable to tax. [S.4] 41
Held, dismissing the appeals, that the concurrent findings were that the joint venture was formed only to secure the contract, in terms of which the scope of each joint venture partner's task was distinctly outlined. Further, the entire work was split between the two joint venture partners, they completed the task through sub-contracts and were responsible for the satisfaction of the National Highways Authority of India. Therefore, the Tribunal did not fall into error of law, in holding that the joint venture was not an association of persons liable to be taxed on that basis. (AY. 2009-10)
CIT v. Oriental Structural Engineers and KMC Construction P. Ltd.-JV (2015) 374 ITR 35 / 231 Taxman 823 (Delhi)(HC)
CIT v. Oriental Structural Engineers P. Ltd. and Common India Ltd.-JV (2015) 374 ITR 35/ 231 Taxman 823 (Delhi)(HC)

S.2(42A) : Short term capital asset – Sale of shares held under ESOP on the date of exercise of option gives right to short term capital gain. [S. 2(29B), 2(42B), 45] 42
Tribunal held that; Rights to purchase shares under ESOP is a capital asset and he transferred said right within 36 months of offer, period of holding of right in question being less than 36 months gain arising from transfer of said right was to be assessed as short term capital gain. (AY. 2005-06)
Kamlesh Bahedia v. ACIT (2015) 151 ITD 495 / 169 TTJ 68 (Delhi)(Trib.)

S.2(42B) : Short term capital gain – Capital asset – Right in the agreement – Transferred within 36 months – Assessable as short term capital gains. [S. 2(14), 2(29B), 45] 43
Right in the agreement was transferred within 36 months hence the gain is assessable as short term capital gains. (AY. 2005-06)
Prakash Shantilal Parekh v. ITO (2015) 37 ITR 119 (Mum.)(Trib.)

44 **S.2(47) : Transfer – Shares – Explanation 2 to section 2(47) – Retrospective amendment under Finance Act, 2012 – Making provision of one of prospective nominees for holding shares in group companies to be acquired by holding company under call option by rewriting framework agreement – Does not amount to 'transfer' in favour of prospective nominee until actual nomination is made.**

The Hon'ble Appellate Tribunal held that as per Explanation 2 to section 2(47) inserted by retrospective amendment by Finance Act, 2012, making provision of one of prospective nominees for holding shares in group companies to be acquired by holding company under call option by rewriting framework agreement does not amount to 'transfer' in favour of prospective nominee until actual nomination is made. (AY. 2008-09)

Vodafone India Services (P) Ltd. v. ACIT (2015) 168 TTJ 1 / 68 SOT 151 (URO) (Mum.)(Trib.)

45 **S.2(47)(v) : Transfer – Development right – Possession of land was given – Capital gains – Held to be transfer. [S. 45]**

Assessee entered into development agreement with builder and developer for transfer of development rights in respect of land. Developer took possession of that land and started development work. Said transaction was to be treated as transfer of right in property covered under section 2(47)(v).

Bertha T. Almeida v. ITO (2015) 229 Taxman 159 (Bom.)(HC)

46 **S.2(47)(v) : Transfer – Capital gains – Development agreement – Consideration of 50% constructed area – Liable to capital gain tax. [S.45]**

The assessee along with his brother were the owner and in possession of land. They entered into a joint development agreement with 'APL'. The assessee and his brother had given an irrevocable licence to the developer to enter and develop the property. They have also executed a power of attorney in favour of the developer to enable the developer to gets sanction site plans, licence and other approvals for the development of entire scheduled property. The developer was authorized to avail loans and financial facilities from the financial institutions.

The AO was of the view that the assessees had surrendered their rights to the extent of 50 per cent in the land in lieu of 50 per cent constructed area, whose cost was to be borne by the builder. Thus, in the opinion of the AO, transfer of the land has taken place within the meaning of section 2(47)(v) and the assessees were assessable for long term capital gain. The CIT (A) on an analysis of the agreement had held that no transfer of the asset in the case of the assessee as on the date of entering into joint development and executing the power of attorney taken place. Therefore, capital gain was not assessable. On appeal by revenue the Tribunal upheld the order of AO. (AY. 2007-08)

ITO v. N.S. Nagaraj (2015) 152 ITD 262 / 118 DTR 163 / 170 TTJ 599 (Bang.)(Trib.)

47 **S.2(47)(v) : Transfer – Capital gains – Conversion of capital asset to stock in trade – Accrual – Stock in trade – Land ceases to be a capital asset on date of application for conversion into N. A. land. Pursuant to amendment to S. 53A of Transfer of Property Act – Non-registered development agreement does not result in transfer u/s. 2(47)(v) [S.(2(14) 2(47)(v),(vi), 45, 48, Transfer of Property Act, 1882, S.53A]**

(i) The land ceased to be a capital asset from the date when assessee filed application before the Bangalore Development Authority for conversion of land from

'agriculture' to non-agriculture. The intent of the assessee to hold the land as 'stock-in-trade' is further established by the fact that in the records of Revenue Department land was registered as 'N.A. Land' without which no residential project could be carried thereon. The approval of plans to construct residential villas by BDA further proves the intention of the appellants to treat the land as commercial asset. Thus various steps taken by the assessee are very much part of business activities involved in real estate development.

(ii) Amendment made in section 53A in 2001 is also relevant wherein an additional condition for registration of the written agreement was introduced as a result of which if the agreement between transferor and transferee is not registered, the transferor can dispossess the transferee from the property. Simultaneously, a consequential amendment was also been made in The Registration Act, 1908 to provide that unless the documents containing contracts to transfer any immovable property for the purpose of section 53A of the TOPA is registered, it shall not have effect for the purposes of section 53A of the TOPA. A perusal of the Section reveals that registration of document is a *sine qua non* for applicability of section 53A of TOPA which entitles the transferee to remain in possession of the property.

(iii) In the instant case, Development Agreement was executed on stamp paper of ₹ 100/- and the same was not registered, hence, provisions of section 2(47)(v) of the Act are not applicable since the conditions stipulated in section 53A of TOPA are fulfilled.

(iv) With respect to the decision of the Bombay High Court in the case of *Chaturbhuj Dwarkadas Kapadia v. CIT (2003) 260 ITR 491 (Bom)(HC)*, we found that the said decision is not applicable because the said decision was in the context of transfer of capital asset. Although the said decision was rendered in February 2003 the assessment year under its consideration was A.Y. 1996-97. Further for the purpose of assessment of capital gains in the said case, all the conditions specified in Section 53A of the TOPA were satisfied. Hence, the judgment was delivered *qua* the law prevailing in the year of the transaction. Accordingly, the Hon'ble Bombay High Court has discussed all the conditions required to be complied under Section 53A of the TOPA, other than the condition of registration, since the law provided only five conditions at the time. Thus the case of Chaturbhuj Dwarkadas Kapadia (supra) is of no help to Revenue to bring the transaction within the purview of section 53A of TOPA. As provisions of section 53A was amended in 2001 by which additional condition of registration of the written agreement was introduced and since in the instant case the agreement was not registered, the decision rendered by Hon'ble Bombay High Court in the case of Chaturbhuj Dwarkadas Kapadia (2003) 260 ITR 491 with respect to relevant provisions of section 53A applicable in A.Y. 1996-97 will not be applicable to the facts of instant case. We can therefore safely conclude that the conditions stipulated in section 53A of TOPA are not satisfied in the case of assessee as discussed above, there is no transfer as per the provisions of section 2(47) of the Act. (AY. 2008-09)

Fardeen Khan v. ACIT (2015) 117 DTR 130 / 169 TTJ 398 / 40 ITR 487 / 69 SOT 109 (URO)(Mum.)(Trib.)

Section 4 : Charge of income-tax

48 **S.4 : Charge of income-tax – Accrual – Method of accounting – Interest accrues in assessment year relevant to accounting year in which allotment made. [S. 145, Companies Act, 1956, S. 73]**

The assessee opened a public issue of shares on January 29, 1992. The date of closure of this issue was February 3, 1992. Moneys from the applicants to the share capital were deposited in the bank in 46 days in accordance with the requirement under law. The shares were ultimately allotted in June, 1992. Application moneys were returned to those who were not allotted the shares, with interest. On the moneys collected from intending subscribers kept in the bank for 46 days the assessee earned interest of ₹ 1,83,31,363. Since the money was received between January 29, 1992 and February 3, 1992, the Assessing Officer taxed the interest in the assessment year 1992-93 rejecting the assessee's claim that since the shares were allotted only in June, 1992, and according to section 73 of the Companies Act, 1956, the assessee was required to keep the money in the bank, interest accrued to the assessee only on the allotment of the shares as before that the amount was kept in trust by the assessee and belonged to the applicants who wanted to subscribe for the shares. The High Court accepted the assessee's contention holding that it was only after the allotment process was completed and all moneys payable to those to whom moneys were refundable were refunded together with interest wherever interest became payable, that the balance remaining from and out of the interest earned on the application money could be regarded as belonging to the company and that the application money as also interest earned thereon would remain within a trust in favour of the general body of applicants until the process was completed in all respects. On appeal by the revenue dismissing the appeal the Court held that; the assessee had shown the interest in its income-tax returns and paid the tax thereupon. Thus, there was no error in the order passed by the High Court holding that the interest income had accrued only in the assessment year 1993-94 and was taxable in that year only and not in the assessment year 1992-93.(AY. 1993-94)

CIT v. Henkel Spic India Ltd. (2015) 379 ITR 322 / (2016) 236 Taxman 390 / 282 CTR 344 (SC)

Editorial : Decision in CIT v. Henkel Spic India Ltd. [2004] 266 ITR 490 (Mad) is affirmed.

49 **S.4 : Charge of income-tax – Capital or revenue – Subsidy or incentive from Government – Matter remanded to CIT(A).**

Assessee had received incentive under the incentive scheme of the Government for payment to sugar cane growers. Matter is remanded to the CIT(A) and the assessee is entitled to raise the contention before the CIT(A) that the issue is covered in his favour by the decision in *CIT v. Ponni Sugars & Chemicals Ltd. (2008) 306 ITR 392 (SC).* (AY. 1993-94)

Dy. CIT v. Budhewal Co-operative Sugar Mills Ltd. (2015) 373 ITR 35 / 278 CTR 103 / 233 Taxman 509 (SC)

S.4 : Charge of income-tax – Scope of total income – Enhanced award by way of interim order – Can be taxed in the year in which final decision of High Court. [S. 5] 50
Dismissing the appeal of revenue the Court held that ; where enhanced award pronounced by arbitrator had not attained finality, amounts received by assessee by way of interim order of High Court could not be taxed in year of receipt but in year in which final decision of High Court would come. (AY. 2002-03)
CIT v. L. Sambashiva Reddy (2015) 234 Taxman 775 (Karn.)(HC)

S.4 : Charge of income-tax – Mercantile system of accounting – Accrual of income was deferred prior to closing of accounting year and as right to receive fee was suspended, addition of income was held to be not justified. [S. 145] 51
Dismissing the appeal of revenue the Court held that ; principle of law which emerges is if it is found that the assessee had given up the amount even before the accounts were made up, the mere fact that the accounts of the assessee are maintained on mercantile basis cannot lead to a conclusion that the amount had accrued in the relevant assessment year. Hence, the actual or real accrual of income is the point in issue. In the case in hand, it appears from records that in its best interest the assessee had agreed for deferment of fees. Accordingly the original agreement was modified which was supported by a resolution of the Board. The genuineness of such modification is not in question as the Financial Institution was a party to such modification. Therefore, as the accrual of income was deferred prior to the closing of the accounting year, which as evident from facts was for business expediency, and as the right to receive the fee was suspended, the Tribunal was justified in deleting the addition. (AY. 1989-90 to 1991-92)
CIT v. Nicco Corporation Ltd. (2015) 234 Taxman 671 / (2016) 382 ITR 490 (Cal.)(HC)

S.4 : Charge of income-tax – Subsidy from holding company – Unutilised subsidy not income of assessee in the year of receipt. 52
Dismissing the appeal of revenue the Court held that subsidy received by assessee from its holding company against specific obligation to incur expenditure on specific activities, therefore unutilised subsidy not income of assessee in the year of receipt. (AY. 2006-07, 2007-08, 2008-09)
CIT v. Cannon India P. Ltd. (2015) 377 ITR 514 / 280 CTR 597 / 126 DTR 313 / (2016) 66 taxmann.com 88 (Delhi) (HC)

S.4 : Charge of income-tax – Transferring part of its manufacturing unit to its sister concern and as consideration allotting shares of agreed value – Transaction at book value – No sum over and above cost of such assets realised – No income arises for purpose of tax. 53
Dismissing the appeal of revenue the Court held that what escaped the attention of the Assessing Officer was that at the stage of valuation of the assets transferred itself, the book value of the fixed assets transferred was taken into consideration. Additionally, the entire net current assets too were valued and transferred. It was the aggregate of the book value and the net current value which constituted the sale price of ₹ 2,02,40,560 towards which shares were in fact allotted. Given these facts, the Assessing Officer assumed that the other liabilities and assets too had been transferred

which was an inaccurate assumption. The Commissioner (Appeals) too ignored this important feature. Given these factors, no fault could be found with the Tribunal's conclusion that regardless of how the assessee treated the transaction, i.e., either reflecting in the profit and loss account or omitting to do so, in sum, no gain or income arose which could be brought to tax. (AY. 1993-94)
CIT v. DLF Universal Ltd. (2015) 378 ITR 197 (Delhi)(HC)

54 **S.4 : Charge of income-tax – Notional interest – Advances not out of borrowed funds – Such advances accepted in earlier years – Rule of consistency – No addition could be made on account of notional interest.**
Dismissing the appeal of revenue's the Court held that such advances were in earlier years and no disallowance was made, hence addition on account of notional advances was held to be not justified.(AY. 1993-94)
CIT v. DLF Universal Ltd. (2015) 378 ITR 197 (Delhi)(HC)

55 **S.4 : Charge of income-tax – Capital or revenue – Excise duty paid in respect of materials prior to date of commencement – Refund of excise duty would go to ultimately reduce cost of project – Capital receipt. [S.28(iiic), 145]**
Dismissing the appeal of revenue the Court held that; the refund of excise duty related to the cost of acquisition of capital assets which formed part of the overall project cost incurred in the pre-commissioning phase of the project. The duty drawback would, therefore, to that extent reduce the project cost and, therefore, could not, in the assessment year 2009-10 be treated as business income.(AY. 2009-10)
CIT v. Maithon Power Ltd. (2015) 376 ITR 414 / 63 taxmann.com 158 (Delhi)(HC)

56 **S.4 : Charge of income-tax – Best judgment assessment – Issue of double addition was rejected by the Court. [S.144]**
The submission of double taxation was rejected by the Tribunal. On reference the Court held that, amount of income, which actually belonged to assessee, had gone into coffers of Export firm and its assessment in hands of Export firm was not objected to, assessee could not be permitted to urge that since Export firm had already paid tax on that income same could not be assessed in its hands again. (AY. 1950-51 to 1958-59)
R.B. Shreeram Durgaprasad (P.) Ltd. v. CIT (2015) 233 Taxman 209 / 126 DTR 307 (Bom.) (HC)

57 **S.4 : Charge of income-tax – Mutuality – Premium from outgoing members – The premium amount received by Society on transfer of four plots was not liable to tax as the said amount was to be utilised for the benefit of members.**
The assessee-society had given its plots on lease to its members for the purpose of constructing residential units. During the relevant year, the society collected premium, on transfer of some plots from the outgoing members as per the Bye-Laws of the society and claimed such amount as capital receipt. The Assessing Officer held that the assessee was not a co-operative society but an association of persons engaged in the business and accordingly, added premium amount to the income of the assessee.
However, all the three following tests of mutuality laid down since the decision of Privy Council in case of English & Scottish Joint Co-operative Wholesale Society Ltd. which

were reiterated, highlighted and refined in the decision in case of *Bangalore Club v. CIT [2013] 350 ITR 509 (SC))* stands satisfied in instant case:
(1) The identity of the contributors to the fund and the recipients from the fund, (2) The treatment of the company, though incorporated as a mere entity for the convenience of the members and policy holders, in other words, as an instrument obedient to their mandate and (3) The impossibility that contributors should derive profits from contributions made by themselves to a fund which could only be expended or returned to themselves.
Further, it was found from the records that these funds were to be expended for common amenities or for general benefit of members of society, or to be distributed amongst members in form of dividend or lease rent waiver, it could not be regarded as 'taxable income' in hands of assessee. (AY. 1986-87)
CIT v. Prabhukunj Co-op. Housing Society Ltd. (2015) 377 ITR 13 / 124 DTR 233 / 232 Taxman 517 (FB)(Guj.)(HC)

S.4 : Charge of income-tax – Interest on fixed deposit – Income from other sources – Nodal agency – Interest capitalised – Interest cannot be assessed as income of the assessee. [S. 56] 58
Assessee acted as a nodal agency for implementation of a scheme and there was no profit motive as entire fund entrusted and interest accrued from deposits had to be utilised only for purposes of scheme. Interest cannot be assessed as income of the assessee. Interest was capitalised. (AY. 2008-09)
CIT v. Karnataka State Agricultural Produce Processing & Export Corporation Ltd. (2015) 377 ITR 496 / 231 Taxman 831 / 280 CTR 590 (Karn.)(HC)

S.4 : Charge of income-tax – Non-resident – Indian permanent establishment of foreign bank – Interest received from head office and other overseas branches – Not chargeable to tax – DTAA – India-Netherland [S.90, Article 11(2)] 59
Tribunal restored the matter the issue of rate at which interest to be charged to tax on income-tax refund received in the light of the Indo-France DTAA and the decision of the Special Bench in *Asst. CIT v. Clough Engineering Ltd. (2011) 9 Trib. 618 / 130 ITD 137 (SB)(Delhi)(Trib)*. The Grievance of the revenue is with the impugned order following the decision of the Special Bench in Clough Engineering Ltd (supra). The Court observed that the decision of Special Bench had been followed in ITA No. 183/ Mum/2010, DHL *Operations B.V. Netherlands v. Dy. CIT*. The issue before the Tribunal was the rate of tax on which income tax refund is to be taxed i.e. on the basis of article of the DTAA in the above case concluded that interest on income tax refund is not effectively connected with the permanent establishment either on asset test or activity test. Therefore taxable under Article 11(2) of the Indo-Netherland s tax treaty. The revenue carried the aforsesaid decision of DHL Operations (supra) in appeal to this court, being Income tax Appeal No 431 of 2002. This Court by order dated July 17, 2014, refused to entertain the appeal. In the circumstances no fault can be found with the impugned order of the Tribunal in restoring the issue to the Assessing Officer to determine/adopt the rate of tax on refund in the light of the relevant clauses of the Indo-France DTAA and the decision of the Special Bench in Clough Engineering

(supra). Accordingly question No 4 does not raise any substantial question of law so as to be entertained. (AY.1997-98)
DIT v. Credit Agricole Indosuez (No.1) (2015) 377 ITR 102 / 280 CTR 491 / 126 DTR 156 (Bom.)(HC)

60 **S.4 : Charge of income-tax – Compensation on compulsory acquisition of land – Amount received between April, 1976, and April, 1977 – Amount transferred to trust in April, 1983 – Amount assessable in hands of assessee up to April, 1983 – Compulsory acquisition of land – Enhanced compensation can be gifted. [Gift tax Act, Transfer of Property Act, 1882, S.122, 130]**
On a reference by assessee the Court held, (i) that had the assessee gifted the mere right to receive a probable enhanced compensation, things would have been different altogether. By the time he created the trust deed, the compensation stood already enhanced in the year 1974. What was gifted to the trust was the compensation enhanced in the original petition. The only difference was that the amount so enhanced was subject to modification by the High Court. Therefore, being an actionable claim, it was capable of being gifted.
(ii) That the enhanced compensation of ₹ 4 lakhs was received by the assessee between April 26, 1976, and April 25, 1977. Had he passed on that amount instantly to the trust, the amount would have become the corpus of the trust. Since the amount remained in the hands of the assessee, at least till April 4, 1983, i.e., for a period of 6 years, it partook the character of income and was rightly assessed to tax. (AY. 1983-84, 1984-85)
Pentakota Radhakrishna v. CIT (2015) 373 ITR 261 (T&AT)(HC)

61 **S.4 : Charge of income-tax – Capital or revenue – Non-compete fee – Goodwill – Capital in nature. [S.55(2)(a)]**
Dismissing the appeal, the Court held that; the assessee transferred the technical know-how and other advantages to the joint venture company consisting of the assessee and the German company and the assessee continued its business using its own logo, trade name, licences, permits and approval under an agreement with another company. The Tribunal held that there was no intention to acquire the goodwill of the assessee and, therefore, the non-compete fee received by the assessee could not be treated as payment for goodwill taxable as income. Section 55(2)(a) of the Income-tax Act, 1961, came into effect in the year 1998-99, whereas the assessment year in question was 1996-97. Therefore, there was no basis to fall back on section 55(2). The non-compete fee received by the assessee was capital in nature. *Guffic Chem. P. Ltd. v. CIT [2011] 332 ITR 602 (SC)* followed.(AY. 1996-97)
CIT v. Hackbridge Hewittic and Easun Ltd. (2015) 373 ITR 109 (Mad.)(HC)

62 **S.4 : Charge of income-tax – Notional interest – Deletion was held to be justified.**
In view of order passed in earlier assessment year in assessee's own case, Tribunal was justified in deleting addition towards notional interest attributable to investment in shares.
ACIT v. EMTICI Engineering Ltd. (2015)230 Taxman 82 (Guj.)(HC)

S.4 : Charge of income-tax – Words "discontinued business" – Professional fees received by assessee after elevation to post of Judge would not be taxable as income. [S.176(4)] 63

Assessee was a sitting Judge of High Court. Prior to this he was practicing as an advocate in High Court. After being elevated to post of judge he discontinued his legal profession as an advocate. Assessee received certain outstanding dues from his past clients. Professional fees received by assessee after elevation to post of Judge would not be taxable as income. (AY. 1996-97, 1998-99)

CIT v. Anil R. Dave (2015) 230 Taxman 395 (Guj.)(HC)

S.4 : Charge of income-tax – Mutuality – Club-Guest charge – Guest charge received by assessee club from its members would not be liable to tax. 64

Assessee-club received 'guest charge' from its members and utilized it for benefit and development of club members. Since principal of mutuality would apply to transaction with member; guest charge received by assessee club from its members would not be liable to tax.

Junagadh Gymkhana v. ITO (2015) 230 Taxman 460 (Guj.)(HC)

S.4 : Charge of income-tax – Tenancy of rental belong to individual partners – Addition cannot be made in the name of firm. [Ss.45, 54EC] 65

The assessee-firm was carrying on business from a rental premises. The Assessing Officer brought to tax consideration in the hands of the assessee-firm. On appeal, the Commissioner (Appeals) held that the rental premises did not belong to the assessee-firm but to its partners in their individual capacity accordingly, appeal of the assessee-firm was allowed. On appeal, the Tribunal upheld the order of the Commissioner (Appeals). On appeal dismissing the appeal of revenue the Court held that where on examination of evidence it was clear that tenancy of rental premises belonged to individual partners and not to assessee-firm and consideration was received by partners in individual capacity, addition made in income of assessee-firm was not justified. (AY. 2006-07)

CIT v. Bombay Electric Laundry (2015) 230 Taxman 209 (Bom.)(HC)

S.4 : Charge of income-tax – Overhead expenses in construction of community centre – Minutes misread – Charges not received – Addition was deleted. 66

Assessee had undertaken construction of project awarded to them by Government. Assessing Officer relied upon minutes of meeting to hold that assessee was entitled to overhead charges of 1.5 per cent not only in respect of cost of construction of community centre but also on cost of construction of residential flats and made addition. However, it was found that assessee never received 1.5 per cent as overhead expenses for construction of residential quarters and said minutes had been misread, therefore stand of assessee that notes of meeting related to development of community centre complex and not to residential quarters was correct. Additions confirmed by the Tribunal was deleted. (AY. 2002-03)

Housing & Urban Development Corporation Ltd. v. Addl. CIT (2015) 229 Taxman 157 (Delhi)(HC)

67 **S.4 : Charge of income-tax – Pre-operative expenses – Amortisation of preliminary expenses – Income from other sources – Interest income was to be adjusted against pre-operative cost of plant and machinery cost of plant and machinery. [S.35D, 56]**
Assessee set up an industrial undertaking at NEPZ to manufacture Halogen lamp. Production was not yet started. Assessee invested share application money received by it in FDRs for a short period for purpose of providing security for obtaining letter of credit to import machineries. Since said deposit was made under compulsion for having letter of credit, interest income was to be adjusted against pre-operative cost of plant and machinery cost of plant and machinery. (AY. 1992-93)
Phoenix Lamps India Ltd. v. CIT (2015) 228 Taxman 306 (Mag.)(All.)(HC)

68 **S.4 : Charge of income-tax – Protective assessment – Substantive basis – Double taxation – Additions cannot be made in the hands of partners. [S. 143(3)]**
Where additions were already made on substantive basis in case of partnership firm or other partners and said additions had been finally sustained by Tribunal, then same addition could not be made on protective basis in hands of assessee being partner of firm. (AY. 1986-87)
CIT v. Sobhrajmal (2015) 228 Taxman 308 (Raj.)(HC)

69 **S.4 : Charge of income-tax – Deduction at source – Compensation awarded under Motor Vehicles Act is in lieu of death of a person or bodily injury suffered in a vehicular accident and it could not be taxed as income-Circular of Board to deduct tax at source was quashed. [Ss. 2(31), 2(42), 194A, Motor Vehicles Act, 1988]**
The Registrar of the High Court had put up a note that Bank Authorities were making tax deductions on interest accrued on the term deposits, i.e., fixed deposits made by the Registry in terms of the orders passed by the Court in Motor Accident Claims cases. The matter was referred to the Finance/Purchase Committee for examination. The Committee was of the view that since the dispute involved was intricate and public interest was involved, it was recommended that the matter required consideration on judicial side.
The recommendation of the Committee was treated as Public interest Litigation and *suo motu* proceedings were drawn.
The department filed the reply and pleaded that in terms of Circular No. 8/2011, dated 14-10-2011, issued by the income-tax authorities, income-tax was to be deducted on the interest periodically accruing on the deposits made on the court orders to protect the interest of the litigants.
The Court held that the circular, dated 14-10-2011, issued by the Income-tax authorities, is not in tune with the mandate of sections 2(42) and 2(31), read with section 6. The said circular also is not in accordance with the mandate of section 194A hence the Compensation awarded under Motor Vehicles Act is awarded in lieu of death of a person or bodily injury suffered in a vehicular accident and it could not be taxed as income. Circular No. 8/2011, dated 14-10-2011, issued by Income-tax Authorities, whereby deduction of income-tax has been ordered on award amount and interest accrued on deposits made under orders of Court in Motor Accident Claims cases run contrary to mandate of granting compensation, thus, was quashed. In case any such deduction has

been made by department, they are directed to refund the same, with interest at the rate of 12% from the date of deduction till payment.
Court on its own motion v. H.P. State Co-operative Bank Ltd. (2015) 228 Taxman 151 / 117 DTR 231 / 276 CTR 264 (HP)(HC)

S.4 : Charge of income-tax – Income which was taxed in the hands of HUF, cannot be taxed again on a member of HUF in his individual capacity. [VDIS, 1997, S.64, 65] 70
Once a particular amount was taxed in hands of HUF in terms of declaration made under Voluntary Disclosure of Income Scheme, 1997, said amount could not be taxed again in hands of assessee as a member of HUF in his individual capacity.(AY. 1988-89 to 1997-98)
CIT v. Kundanmal Babulal Jain (2015) 228 Taxman 165 (Mag.)(Karn.)(HC)

S.4 : Charge of income-tax – Real income – Excess billing discovered and rectified – Rectification by making appropriate entries in account books – Deletion of addition which was made on the basis of hypothetical income was held to be justified. [Ss.5, 36(2), 145] 71
The excess surcharge which was not lawfully recoverable had to be set right, for which permission of the Reserve Bank of India was required in a procedure prescribed. The assessee had noticed the error and rectified the mistake in the balance-sheet before the return was filed. It offered to tax the actual income and deleted the income, which was relatable to the erroneous claim under surcharge. Hence, the Tribunal was justified in holding that there was no question of tax on a hypothetical income. (AY.2005-06)
CIT v. Tyco Sanmar Ltd. (2015) 370 ITR 173 / 230 Taxman 396 (Mad.) (HC)

S.4 : Charge of income-tax – Joint venture – Even if contract is awarded to the Joint Venture, the income is assessable only in the hands of the person which has executed the work. [S. 2(31), 143(3), 153A] 72
The High Court had to consider whether the entire income earned by the joint venture company is liable to be taxed in the hand of one of the members of the assessee company without appreciating the fact that the contract was awarded to the assessee company and not to the individual member of the assessee company. It also had to consider the impact of C.H. Acthaiya 218 ITR 239 (SC) and Murugesa Naicker Mansion 244 ITR 461 (SC) wherein it was held that AO is not precluded from taxing the right person merely on the ground that a wrong person is taxable. HELD by the High Court dismissing the appeal:
The ITAT has as a matter of fact found that the assessee/joint venture did not execute the contract work and the said work was done by one of its constituents namely SMS Infrastructure Limited. It is also found that the receipts for the said project work are reflected in the books of account of SMS Infrastructure Limited and in return, said SMS Infrastructure Limited has disclosed that income. The said return was accepted by the Assessing Officer in the assessment made under Section 153A read with Section 143 (3) of the Income-tax Act, 1961. It found that, therefore, some income could not have been taxed again in the hands of joint venture/assessee.
CIT v. SMSL-UANRCL (JV)(2015) 372 ITR 429 / 233 Taxman 216 / 116 DTR 430 / 277 CTR 47 (Bom.)(HC)

73 **S.4 : Charge of income-tax – Subsidy – Capital or revenue – Subsidy – Entertainment tax subsidy is a capital receipt even though the source is the public who visit the cinema hall after it becomes operational. [U.P. Entertainment and Betting Tax Act, 1979]**

(i) The UP Scheme under which the assessee claims exemption to the extent of entertainment tax subsidy, claiming it to be capital receipt, is clearly designed to promote the investors in the cinema industry encouraging establishment of new multiplexes. A subsidy of such nature cannot possibly be granted by the Government directly. Entertainment tax is leviable on the admission tickets to cinema halls only after the facility becomes operational. Since the source of the subsidy is the public at large which is to be attracted as viewers to the cinema halls, the funds to support such an incentive cannot be generated until and unless the cinema halls become functional.

(ii) The State Government had offered 100% tax exemptions for the first three years reduced to 75% in the remaining two years. Thus, the amount of subsidy earned would depend on the extent of viewership the cinema hall is able to attract. After all, the collections of entertainment tax would correspond to the number of admission tickets sold. Since the maximum amount of subsidy made available is subject to the ceiling equivalent to the amount invested by the assessee in the construction of the multiplex as also the actual cost incurred in arranging the requisite equipment installed therein, it naturally follows that the purpose is to assist the entrepreneur in meeting the expenditure incurred on such accounts. Given the uncertainties of a business of this nature, it is also possible that a multiplex owner may not be able to muster enough viewership to recover all his investments in the five year period. Seen in the above light, we are of the considered view that it was unreasonable on the part of the Assessing Officer to decline the claim of the assessee about the subsidy being capital receipt. Such a subsidy by its very nature, was bound to come in the hands of the assessee after the cinema hall had become functional and definitely not before the commencement of production. Since the purpose was to offset the expenditure incurred in setting up of the project, such receipt (subject, of course, to the cap of amount and period under the scheme) could not have been treated as assistance for the purposes of trade. (AY. 2006-07 to 2009-10)

CIT v. Bougainvillea Multiplex Entertainment (2015) 373 ITR 14 / 229 Taxman 471 / 116 DTR 129 / 275 CTR 151 (Delhi)(HC)

74 **S.4 : Charge of income-tax – Receipt on sale of carbon credits is a capital receipt – Not assessable as business income. [S. 28(i)]**

Dismissing the appeal of revenue the Tribunal held that receipt on sale of carbon credits is a capital receipt. (AY. 2008-09, 2009-10]

Dy. CIT v. My Home Power Ltd. (2014) 33 ITR 731 / (2015) 68 SOT 38 (URO)(Hyd.)(Trib.)

Editorial : Refer CIT v. My Home Power Ltd. (2014) 365 ITR 82 (AP)(HC)

75 **S.4 : Charge of income-tax – Sub-broker – Distributed NCDEX profits among its clients – Profit could not be assessed as income of assessee. [Forward Contract (Regulations) Act, 1952]**

Where assessee-firm acted as sub-broker and distributed NCDEX profits among its clients, merely because assessee had violated provisions of Forward Contract

(Regulations) Act, 1952, profit could not be assessed as income of assessee. (AY. 2006-07 to 2007-08)
ITO v. Shanti Commodities (2015) 171 TTJ 641 / (2016) 156 ITD 34 (Pune)(Trib.)

S.4 : Charge of income-tax – Merely because payment was reflected in AS-26 and was shown to have received by the assessee, it could not be brought to tax – Addition was deleted. [S.69C] 76

Assessee is retired soldier, upon his retirement as Lieutenant Colonel, received certain security contracts from government bodies such as BHEL under settlement scheme framed by Government of India. During course of scrutiny assessment proceedings, AO, based on information as per AS-26, noted that the assessee had not disclosed certain contractual receipts. As there was no explanation from assessee, AO proceeded to bring to tax those receipts as unaccounted income. There was also discrepancy in the receipts from 'X' to extent of ₹ 24,89,710 that was also brought to tax. AO further noticed that while Assessee has claimed deduction of ₹ 5,22,214 in respect of service tax, his actual service tax payment was of ₹ 9,55,713. AO treated unexplained expenses as income of Assessee u/s. 69C. CIT(A) upheld action of AO but restricted addition to 40% of, what were termed as, unaccounted receipts. On appeal Tribunal held that, merely because payment was reflected in AS-26 and was shown to have been made to assessee, it could not be brought to tax in his hands when said money was not received by the assessee. Stand of assessee was that payments made by BPCL, AIR and IOC were never received by assessee, and monies, received fraudulently in name of and on behalf of assessee, were received by some other person. Neither that aspect of matter was examined on merits, nor any effort was made to find out through appropriate inquiries through related banks, actual beneficiary of those payments. Income tax proceedings were not adversarial proceedings and powers vested in income tax authorities were to be used when circumstances so warrant or justify. Thus, AO ought to have established trail of money and find out actual beneficiary of payments that were admittedly made through banking channels. Additions in respect of monies said to have been paid by BPCL, AIR and IOC was deleted and matter was restored to file of AO to verify if assessee was actual beneficiary of payments in question. Appeal allowed for statistical purposes. (AY. 2009-10)
Ravindra Pratap Thareja v. ITO (2015) 154 ITD 633 / 129 DTR 181 / (2016) 175 TTJ 365 (Jab.)(Trib.)

S.4. Charge of income-tax – Accrual – Non-resident receiving money in his account out side India – Income cannot be said to be accrued in India – Original source located outside India amount deposited his own account – Additions cannot be made as cash credits or unexplained investment [S.5, 68, 68, 69A, 69B] 77

The assessee NRI had filed his return of income, disclosing only salary income in the capacity as Chairman of a Company. AO called the bank details of NRI A/Cs. The assessee filed all relevant details, however the AO made additions under sections 68, 69, 69A and 69B of the Act. CIT(A) considering the explanation deleted the addition. On appeal by revenue, dismissing the appeal the Tribunal held that; provision of section 5 does not permit taxation of amounts remitted to India from sources outside India

which are not incomes under provisions of Act. Where assessee, an NRI, received a certain sum from his own account outside India through proper banking channels with necessary statutory approvals, income could not be said to accrue or arise in India. Provisions of section 68 or 69 would be applicable in case of non-resident only with reference to those amounts whose origin of source can be located in India. Assessee being a non-resident invoking provisions of sections 68 and 69 had its own limitations, since assessee had remitted his own funds abroad to India, said inward remittance could not be considered as unaccounted income of assessee under sections 68 and 69. Where assessee transferred his own fund, said fund could not represent his unexplained investment under section 69A. (AY. 2011-12)
Dy. CIT v. Madhusudan Rao (2015) 68 SOT 515 (Hyd.)(Trib.)

78 **S.4 : Charge of income-tax – Business income – Construction activity started – Advances received from customers put temporarily in Fixed Deposits – Interest received is business income same has to be reduced from work-in-progress. [S. 28(i), 56, 145]**
The assessee was engaged in the business of development and construction of properties. The assessee firm had received advances from customers and money received through such advances which were not required immediately was deposited in FDRs etc. on temporary basis. The interest credited on such deposits was deducted from the work-in-progress. However, Assessing Officer taxed such interest as 'income from other sources'. On behalf of the Revenue, reliance was placed on the decision of Hon'ble Supreme Court in the case of *Tuticorin Alkali Chemicals and Fertilizers Ltd. v. CIT*. It was observed that the facts in this case were completely different and, therefore, decision in the case of *Tuticorin Alkali Chemicals and Fertilisers Ltd. v. CIT* was not applicable. The decision of the Hon'ble Supreme Court in the case of *CIT v. Bokaro Steel Ltd. (1999) 236 ITR 315 (SC)* held that interest income is to be assessed as business income because the assessee had already commenced business. In this background the interest income was held to be not taxable. Since the facts of the assessee's case were identical to the facts of *CIT v. Bokaro Steel Ltd.* case, therefore, following the decision, it was held that the interest income cannot be treated as 'income from other sources' but the same was to be reduced from the work-in-progress and the same is not taxable as income from other sources. The addition of interest as income from other sources was directed to be deleted. (AY. 2008-09)
Samar Estate (P) Ltd. v. ITO (2015) 170 TTJ 14 (UO)/ 70 SOT 481 (Chd)(Trib.)

79 **S.4 : Charge of income-tax – Mutuality – Contribution received from members held to be not taxable – Income from sale of complimentary liquor being commercial in nature is assessable as income.**
Tribunal held that the contributions received from the members were utilised for conducting the events and the surplus, if any, was accepted as exempt under the principles of mutuality. The contributors had partly sponsored the events, apparently as a part of their respective sales promotion activities. The objective of the assessee in receiving these contributions could be considered to meet part of the expenditure incurred in organising the events and there was no intention to earn any income out

of the contributions. Therefore, the contributions could not be taxed as income of the assessee. Tribunal also held that the complimentary liquor had been sold at a price and the intention of the assessee was to make profit out of sale of complimentary liquors. Thus the action of the assessee was commercial in nature. It was not shown that the liquor companies, who had given complimentary liquors were members of the assessee. There was no infirmity in the order of the Commissioner (Appeals). (AY.2007-08)
Bombay Gymkhana Ltd. v. Dy. CIT (2015) 40 ITR 455 / 68 SOT 366 (Mum.)(Trib.)

S.4 : Charge of income-tax – Capital or revenue – Total amount of purchase consideration capitalised in books of account – Refund of purchase price to be considered as akin to original amount – Capital receipt. 80

Allowing the appeal the Tribunal held that upon acquisition of the mining and construction business, the total consideration paid was capitalised. Any reduction in the purchase consideration by way of refund would retain the same character as the original amount. There was no justification to treat the amount as a revenue receipt. Any refund or adjustment in purchase consideration, even if in relation to revenue assets, would not be an item of the profit and loss account of the assessee inasmuch as these items had not been considered as items of expense in the preceding assessment year of the assessee. The action of the assessee in treating the refund amount as a capital receipt and reducing it from the amount recorded as goodwill earlier was proper. The addition was to be deleted. (AY. 2005-06)
Sandvik Mining and Construction Tools India P. Ltd. v. ITO (2015) 40 ITR 54 (Pune)(Trib.)

S.4 : Charge of income-tax – Deduction at source – Advance payment – Does not automatically lead to the conclusion that it is income of the recipient – Addition was deleted.[Ss.2(24), 194C] 81

Certain advances were received by the assessee against jobs to be carried out. The party paying the amount showed the nature of payment of ₹ 34,00,000/- as 'transportation charges' in its TDS certificate for ₹ 70,000/- issued to the assessee. But, a clarificatory letter was also issued along with a sworn affidavit that the TDS was against the advance payment against job work and the TDS certificate mentioning transportation charges was an error. The Assessing Officer made an addition of ₹ 34,00,000 as transportation charges income based on the TDS Certificate. It was held that merely because the transportation charges was mentioned as payment in TDS certificate that cannot be a conclusive evidence that income has accrued to the assessee. The fact that it was a mistake was duly clarified by the party paying the amount. The addition was deleted. (AY. 2004-05)
ITO v. Shree Vinayak Udyog (2015) 170 TTJ 390 (Kol.)(Trib.)

S.4 : Charge of income-tax – Capital or revenue – Sales tax subsidy Industrial unit covered under West Bengal Incentive Scheme, 1999 – Sales tax subsidy received from Government was capital receipt and not liable to tax. 82

In the course of appellate proceedings, the question came up for consideration was whether in case of industrial unit of assessee, covered under the West Bengal Incentive Scheme, 1999, sales tax subsidy received from Government was capital receipt or

revenue receipt. Assessee falls within the scheme known as West Bengal Incentive Scheme, 1999, The object/purpose of assistance under the subsidy scheme was to enable the assessee to set up new unit in State of West Bengal. Therefore, the receipt of the sales tax subsidy in the hands of assessee was capital in nature. (AY.2003-04, 2007-08)
Dy. CIT v. Bhushan Ltd. (2015) 155 ITD 750 (Chd.)(Trib.)

83 **S.4 : Charge of income-tax – Interest on surplus funds – Prior to implementation of its project – Capital receipts – Required to be set off against pre-operative expenses. [S.28(i)]**
Assessee Company was engaged in business of developing, operating, maintenance of power projects and sale of power. During year under consideration, assessee's projects were under implementation and if had not started any commercial activities. Assessee earned certain interest income on surplus funds deposited in Government securities. Assessing Officer assessed the interest as revenue receipt. On appeal the Tribunal held that since interest received related to period prior to commencement of business, it was in nature of capital receipt and was required to be set off against pre-operative expenses. Amount so received was to be treated as capital receipt. (AY. 2008-09)
Adani Power Ltd. v. ACIT (2015) 155 ITD 239 (Ahd.)(Trib.)

84 **S.4 : Charge of income tax – Subsidy – Industrial Policy 1996 of Punjab Government – Capital receipt.**
Subsidy received by assessee-company on export oriented unit from Director of Industries, Punjab under Industrial Policy 1996 of Punjab Government for installation of plant and machinery would be capital receipt.
Safari Bikes Ltd. v. JCIT (2014) 33 ITR 665 / 166 TTJ 216 / (2015) 67 SOT 257 (Chd.) (Trib.)

85 **S.4 : Charge of income-tax – Capital or revenue – Business income – Receipt on sale of carbon credit – Capital in nature.[S.28(i)]**
Tribunal held that the receipt on sale of carbon credits was capital in nature. (AY. 2010-11)
ACIT v. INTEX (2015) 38 ITR 496 / 154 ITD 365 (Chennai)(Trib.)

86 **S.4 : Charge of income-tax – Accrual – Grants from Government – To meet the expenses – Not chargeable to tax – Amount not adjusted is to be chargeable to tax. [S.12A]**
The assessee was a Government of India agency under the Ministry of Shipping, Road Transport and Highways and was granted registration under section 12A of the Act. The assessee claimed that income from internal resources were grant from the Government and therefore could not be chargeable to tax. The AO charged the income from internal resources to tax. The CIT(A)(A) confirmed this. On appeal:
Held, that, grants to meet the expenses is not chargeable to tax. Amount not adjusted is to be chargeable to tax. (AY. 1988-89, to 1996-97)
Inland Waterways Authority of India v. Add. CIT (2015) 37 ITR 332 (Delhi)(Trib.)

S.4 : Charge of income-tax – Diversion of income – Income by over-riding title – Application of income – Contribution of 1% of net profit to the Co-operative Education Fund maintained by National Co-operative Union is an application of income. [Ss. 61, 62] 87

On facts, it is only after the net profit reaches the co-operative society that the question of its disposal in terms of the provisions arise of the Act of 1965 and not earlier thereto, net profit is to be apportioned by transferring part of it as may be prescribed by Rules to the reserve fund or to other funds. Part of the profits has to be carried to the co-operative deduction fund constituted under the Rules and the balance is available for utilisation for payment of dividends to the members, bonus to the members and contribution to such other special funds as may be specified in the Rules as per S.63(2). As already stated earlier, assessee is not charging the amount of 1% on the profits of the year, in the year of accrual but is claiming the amount paid during the year on the profits of earlier year. This certainly indicates that the amounts have been received by assessee and utilized by assessee, then only amount was remitted to the said National Union under the Act. This indicates, there is no diversion at source but is only appropriation of profits as per principles laid down. It is also an admitted fact that there is no charge in the year in which assessee incurs losses. It is only when there are profits the amount has to be paid. This also distinguishes the issue that it is only an appropriation of profits earned but not diversion of income. If it is to be considered as diversion at source by overriding title, whether assessee incurs profits or loss, the said amount has to be paid. This is not the case here. The amount at 1% is payable only when assessee has profits in any year. This supports the view that this is not a diversion at source but an appropriation of amounts.

Following the principles laid down in *CIT v. Jodhpur Co-operative Marketing Society 275 ITR 372 (Raj.),* we are of the opinion that the amount contributed by assessee to the National Cooperative Union, New Delhi is appropriation from the net profits. There is a right to receive the income independent of accrual and receipt of income by the assessee before third party could lay claim to any part of it. Since income reached assessee before it reached to a third party, there is no diversion. As already stated, there is no payment in the year of losses. Therefore, payment under section 63(1)(b) is only an appropriation of profit. Moreover, this amount paid during the year is also not out of the profits of this year but profits of earlier year. Therefore, on that count also amount cannot be allowed as deduction during the year. (ITA No. 1580/Hyd/2013, dated 31.12.2014) (AY. 2010-11)

A. P. Mahesh Co-op. Urban Bank Ltd. v. DCIT (2015) 55 taxmann.com 429 (Hyd.)(Trib.) www.itatonline.org

S.4 : Charge of income-tax – Advance against depreciation by way of tariff charges – Liability not includible in computation of taxable income.[S.145] 88

Assessee, a public sector company, engaged in selling electricity to State Electricity Boards, received Advance Against Depreciation (AAD) by way of tariff charge which was to be adjusted against future depreciation so as to reduce tariff in future years, amount so received was to be regarded as liability and, thus, not includible in computation of taxable income.(AY. 2000-01, 2001-02, 2003-04)

ACIT v. NHPC Ltd. (2014) 50 taxmann.com 221 / (2015) 67 SOT 130 (Delhi)(Trib.)

Section 5 : Scope of total income

89 **S.5 : Scope of total income – Membership fee was for 10 years – Non-refundable deposits – Fee was to be spread over a period of 10 years and whole amount could not be taxed in year of receipt. [Ss. 4, 37(1)]**
Assessee-club collected non-refundable deposits from its members which was operational for a period of 10 years with a rider that liability attached to pay membership fee was for 10 years. Fee was to be spread over a period of 10 years and whole amount could not be taxed in year of receipt. (AY. 2003-04)
CIT v. Sportsfield Amusement (2015) 231 Taxman 252 (Bom.)(HC)

90 **S.5 : Scope of total income – Discount cards – Justified in spreading out amount of membership fee and expenses. [Ss. 37(i), 145(3), Accounting Standard 9]**
Assessee company was engaged in business of providing discount cards to members on payment of membership fees. Accounts of assessee had been prepared on accrual basis and accordingly, it had spread over receipt as well as insurance premium expenditure to period of membership. Dismissing the appeal of revenue the Court held that since services were rendered partially in a year, both revenue and expenses were to be shown proportionate to degree of completion of service and, therefore, assessee was justified in spreading out amount of membership fee and expenses.(AY. 1989-90 to 2006-07)
CIT v. Winner Business Link (P.) Ltd. (2015) 230 Taxman 399 (Guj.)(HC)

91 **S.5 : Scope of total income – Method of accounting – Cash system – Interest on fixed deposit – Interest earned on fixed deposit which was not received during relevant assessment year would not be added as income of relevant year.[S.145]**
Assessee had not shown interest earned on fixed deposit in relevant year on plea that same would be paid to it in near future along with original sum. On reference the Court held that since assessee consistently followed cash system of accounting, interest on fixed deposit would not be added to its income in relevant assessment year.(AY. 1989-90)
CIT v. Adamsons Inc. (2015) 230 Taxman 72 (Bom.)(HC)

92 **S.5 : Scope of total income – Accrual – Income from Advance Licence benefit receivable is taxable in subsequent year in which it has accrued to appellant.[S.145]**
Income from Advance Licence benefit receivable is taxable in subsequent year in which it has accrued to appellant. (AY. 1997-98)
United Phosphorus Ltd. v. Addl. CIT (2015) 230 Taxman 596 (Guj.)(HC)

93 **S.5 : Scope of total income – Accrual – Income from Pass Book scheme is taxable in subsequent year in which it has accrued to appellant.[S. 145]**
Income from Pass Book scheme is taxable in subsequent year in which it has accrued to appellant. (AY. 1997-98)
United Phosphorus Ltd. v. Addl. CIT (2015) 230 Taxman 596 (Guj.)(HC)

S.5 : Scope of total income – Accrual of income – Mercantile system of accounting – Civil construction – Sums retained for payment after expiry of defect-free period – Right to receive amount contingent upon there being no defects – Accrual only on receipt of amount after defect-free period.[S.145] 94

The assessee, a civil contractor, was awarded a contract by the Hyderabad Municipal Water Supply and Sewerage Board. The contract provided for deduction of 7.5 per cent from each bill. Out of this, 5 per cent would be payable on successful completion of the work and the balance 2.5 per cent after the expiry of the defect-free period. The assessee, for the assessment year 1996-97, did not include the amount representing 2.5 per cent. of the bills. According to the assessee, such amount could be shown as income, only on its being received. The Assessing Officer held that since the assessee was following the mercantile system of accounting, the amount of 2.5 per cent. of bills could be said to have accrued to it, along with the amount paid under the bills and was liable to be treated as income for that year. The Commissioner (Appeals) confirmed this. The Tribunal held in favour of the assessee. On appeal :

Held, dismissing the appeal, that the right to receive that amount was contingent upon there not being any defects in the work, during the stipulated period. It was then, and only then, that the amount could be said to have accrued to the assessee. (AY. 1996-97)

CIT v. Shanker Constructions (2015) 371 ITR 320 / 233 Taxman 449 (T&AP)(HC)

S.5 : Scope of total income – Accrual – Nodal agency – Failure by authorities to examine nature and character of receipts. Matter remanded. 95

Statutory body acting as nodal agency. External development charges received and spent according to direction of State Government. Failure by authorities to examine nature and character of receipts. Matter remanded.(AY. 2009-10, 2010-11)

Dy. CIT v. Greater Ludhiana Area Development Authority (2015) 39 ITR 100 / 170 TTJ 457 (Chd.)(Trib.)

S.5 : Scope of total income – Accounting – Accrual – Interest on securities – Receipt basis – Interest not chargeable to tax. [S.145] 96

As the interest from investments due to the assessee for the months of January, February and March would be accruing only in June, the assessee claimed expenditure towards broken period interest by adding back the amount for the assessment year 2005-06. The Assessing Officer disallowed the claim and the broken period interest was brought to tax for the assessment year 2005-06, as the issue pertaining to the assessment year 2004-05 was in appeal. The Commissioner (Appeals) held that the broken period interest was not chargeable to tax in the assessment year 2005-06. On appeal:

Held, that the assessee was following the method of offering interest on securities to tax on receipt basis on maturity and it was accepted by the Department in the past. Therefore, the broken period interest was not chargeable to tax in the assessment year 2005-06.(AY.2005-06)

ING Vysya Bank Ltd. v. ACIT (2015) 39 ITR 250 (Bang.)(Trib.)

97 **S.5 : Scope of total income – Accrual of income outside and in India – Stock option – Not-ordinary resident – Only that portion of stock awards and stock option transfer proceeds which are attributable to services rendered in India can form part of total income of the relevant assessment year of the assessee who is not-ordinarily resident – DTAA-India-USA. [S.9(1)(ii), 147, 148, Art. 16]**

Assessee is an individual employed with M/s. Microsoft India (R & D) Hyderabad. The Assessing Officer reopened the assessment under section 147 by issuing notice under section 148. In response to the notice the assessee filed a letter requesting to treat the return filed originally as a return in response to notice under section 148. The Assessing Officer made the addition of the amount of ₹ 1,49,80,713/- being the stock award / SOTP. The CIT(A) confirmed the addition made by the Assessing Officer.

The Tribunal remitted the matter to the Assessing Officer for taking a fresh decision and held that only that portion of stock awards and stock option transfer proceeds which are attributable to services rendered in India can form part of total income of the relevant assessment year of the assessee who is not-ordinarily resident. (AY. 2007-08)

Anil Bhansali v. ITO (2015) 168 TTJ 412 / 115 DTR 132 / 53 taxmann.com 367 (Hyd.) (Trib.)

98 **S.5 : Scope of total income – Accrual of income – Agreement was signed in the relevant assessment year hence, income cannot be assessed for the relevant assessment year. [S.145]**

The assessee was a State Government undertaking, engaged in the business of power generation. It supplies power *inter alia* to DISCOMs, which again were undertakings of the State Government. During the year under consideration, huge amount due to the assessee by the DISCOMs running into thousands of crores was outstanding. According to the AO the assessee had right to claim interest on such dues and accordingly interest receivable worked out at ₹ 233.75 crores was added by him to the total income of the assessee. On appeal, the CIT(A) found merit in the submissions made by the assessee on this issue and deleted the addition made by the AO. On appeal by revenue the Tribunal held that said agreement was effective from date of signing of agreement i.e. 22-12-2009, and not in relevant assessment year, therefore, assessee was not entitled to claim any interest on said delayed payments for year under consideration and such interest income could not be said to have accrued to assessee in relevant year. (AY. 2009-10)

Dy. CIT v. Andhra Pradesh Power Generation Corporation Ltd. (2014) 52 taxmann.com 300 / (2015) 67 SOT 183 (Hyd.)(Trib.)

Section 6 : Residence in India

99 **S.6 : Residence in India – Extended stay due to wrongful impounding of passport – Period from impounding of passport till release – Excludible while counting days of stay in India – Assessee to be treated as non-resident. [S.6(1)(a)]**

While the executive action of impounding of passport rendered it impossible for the assessee to leave India. He virtually became an unwilling resident on Indian soil without his consent and against his will. His involuntary stay during the period that followed till

the passport was restored under the court's directive must be excluded for calculating the period under section 6(1)(a).(AY.2007-08, 2008-09)
CIT v. Suresh Nanda (2015) 375 ITR 172 / 233 Taxman 4 / 278 CTR 21 / 120 DTR 329 (Delhi) (HC)
Editorial: Order in Suresh Nanda v. ACIT (2014) 31 ITR (Trib) 620 (Delhi) is affirmed.

Section 9 : Income deemed to accrue or arise in India

S.9(1)(i) : Income deemed to accrue or arise in India – Concept of "source rule" vs. "residence rule" explained. Definition of expression "fees for technical services" in S. 9(1)(vii) explained with reference to "consultancy" services. [S.9(1)(vii)] 100
The assessee paid fees to a non-resident (NRC). The obligation of the NRC was to: (i) Develop comprehensive financial model to tie-up the rupee and foreign currency loan requirements of the project. (ii) Assist expert credit agencies world-wide and obtain commercial bank support on the most competitive terms. (iii) Assist the appellant company in loan negotiations and documentation with the lenders. The assessee claimed that as the fees were paid for services rendered outside India, the same were not chargeable to tax in India and that the assessee was under no obligation to deduct TDS u/s. 195. However, the AO and CIT rejected the claim of the assessee. The High Court (228 ITR 564) held that the said payment was not assessable u/s. 9(1)(i) but that it was assessable u/s. 9(1)(vii). The assessee claimed that s. 9(1)(vii) was constitutionally invalid as it taxed extra-territorial transactions. However, this claim was rejected by the Constitution Bench of the Supreme Court in 332 ITR 130. On merits, the matter was remanded to the Division Bench of the Supreme Court. HELD by the Division Bench dismissing the appeal:

(i) Re S. 9(1)(i): The NRC is a Non-Resident Company and it does not have a place of business in India. The revenue has not advanced a case that the income had actually arisen or received by the NRC in India. The High Court has recorded the payment or receipt paid by the appellant to the NRC as success fee would not be taxable under Section 9(1)(i) of the Act as the transaction/activity did not have any business connection. The conclusion of the High Court in this regard is absolutely defensible in view of the principles stated in *C.I.T. v. Aggarwal and Company 56 ITR 20, C.I.T. v. TRC 166 ITR 1993* and *Birendra Prasad Rai v. ITC 129 ITR 29*5;

(ii) Re S. 9(1)(vii): The principal provision is Clause (b) of Section 9(1)(vii) of the Act. The said provision carves out an exception. The exception carved out in the latter part of clause (b) applies to a situation when fee is payable in respect of services utilized for business or profession carried out by an Indian payer outside India or for the purpose of making or earning of income by the Indian assessee i.e. the payer, for the purpose of making or earning any income from a source outside India.

(iii) Re "Source Rule" in s. 9(1)(vii): On a studied scrutiny of the said Clause (b) of Section 9(1)(vii), it becomes clear that it lays down the principle what is basically known as the "source rule", that is, income of the recipient to be charged or chargeable in the country where the source of payment is located, to clarify, where the payer is located. The Clause further mandates and requires that the services should be utilized in India.

(iv) Re "Source Rule" vs. "Residence Rule": The two principles, namely, "Situs of residence" and "Situs of source of income" have witnessed divergence and difference in the field of international taxation. The principle "Residence State Taxation" gives primacy to the country of the residency of the assessee. This principle postulates taxation of world-wide income and world-wide capital in the country of residence of the natural or juridical person. The "Source State Taxation" rule confers primacy to right to tax to a particular income or transaction to the State/nation where the source of the said income is located. The second rule, as is understood, is transaction specific. To elaborate, the source State seeks to tax the transaction or capital within its territory even when the income benefits belongs to a non-residence person, that is, a person resident in another country. The aforesaid principle sometimes is given a different name, that is, the territorial principle. It is apt to state here that the residence based taxation is perceived as benefiting the developed or capital exporting countries whereas the source based taxation protects and is regarded as more beneficial to capital importing countries, that is, developing nations. Here comes the principle of nexus, for the nexus of the right to tax is in the source rule. It is founded on the right of a country to tax the income earned from a source located in the said State, irrespective of the country of the residence of the recipient. It is well settled that the source based taxation is accepted and applied in international taxation law.

(v) Re meaning of the expression, managerial, technical or consultancy service in s. 9(1)(vii): The expression "managerial, technical or consultancy service" have not been defined in the Act, and, therefore, it is obligatory on our part to examine how the said expressions are used and understood by the persons engaged in business. The general and common usage of the said words has to be understood at common parlance. By technical services, we mean in this context services requiring expertise in technology. By consultancy services, we mean in this context advisory services. The category of technical and consultancy services are to some extent overlapping because a consultancy service could also be technical service. However, the category of consultancy services also includes an advisory service, whether or not expertise in technology is required to perform it. The word "consultancy" has been defined in the Dictionary as "the work or position of a consultant; a department of consultants." "Consultant" itself has been defined, *inter alia*, as "a person who gives professional advice or services in a specialized field." It is obvious that the word "consultant" is a derivative of the word "consult" which entails deliberations, consideration, conferring with someone, conferring about or upon a matter.

(vi) Re Facts: On facts, the NRC had acted as a consultant. It had the skill, acumen and knowledge in the specialized field i.e. preparation of a scheme for required finances and to tie-up required loans. The nature of activities undertaken by the NRC has earlier been referred to by us. The nature of service referred by the NRC, can be said with certainty would come within the ambit and sweep of the term 'consultancy service' and, therefore, it has been rightly held that the tax at source should have been deducted as the amount paid as fee could be taxable under the head 'Fee for technical service'. Once the tax is payable paid the grant of 'No

Objection Certificate' was not legally permissible. Ergo, the judgment and order passed by the High Court are absolutely impregnable.

GVK Industries Ltd. v. ITO (2015) 371 ITR 453 / 115 DTR 313 / 275 CTR 121 / 231 Taxman 18 (SC)

S.9(1)(i) : Income deemed to accrue or arise in India – Business connection – No person can make profit out of itself – Interest income received by assessee bank from branches outside India which was, in fact, received from Head Office, was not chargeable to tax. [S.90(2)] 101

In the original return of income, the respondent-assessee had claimed the benefit of DTAA. Subsequently, the respondent-assessee filed revised return of income wherein it has specifically pleaded that the interest received from branches outside India could not be considered as taxable income as one could not earn income out of itself.

The Assessing Officer held that the respondent-assessee's interest income was taxable under the normal provisions of the Act as well as DTAA.

On further appeal, the Commissioner (Appeals) by the order in appeal held that the interest income was chargeable to tax under normal provision of the Act i.e. section 9(1)(c). The Tribunal held that no occasion to tax such interest income received from its Head Office could arise nor deduction was to be allowed in case of interest paid by the respondent-assessee to its Head Office. On appeal dismissing the appeal of revenue the Court held that It was found that respondent-assessee had claimed benefit under the DTAA in its return of income but the same was effectively withdrawn by virtue of filing a revised return of income. Although the Assessing Officer held that the respondent-assessee is liable to pay tax in respect of interest earned from its Head Office both under the normal provision of Act as well as DTAA, both Commissioner (Appeals) as well as the Tribunal have proceeded on the basis of the claim of the respondent-assessee being under the normal provisions of the Act. In the present facts, the issue arising for consideration is not the deduction on account of interest paid to the Head Office but the non exigibility to tax on account of interest received from its Head Office. No person can make profit out of itself as held by the Apex Court in the case of *Sir Kikabhai Premchand v. CIT [1953] 24 ITR 506*. In any view of the matter, section 90(2) itself provides that the assessee has an option to either invoke DTAA or normal provisions of tax to the extent which of the two is more beneficial to it. In this case, by filing the revised return of income the claim to be subjected to tax under the DTAA stood withdrawn. In the above view, no substantial question of law arise. Accordingly, Question (c) as formulated by the revenue, does not give rise to any substantial question of law. (AY. 1998-99)

DIT v. American Express Bank Ltd. (2015) 235 Taxman 85 (Bom.)(HC)

S.9(1)(i) : Income deemed to accrue or arise in India – Business connection – Provision dealing with business of extraction of mineral oil in India is not applicable to interest on tax refund – DTAA-India-UK. [S.44BB, Article 12] 102

Where assessee is carrying on business through a permanent establishment in India, interest on tax refund is taxable as business income under clause 6 of Article 12 of

Double Taxation Avoidance Treaty between India and UK. Provision dealing with business of extraction of mineral oil in India is not applicable to interest on tax refund. *B. J. Services Co. Middle East Ltd. v. ACIT (2015) 234 Taxman 604 / (2016) 380 ITR 138 (Uttarakhand)(HC)*

103 **S.9(1)(i) : Income deemed to accrue or arise in India – Business connection – Transaction was arm's length – Benefit claimed by the assessee was held to be allowable – DTAA – India–France [S.44B, Art, 5]**

Assessee, a French company, operating Indian business of shipping in international traffic through an agent in India, claimed benefit of section 44B. Assessing Officer rejected assessee's claim and assessed freight earnings on ground that Indian agent was Permanent Establishment of assessee in India. On appeal Tribunal decided in favour of assessee. On appeal by revenue dismissing the appeal the Court held that as it was not demonstrated by revenue that transaction between assessee and its agent were not at arm's length conditions, Tribunal was justified in deciding matter in favour of assessee. (AY. 2006-07)

DIT v. Delmas France (2015) 232 Taxman 401 / 281 CTR 265 (Bom.)(HC)

104 **S.9(1)(i) : Income deemed to accrue or arise in India – Capital gains – Deduction at source – Sale of shares – Not taxable in India hence not liable to deduct tax at source – DTAA-India-Mauritius. [Ss.45, 195, Article 13]**

A share purchase agreement was entered into between assessee and two companies namely 'Blackstone' and 'Barclay' incorporated in Mauritius. In terms of agreement, Mauritius based companies agreed to sell their shareholding in an Indian company, namely, SKR BPO, to assessee. AAR held that the assessee is liable to deduct tax at source. On Writ allowing the petition the Court held that, since capital gains that arose on account of sale of shares of SKR BPO by Blackstone and Barclays were derived by a resident of a Contracting State from alienation of property other than property mentioned in paragraphs 1, 2 and 3 of Article 13 of DTAA, same was taxable only in 'that State' i.e. Mauritius. Consequently, assessee was not required to deduct tax at source while making payment of sale consideration of shares to seller companies.

Serco BPO (P.) Ltd. v. AAR (2015) 379 ITR 256 / 234 Taxman 630 / 280 CTR 1 (P&H)(HC)

105 **S.9(1)(i) : Income deemed to accrue or arise in India – Business connection – Liaison office of a foreign co which identifies a manufacturer in India, negotiates the price, helps in choosing raw material to be used, ensures compliance with quality and gets material tested is not a 'permanent establishment' – DTAA-India-USA. [Art. 5, 7]**

The High Court had to consider the following questions:

(a) Whether the Indian liaison office involves a permanent arrangement for the application under Article 5.1 of the DTAA?

(b) Whether any portion of the income attributable to the liaison office on account of the activity of vendors co-operation of global production management and planning and equitable quality assurance strategy, quality development and is liable to tax?

HELD by the High Court:

(i) Section 9 of the Income-tax Act deals with income deemed to accrue or arise in India. It provides that all income accruing or arising, whether directly or indirectly,

through or from any business connection in India, or through or from any property in India, or through or from any asset or source of income in India or through the transfer of a capital asset situate in India shall be deemed to accrue or arise in India. However, explanation 1(b) to the said Section carves out an exception. It provides that in the case of a non-resident, no income shall be deemed to accrue or arise in India to him through or from operations which are confined to the purchase of goods in India for the purpose of export. Therefore, it is clear that when a non-resident purchases goods in India for the purpose of export, no income accrues or arises in India for such non-resident for it to be taxed.

(ii) Under Article 7(1) of the Tax Convention with the Republic of India and the USA, it clear that if a permanent establishment carries on business of sales in India or other business activities of the same or similar kind through that permanent establishment, then only, the profits of the enterprise will be taxed. Therefore, there is no tax liability if purchase is made for the purpose of export. The permanent establishment referred to therein is also defined in Article 5. It provides that for the purposes of this convention, the term "permanent establishment" means a fixed place of business through which the business of an enterprise is wholly or partly carried on. It is an inclusive definition of what is included in the term 'permanent establishment' which is clearly set out in sub-article (2). However, sub-article (3) starts with a non-obstante clause. It makes it clear that the term 'permanent establishment' shall be deemed not to include any one or more of the following as set out in sub-article (3). Clause (d) of sub-article (3) speaks about the maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise, or of collecting information, for the enterprise. In other words if the permanent establishment is established for the purpose of purchasing goods or merchandise for the purpose of collecting information for the enterprise, it is not a permanent establishment as defined under Article 5(1) read with Article 7. According to the Advance Ruling Authority what sub-Article 3(d) excludes is the place of business solely for the purpose of purchasing goods or of collecting information for the enterprise.

(iii) In the instant case, the liaison office of the petitioner identifies a competent manufacturer, negotiates a competitive price, helps in choosing the material to be used, ensures compliance with the quality of the material, acts as go-between, between the petitioner and the seller or the manufacturer, seller of the goods and even gets the material tested to ensure quality in addition to ensuring compliance with its policies and the relevant laws of India by the suppliers. Therefore, it is of the view that the aforesaid activities carried on by the liaison office, cannot be said to be an activity solely for the purpose of purchasing the goods or for collecting information for the enterprise. We find it difficult to accept this reasoning. If the petitioner has to purchase goods for the purpose of export, an obligation is cast on the petitioner to see that the goods, which are purchased in India for export outside India is acceptable to the customer outside India. To carry on that business effectively, the aforesaid steps are to be taken by the seller i.e., the petitioner. Otherwise, the goods, which are purchased in India may not find a customer outside India and therefore, the authority was not justified in recording a finding that those acts amounts to involvement in all the activities connected

with the business except the actual sale of the products outside the country. In our considered information, all those acts are necessary to be performed by the petitioner – assessee before export of goods. Consequently, the reasoning of the authority that for the same reasons, the liaison office in question would qualify to be a permanent establishment in terms of Article 5 of the DTAA is also erroneous. That liaison office is established only for the purpose of carrying on business of purchasing goods for the purpose of export and all that activity also falls within the meaning of the words "collecting information" for the enterprise. In that view of the matter, we are of the view that the impugned order is unsustainable.

Columbia Sportswear Company v. DIT (2015) 235 Taxman 349 (Karn.)(HC)

106 **S.9(1)(i) : Income deemed to accrue or arise in India – Business connection – Telecasting of TV channels such as B4U Music, MCM etc. – Advertisement – Amount received from advertisers was not liable to tax in India-DTAA-India-Mauritius. [Article 5, 7]**

Assessee, a Mauritius based company, was engaged in business of telecasting of TV channels such as B4U Music, MCM etc. Assessee's income from India consisted of collections from time slots given to advertisers through its affiliates. Assessing Officer held that affiliated entities of assessee constituted permanent establishment of assessee within meaning of Article 5 of India-Mauritius DTAA. Accordingly, amount received from advertisers was brought to tax in India. Tribunal held that the assessee carried out entire activities from Mauritius and all contracts were concluded in Mauritius. It was also undisputed that activity carried out in India was incidental or auxiliary/preparatory in nature which was carried out in a routine manner. On facts, affiliates/agents of assessee in India did not constitute its PE in India in terms of paragraph 5 of Article 5 of India-Mauritius DTAA and, thus, amount in question received from advertisers was not liable to tax in India. Appeal of revenue was dismissed by High Court.

DIT v. B4U International Holdings Ltd. (2015) 374 ITR 453 / 231 Taxman 858 / 277 CTR 213 / 199 DTR 73 (Bom.)(HC)

107 **S.9(1)(i) : Income deemed to accrue or arise in India – Business connection – Non-resident – Income from purchase of goods for export – Liaison office in India – Income of liaison office not deemed to accrue or arise in India**

Income from purchase of goods for export. Income of liaison office not deemed to accrue or arise in India. Appeal of revenue was dismissed.(AY. 2003-04 to 2007-08)

DIT(IT) v. Tesco International Sourcing Ltd. (2015) 373 ITR 421 (Karn.)(HC)

108 **S.9(1)(i) : Income deemed to accrue or arise in India – Business connection – Agent – Revenue has not challenged the order of Tribunal holding that the amount received by non-resident from assessee was not taxable – Question of treating the assessee became academic. [S.195]**

Where revenue did not prefer appeal against order of Tribunal holding that amount received by non-resident from assessee was not taxable in India, question as to whether assessee could be treated as agent of those non-residents or not became academic.

PILCOM v. CIT (2015) 228 Taxman 336 (Mag.)(Cal.)(HC)

S.9(1)(i) : Income deemed to accrue or arise in India – Business connection – Royalty – Amount received by assessee-foreign company for hiring out dredgers to its Indian company would not be taxable in India as royalty- DTAA-India-Netherland. [S. 2(23A), Article 12] 109

The assessee was a company incorporated in Netherlands and falls within the definition of a foreign company under section 2(23A). The management and control of the assessee company was situated in Netherlands. The assessee let out dredging equipment to their Indian company. Amount received by assessee-foreign company for hiring out dredgers to its Indian company would not be taxable in India as royalty, as Article 12 of DTAA does not include said payment within its ambit. (AY.2003-04)

CIT v. Van Oord ACZ Equipment BV (2015) 373 ITR 133 / 273 CTR 548 / 228 Taxman 199 / 113 DTR 359 (Mad.)(HC)

S.9(1)(i) : Income deemed to accrue or arise in India – Permanent Establishment – Providing news and financial information – As the assessee had no PE in India distribution fee received could not be brought to tax in India – DTAA-India-UK [Ss.44D, 115JA, 144C(5), 234D, Art 5(5)] 110

Assessee an UK based company engaged in business of providing news and financial information worldwide, entered into distribution agreement with RIPL in India, since RIPL was not habitually exercising its authority to negotiate and conclude contracts on behalf of assessee, it could be concluded that assessee did not have PE in India consequently, distribution fee received by it could not be brought to tax in India. (AY. 1997-98)

Returns Limited v. Dy. CIT (2015) 155 ITD 844 / (2016) 131 DTR 241 / 176 TTJ 299 (Mum.)(Trib.)

S.9(1) : Income deemed to accrue or arise in India – Business connection – Royalty – Deduction at source. [S. 9(1)(vi), 40(a)(i), 195] 111

Assessee company entered into an agreement with 'F', a foreign firm, to provide investment advice for investments to be carried outside India. AO held that payment made by assessee to 'F' were in nature of royalty. Tribunal held that in assessee's own case for earlier assessment year, it was held that said payment could not be treated as royalty as it did not include any information provided in course of advisory services and further, since services were rendered abroad, no part of income had accrued or arose in India and no tax would be deducted. Following said decision, assessee would not be liable to deduct tax on said payment made. (AY. 2009-10, 2010-11)

ACIT v. Sundaram Asset Management Co. Ltd. (2014) 52 taxmann.com 466 / (2015) 67 SOT 67 (URO)(Chennai)(Trib.)

S.9(1)(i) : Income deemed to accrue or arise in India – Business connection – Installation services did not constitute permanent establishment – Not taxable in India – DTAA-India-Singapore. [Art. 5, 7] 112

The Tribunal held that the activity of assessee is purely installation services, if is to be scrutinized under Article 5(6). The installation activities carried out by the assessee in terms of various contracts in India did not constitute PE in India under Article 5(3) and, therefore, income earned from the said contracts for installation activities is not taxable

in India. Threshold limit of 183 days under Article 5(3) of Indo-Singapore DTAA would be calculated from date of actual activity for installation purpose and not from date of contract. (AY. 2010-11)
Kreuz Subsea Pte. Ltd. v. Dy. CIT (2015) 172 TTJ 291 / 42 ITR 11 / 69 SOT 368 / 122 DTR 422 (Mum.)(Trib.)

113 **S.9(1)(i) : Income deemed to accrue or arise in India – Business connection – Service PE – Establishing subsidiary in other treaty country does not result in creating PE of a foreign holding company in the third country. As the employees of SRSIPL are not providing services to the assessee as if they were the employees of the assessee, there is no "service PE" – DTAA-India-Switzerland.[S.90, Art, 5]**
The AO is not right in (i) treating the assessee as having a Dependent Agency Permanent Establishment; (ii) laying down that the assessee has a business connection in India; (iii) treating SRSIPL as service PE and (iv) treating SRSIPL as Agency PE. Ld. The assessee does not fulfil any of the mandatory conditions for the aforementioned allegations. Article 5(4) of the Indo-Swiss Treaty categorically excludes cases of reinsurance services. The agreement between the assessee and SRSIPL does not include contracts of reinsurance and confirmation of liability. The facts of the case in hand clearly show that the employees of the SRSIPL has only provided services to SRSIPL and there is no noting on record to prove that the employees had provided services to the assessee or the assessee is paying their salaries or perquisites. (AY. 2010-11)
Swiss Re-insurance Co. Ltd. v. DDIT (2015) 169 TTJ 129 / 38 ITR 568 (Mum.)(Trib.)

114 **S.9(1)(i) : Income deemed to accrue or arise in India – Royalty – Income from capacity sales under capacity sales agreement between assessee and VSNL – Question of attribution of profits does not arise – Income from capacity sales not taxable in India as business income or royalty or fees for technical services – Standby maintenance charges – Not fees for technical services under section 9(1)(vii). [Ss.9(1)(vi),9(1)(vii)]**
The assessee was a Bermuda-based company which had built a high capacity submarine fibre optic telecommunications cable providing a telecommunication link between the United Kingdom and Japan. The assessee entered into memorandum of understanding with various other international telecommunication carriers for the purpose of planning, designing and constructing the submarine fibre optic telecommunications cable. For this purpose the memorandum of understanding elaborated the rights and obligations of the various parties involved in the fibre optic link around the global cable system (FLAG). At the time of the signing of the memorandum of understanding, there were 13 parties other than the assessee, which included VSNL. All the signatory parties intended to acquire the capacity in the FLAG cable system in terms of minimum investment unit. The memorandum of understanding was effective till construction and maintenance agreement was executed by the parties. Thereafter, the assessee entered into a capacity sales agreement with VSNL. Accordingly, VSNL had to pay US $28.94 million to the assessee towards purchase of capacity. The assessee claimed that it was from sale of goods from a non-resident to a resident which could not be taxed in India. The Assessing Officer held that the payment was in the nature of royalty or fees for technical know-how and it was taxable under section 9(1)(i). The receipts in the hands of the assessee did not arise as a consequence of sale of any article or commodity but the use

of "right to use" assignable capacity in the cable system and it was taxable under section 9(1)(vi) and 9(1)(vii). Similarly, the income from standby maintenance activities required highly skilled and technical personnel and was separately received and was also taxable under the head "fees for technical services". The Commissioner (Appeals) observed that the amount received by the assessee from VSNL was on account of sale of capacity in the cable system and it was from normal business of the assessee was taxable as business income of the assessee under section 9(1)(i), that the income attributable to India could be worked out on the basis of the proportionate worldwide profits and the payment could not be taxed as royalty or fees for technical services under section 9(1)(vi) or (vii), that the payment received on account of standby maintenance in terms of the construction and maintenance agreement was taxable in India as fees for technical services under section 9(1)(vii). On appeal :

Held, (i) that in the case of a "royalty", agreement, the complete ownership is never transferred to the other party. The concept of transfer of ownership to the exclusion of the other party is denuded in the case of "royalty". What is envisaged in section 9(1)(vi) read with Explanation thereto, is that there should be transfer of rights of any kind of the property as defined therein; or imparting of any information in respect of various kinds of property; or use of rights to use of any equipment. If the consideration has been received for transferring the ownership with all rights and obligations then such a consideration cannot be taxed under the head "Royalty". Thus, characterisation of the transfer has to be seen in the terms of the contract and agreement entered by the parties, which here in this case is for sale and not for simple user.

(ii) That Explanation 1(a) to section 9(1)(i) clarified that the income from business deemed under clause (i) of sub-section (1), is to be attributed to the operation carried out in India. The said Explanation would not be applicable, as there was no deemed income accruing or arising to the assessee in India within the ambit of section 9(1)(i). The question of attribution would only arise, if it was established that income had accrued or arisen to the assessee within the deeming fiction of section 9(1)(i). Therefore, the attribution made by the Commissioner (Appeals) on proportionate basis of worldwide revenue and gross profit was not correct. The Commissioner (Appeals) had not shown how there was a business connection, asset or source of income in India. Unless the deeming income fell within the parameters of section 9(1)(i), no attribution could be made. Thus, the payment of US $28.94 million received by the assessee from sales of capacity made to VSNL was not taxable either as "royalty" or "business income" accruing or arising in India within the deeming provision of section 9(1)(i).

(iii) That standby maintenance charges were in the form of a fixed annual charge which was in the nature of reimbursement. Only actual cost incurred had been recovered from VSNL in providing the standby maintenance services. There was no profit element or mark-up involved. The assessee had also provided the details of receipt and cost involved in the standby maintenance expenses. Therefore, the receipts from standby maintenance charges from VSNL could not be taxed as fees for technical services and within the definition and meaning of section 9(1)(vii) as there was no rendering of services.(AY. 1998-99 to 2000-01)

Flag Telecom Group Ltd. v. Dy. CIT (2015) 38 ITR 665 / 119 DTR 115 / 153 ITD 702 / 170 TTJ 1 (Mum.)(Trib.)

115 **S.9(1)(i) : Income deemed to accrue or arise in India – Business connection – Payment made for utilizing telecom voice services in USA – Not liable to deduct tax at source. [Ss.40(a)(ia), 195]**

The assessee made payment to a US company for utilizing telecom voice services in USA and it claimed that the said payment did not constitute fee for technical services but was in the nature of business income of the non-resident. Since the non-resident did not have a Permanent Establishment in India, said income was not chargeable to tax in the hands of the non-resident in India and, therefore, there was no obligation on the part of the assessee to deduct tax at source. The AO however, took the view that the said payment was in nature of fee for technical services and was, therefore, chargeable to tax in India in the hands of the non-resident. Since the assessee did not deduct TDS, the AO invoked the provisions of section 40(a)(i). On appeal, the CIT (A) deleted said addition. On appeal by revenue the Tribunal held that, payment made by assessee, an Indian company to a US company for utilizing telecom services in USA did not constitute fee for technical services as said payments were for use of bandwidth provided for down-linking signals in US; and said payments were not in nature of managerial, consultancy or technical services nor was it for use of or right to use industrial, commercial or a scientific equipment. Order of CIT (A) was confirmed. (AY. 2010-11)

ITO v. Clear Water Technology Services (P.) Ltd. (2014) 52 taxmann.com 115 / (2015) 67 SOT 15 (URO)(Bang.)(Trib.)

116 **S.9(1)(i) : Income deemed to accrue or arise in India – Business connection – Reimbursed amount – Agreement was not examined by AO – Matter remanded.**

AO held that reimbursed amount had to be included in commission income earned by assessee on sales made to its AE. Tribunal held that relevant agreement provided that commission was not to be computed on sale orders which required procurement of local content by assessee, since said agreement was not examined by AO matter was to be remanded for fresh adjudication. (AY. 2008-09)

Varian India (P.) Ltd. v. Addl. CIT (2014) 51 taxmann.com 404 / (2015) 67 SOT 17 (URO) (Mum.)(Trib.)

117 **S.9(1)(i) : Income deemed to accrue or arise in India – Business connection – Permanent establishment – Not a dependent agent – Commission earned could not be taxed in hands of assesee – DTAA-India-USA.[Art. 5, 7]**

Assessee was Indian branch of company named VIPL which in turn was a 100 per cent subsidiary of Varian USA. VIPL entered into distribution and representation agreement with assessee for supply and sale of analytical lab instruments manufactured by them to Indian customers directly and assessee carried out pre-sale activities like liasoning and other incidental post-sale support activities for which it was entitled to commission. Assessee had no authority and also could not negotiate or conclude contracts. None of risks like market risk, product liability risk, R&D risk, credit risk, price risk, inventory risk or foreign currency risk was undertaken by assessee. Tribunal held that on facts, assessee was not a dependent agent of Varian group of companies and did not constitute

a PE for said company in India therefore commission earned could not be taxed in hands of assessee. (AY. 2008-09)
Varian India (P.) Ltd. v. Addl. CIT (2014) 51 taxmann.com 404 / (2015) 67 SOT 17 (URO) (Mum.)(Trib.)

S.9(1)(i) : Income deemed to accrue or arise in India – Business connection – Make available – Testing – Could not be treated as fees for technical services – Not liable to deduct tax at source – DTAA-India-USA.[Ss. 9(1)(vii),195, Art, 12] 118
Assessee, engaged in business of manufacturing ultrasonic meters, paid certain amount to a US company towards calibration and testing of equipment, in view of fact that expertise connected with testing had not been passed on to assessee, payment in question could not be treated as 'fee for technical services' and, thus, assessee was not required to deduct tax at source while making said payment. (AY. 2009-10)
ITO v. Denial Measurement Solutions (P.) Ltd. (2014) 52 taxmann.com 443 / (2015) 67 SOT 76 (URO)(Ahd.)(Trib.)

S.9(1)(i) : Income deemed to accrue or arise in India – Business connection – Managerial services – Even technical or consultancy services, if they do not meet criterion of 'make available', cannot be treated as Fees for technical services – DTAA-India-UK. [Art, 13(4), 15] 119
After amendment effective from 11-2-1994 in DTAA between India and UK, managerial services are not covered in definition of 'Fees for technical services' (FTS) and even technical or consultancy services, if they do not meet criterion of 'make available', cannot be treated as Fees for Technical services. Services generally related to human resource matters, cost control, fund management, quality and design reviews, etc., are routine managerial activities and cannot be classified as technical or consultancy services, by providing such services, it cannot be said that foreign company is making available any technical knowledge of enduring benefit which would enable Indian company to apply them on their own in future.
Measurement Technology Ltd. United Kingdom, In re (2015) 376 ITR 461 / 233 Taxman 515 / 279 CTR 30 (AAR)

S.9(1)(vi) : Income deemed to accrue or arise in India – Income from supply of software embedded in hardware equipment or otherwise to customers in India – Does not amount to royalty – DTAA-India-France. [Art. 13(3)] 120
Held, dismissing the appeals, that the income of the assessee from supply of software embedded in the hardware equipment or otherwise to customers in India did not amount to royalty under section 9(1)(vi).
CIT v. Alcatel Lucent Canada (2015) 372 ITR 476 / 231 CTR 87 / 231 Taxman 87 (Delhi) (HC)

121 **S.9(1)(vi) : Income deemed to accrue or arise in India – – Royalty – Indian agent of foreign company cannot be regarded as "Dependent Agent Permanent Establishment" if agent has no power to conclude contracts. If the agent is remunerated at arm's length basis, no further profit can be attributed to the foreign company. It is doubtful whether retrospective amendment to S. 9(i)(vi) can apply the DTAA. However, question is left open – DTAA-India-Mauritius [S. 4, 5, 6, 90, 195, Article 5(4), 5(5), 7]**

The assessee is a foreign company incorporated in Mauritius. It had filed its residency certificate and pointed out that its business is of telecasting of TV channels such as B4U Music, MCM etc. During the assessment year under consideration, its revenue from India consisted of collections from time slots given to advertisers from India. The details filed by the assessee revealed that there is a general permission granted by the Reserve Bank of India to act as advertisement collecting agents of the assessee. The permissions were granted to M/s. B4U Multimedia International Limited and M/s. B4U Broadband Limited. In the computation of income filed along with the return, the assessee claimed that as it did not have a permanent establishment in India, it is not liable to tax in India under Article 7 of the DTAA between India and Mauritius. The argument further was that the agents of the assessee have marked the ad-time slots of the channels broadcasted by the assessee for which they have received remuneration on arm's length basis. Thus, in the light of the Central Board of Direct Taxes Circular No.23 of 1969, the income of the assessee is not taxable in India. The conditions of Circular 23 are fulfilled. Therefore, Explanation (a) to section 9(1)(i) of the IT Act will have no application. The Assessing Officer did not accept the contentions of the assessee. However, the Tribunal noted that paragraph 5 of Article 5 of the DTAA indicates that an enterprise of a contracting State shall not be deemed to have a permanent establishment in the other contracting State merely because it carries on business in that State through a broker, general commission agent, or any other agent of independent status, where such persons are acting in the ordinary course of their business. However, when the activities of such an agent are devoted exclusively or almost exclusively on behalf of that enterprise, he will not be considered an agent of an independent status within the meaning of this paragraph. The Tribunal held that the assessee carries out the entire activities from Mauritius and all the contracts were concluded in Mauritius. The only activity which is carried out in India is incidental or auxiliary / preparatory in nature which is carried out in a routine manner as per the direction of the principal without application of mind and hence B4U is not an dependent agent. Nearly 4.69% of the total income of B4U India is commission/service income received from the assessee company and, therefore, also it cannot be termed as an dependent agent. As far as the alternate contentions are concerned, it was held that the assessee and B4U India were dealing with each other on arm's length basis. 15% fee is supported by Circular No.742. Thus it was held that no further profits should be taxed in the hands of the assessee. On appeal by the department to the High Court, HELD dismissing the appeal:

(i) As per the agreement between the assessee and B4U, B4U India is not a decision maker nor it has the authority to conclude contracts Further, the Revenue has not brought anything on record to prove that agent has such powers and from the agreement any such conclusion could not have been drawn. Barring this agreement, there is no material or evidence with the Assessing Officer to disprove

the claim of the assessee that the agent has no power to conclude the contract. This finding is rendered on a complete reading of the agreement. The Indo-Mauritius DTAA requires that the first enterprise in the first mentioned State has and habitually exercised in that State an authority to conclude contracts in the name of the enterprise unless his activities are limited to the purchase of goods or merchandise for the enterprise is a condition which is not satisfied. Therefore, this is not a case of B4U India being an agent with an independent status.

(ii) The findings of the Supreme Court judgment in Morgan Stanley & Co. that there is no need for attribution of further profits to the permanent establishment of the foreign company where the transaction between the two is at arm's length but this was only provided that the associate enterprise was remunerated at arm's length basis taking into account all the risk taking functions of the multinational enterprise. Thus, assuming B4U India is a dependent agent of the assessee in India it has been remunerated at arm's length price and, therefore, no profits can be attributed to the assessee. The argument that the assessee had not subjected itself to the transfer price regime and cannot derive assistance from this judgment is not correct because the requirement and in relation to computation of income from international transactions having regard to arm's length price has been put in place in Chapter-X listing special provisions relating to avoidance of tax by substituting section 92 to 92F by the Finance Act of 2001 with effect from 1st April, 2002. Therefore, such compliance has to be made with effect from assessment years 2002-03. In any event, we find that the Tribunal has rightly dealt with the alternate argument by referring to the Revenue Circular 742. There, 15% is taken to be the basis for the arm's length price. Nothing contrary to the same having been brought on record by the Revenue. Similarly, the Division Bench judgment of this Court in the case of *Set Satellite (Singapore) Pte. Ltd. v. Deputy Director of Income Tax (IT) & Anr. (2008) 307 ITR 265* would conclude this aspect.

(iii) The argument that the transponder charges being a consideration and process as clarified in terms of Explanation (6) to section 9 of the IT Act, the assessee was obliged to deduct tax at source under section 195 and having not deducted the same, there has to be a disallowance under section 40(a)(i) of the IT Act is not required to be answered. It was doubtful whether any payment which is stated to be made to a US based company by the assessee which is a Mauritius based company, can be brought to tax in terms of Indian tax laws. We are of the opinion that any wider question or controversy need not be addressed. We clarify that the arguments based on whether the payments made could be brought within the meaning of the word "process" and within the explanation can be raised and are kept open for being considered in an appropriate case. (AY. 2001-02, 2004-05, 2005-06)

DIT v. B4U International Holding LTD (2015) 374 ITR 453 / 119 DTR 73 / 277 CTR 213 / 231 Taxman 858 (Bom.)(HC)

122 **S.9(1)(vi) : Income deemed to accrue or arise in India – Royalty – Lump sum consideration for supply, installation and erection of machinery with relevant know how even if the said amount was treated as royalty, it was covered by S.90 and therefore not liable to tax-DTAA-India-UK. [S. 90]**

Amount paid by assessee to the foreign company for imparting technical know-how under collaboration-cum-service agreements being part of lump sum consideration for installation and erection of machinery cannot be treated as royalty. Though there is a possibility to interpret the clauses of the agreement in such a way that the foreign company retained with it the ultimate patent and prohibited sublease or other unauthorized uses thereof by the assessee, the predominant factors are suggestive of the fact that the consideration paid by the assessee under the know-how license and engineering agreement for parting with technical know-how cannot be treated as royalty. Further, it is not a case of mere licensing of know-how but the same is coupled with engineering. Therefore the impugned amount paid by the assessee to foreign company cannot be treated as royalty. Even if said amount is treated as royalty, it is covered by Indo-UK DTAA and therefore it is not liable to tax in India. (AY. 1988-89, 1989-90)

CIT v. Andhra Petrochemicals Ltd. (2015) 114 DTR 41/275 CTR 58 / 230 Taxman 402 (AP)(HC)

123 **S.9(1)(vi) : Income deemed to accrue or arise in India – Royalty – Fees for technical services – Consideration paid for right to use technical knowhow etc. would be taxable as 'royalty' and consideration paid for technical services taxable in India to the extent they are performed in country of source – DTAA-India-Austria. [S. 9(1)(vii), 90, Articles 6, 7]**

Assessee had agreed to furnish to an entity, knowhow and technical assistance for manufacture of hydro power equipment and marketing the same. Assessee deputed its technical experts to the entity's factory to assist them in setting up and commissioning manufacturing facilities in the design and manufacturing of products. The agreement described lump-sum payment towards 'information and services to be furnished' and recurring payment as 'royalty'. AO treated entire amount towards royalty taxable under Article 6 of DTAA. Held that the agreement with the entity would fall in the category of contract involving supply of technical know-how etc. as well as technical services. Thus both Articles 6 & 7 of DTAA would be applicable. Consideration paid for right to use technical know how etc. would be taxable as 'royalty' and consideration paid for technical services taxable in India to the extent they are performed in country of source. (AY. 1989-90, 1990-91)

CIT v. VOEST Alpine (2015) 114 DTR 188 / 230 Taxman 405 / 274 CTR 84 (Delhi)(HC)

124 **S.9(1)(vi) : Income deemed to accrue or arise in India – Royalty – Sum received by international news & related photos in India is royalty – DTAA-India-France. [Art. 12, 13, Copy right Act, 1957, S.13(1)]**

The assessee an international news agency, was having its headquarters at France. AFP had been distributing its text news and photos connected with news in India through various Indian News agencies, viz., Press Trust of India and IANS. There were two categories of payments received by assessee from India one for transmission of news and the other for transmission of news photos. It provided daily reports of

international events of interest which occurred in the various fields such as politics, sports, economics. The Hon'ble Appellate Tribunal held that 'news' *per se* cannot be copyrighted, whereas a news item or news story would be copyright under section 13(1)(a) of Copyright Act. The Hon'ble ITAT further held that 'photographs' as 'artistic works' are copyright items. Further it was held that the Assessee was providing a gamut of service covering three categories, namely, news item, news story, photographs or news without any split, and categories were interlinked, it should be construed as composite service possessing 'modicum of creativity' and copyright subsisted in news reports and photographs distributed/circulated by assessee. Hence, the copyright would qualify as 'royalties' within meaning ascribed under paragraph 3 of Article 13 of DTAA between India and France. (AY. 2002-03, 2005-06, 2008-09)

Agence France Presse v. Addl. DIT (IT) (2014) 66 SOT 183 / (2015) 153 ITD 568 / 167 TTJ 149 (Delhi)(Trib.)

S.9(1)(vi) : Income – Deemed to accrue or arise in India – Royalty – Deduction at source – Payment made by assessee to non-resident towards purchase of products did not fall within purview of royalty – Not liable to deduct tax at source – DTAA-India-Singapore. [S.195, Art. 12] 125

Assessee was appointed as a registered re-seller of software products manufacture by Altiris, a Singapore based company. In terms of agreement, assessee had to purchase software products from Altiris and sell those products to customers in India. Role of assessee was that of a trader and, there was no transfer of copyright or patent of software products by Altiris to assesse. Assessee was not even permitted to make copies or duplicate software. Payments made by assessee to Altiris did not come within purview of royalty u/s. 9(1)(vi) and, thus, there was no requirement to deduct TDS while making said payments. (AY. 2008-09, 2009-10)

ADIT v. Locuz Enterprise Solutions Ltd. (2015) 154 ITD 808 (Hyd.)(Trib.)

S.9(1)(vi) : Income deemed to accrue or arise in India – Royalty – Fees for technical services – Consideration for supply of software (whether with or without equipment) is not taxable as "royalty" if there is no transfer of right in the copyright to the software-DTAA-India-USA [Ss.9(1)(vii) 115A, Art,2, 5 12, 24, Copy right Act, 1957, S. 14, 52(1)(aa)(ad)] 126

Allowing the appeal of assessee the Tribunal held that: Consideration received by the Assessee for supply of product along with licence of software to end user is not royalty under Article 12 of the Tax Treaty. Even where the software is separately licensed without supply of hardware to the end users (i.e. eight out of 63 customers), we are of the view that the terms of licence agreement is similar to the facts of Infrasoft Ltd. Accordingly, we hold that there was no transfer of any right in respect of copyright by the assessee and it was a case of mere transfer of a copyrighted article. The payment is for a copyrighted article and represents the purchase price of an article. Hence, the payment for the same is not in the nature of royalty under Article 12 of the Tax Treaty. The receipts would constitute business receipts in the hands of the Assessee and is to be assessed as business income subject to assessee having business connection/PE in India. Appeal of assessee was partly allowed. (AY.2003-04 to 2010-11)

Aspect Software Inc v. ADIT (2015) 155 ITD 409/ 172 TTJ 1 (Delhi)(Trib.)

127 **S.9(1)(vi) : Income deemed to accrue or arise in India – Royalty Non-resident – Consideration paid to foreign company for use or right to use confidential program software constitute royalty – Liable to deduct tax at source – DTAA-India-Netherland [Ss.90, 195 Art. 5, 12(3)(a)(b)]**

Authority for Advance Ruling held that consideration paid to foreign company for use or right to use confidential program software constitute royalty hence liable to deduct tax at source.

Skill Soft Ireland Ltd., In re (2015) 376 ITR 371 / 234 Taxman 850 / 279 CTR 12 / 123 DTR 17 (AAR)

128 **S.9(1)(vii) : Income deemed to accrue or arise in India Fees for technical services – Certification agency – Cannot be taxed – DTAA-India-German. [Art. 12(4)]**

Assessee was a certification agency which was issuing ISO certificate to its clients. For that purpose, assessee's audit party evaluated activities undertaken by clients and on basis of report of such audit party, a certificate to individual client/applicant was issued. Assessee's activities were neither technical nor managerial nor consultancy services and therefore, could not be brought within purview of Section 9(1)(vii) and Article 12(4) of Indo-German DTAA.

DIT v. TUV Bayren (India) Ltd. (2015) 234 Taxman 388 (Bom.)(HC)

129 **S.9(1)(vii) : Income not included in total income – Non-resident – Royalty – Mere right to use or permission to use intellectual property rights/know-how – No transfer of full ownership – Not a case of outright sale – Payment taxable in India as royalty – DTAA-India-Germany [Art. VIIIA]**

The proprietorship or ownership rights continued to vest with ADC, non-resident, but the right to use with trade name, technology, etc., was granted by ADC to HCL, the assessee. Thus, it was not a case of transfer of ownership rights. Therefore, the payments by HCL to ADC were for mere right to use intellectual property rights and know-how and not for transfer of full ownership. The payments to ADC would be taxable in India as royalty. (AY. 1989-90, 1990-91)

HCL Ltd. v. CIT (2015) 372 ITR 441 / 276 CTR 416 / 54 taxmann.com 231 / 116 DTR 89 (Delhi)(HC)

130 **S.9(1)(vii) : Income deemed to accrue or arise in India – Shipping business – International traffic – Fees for technical services – Amount paid by Indian entities as "share of cost" of utilizing automated telecommunications system is not assessable as "fees for technical services" if there is not profit element in it – DTAA-India-Netherlands. [S. 44B,90, 115A, 172, Art.7,8, 9,13(4)]**

The assessee had three agents working for them viz. Maersk Logistics India Limited (MLIL), Maersk India Private Limited (MIPL) and Safmarine India (Pvt) Limited (SIPL). These agents would book cargo and act as clearing agents for the assessee. In order to help them in this business, the assessee had procured and maintained a global telecommunication facility called MaerskNet which is a vertically integrated communication system. The agents would incur pro rata costs for using the said system and the agents share of the cost was, therefore, recovered from these three agents. According to the assessee, it was merely a system of cost sharing and hence the payments received by the assessee from MIPL, MLIL and SIPL

were in the nature of reimbursement of expenses. However, the AO and CIT(A) held that the amounts paid by these three agents to the assessee is consideration/fees for technical services rendered by the assessee and taxable in India under Article 13(4) of the DTAA and assessed tax at 20% under section 115A of the Income-tax Act, 1961. The assessee submitted before the Tribunal that without this system, it was not possible to conduct international shipping business efficiently and in having the system set up, the assessee had incurred costs. A share of this cost would have to be borne by each of the agents which utilise the system and, accordingly, these pro rata costs relatable to each of the agents was billed to the agents and these amounts were thus paid. It was merely a "charging back" to the agent, proportionate costs of the global shipping communications system and did not, in any manner, amount to rendering of any technical services. The Tribunal accepted the contention of the assessee. On appeal by the department to the High Court HELD dismissing the appeal:

(i) There is no finding by the Assessing Officer or the Commissioner that there was any profit element involved in the payments received by the assessee from its Indian agents. On the other hand, having considered the various submissions, we are of the view that no technical services as contemplated by the Act have been rendered in the instant case;

(ii) In *Director of Income Tax (International Taxation) v. Safmarine Container Lines NV (2014) 209 ITR 366,* this Court had occasion to consider the effect of the Double Taxation Avoidance Agreement between India and Belgium in which the questions involved were whether the income from inland transport of cargo within India was covered by Article 8(2)(b)(ii) of the Tax Treaty between India and Belgium. This Court, while considering the said issue found that the assessee was not liable to tax by virtue of DTAA in that case. Moreover, in the present case, there was no occasion for the Tribunal to come to any different view. In our view, the Tribunal has correctly observed that utilization of the Maersk Net Communication system was an automated software based communication system which did not require the assessee to render any technical services. It was merely a cost sharing arrangement between the assessee and its agents to efficiently conduct its shipping business. The Maersk Net used by the agents of the assessee entailed certain costs reimbursement to the assessee. It was part of the shipping business and could not be captured under any other provisions of the Income-tax Act except under DTAA;

(iii) In *Commissioner of Income-tax v. Siemens Aktiongeselleschaft reported in [2009] 310 ITR 320 (Bom.)* this Court has held that once there is a treaty between two sovereign nations, though it is open to a sovereign Legislature to amend its laws, a DTAA entered into by the Government, in exercise of the powers conferred by section 90(1) of the Act must be honoured. The provisions of Section 9 Income Tax Act were applicable and the provisions of DTAA, if more beneficial than the I.T. Act, the provisions of DTAA would prevail. Thus, in the instant case also, it is not possible for the revenue to unilaterally decide contrary to the provisions of the DTAA. (AY.2001-02 to 2003-04)

DIT v. A. P. Moller Maersk A/S (2015) 374 ITR 497 / 120 DTR 147 / 278 CTR 139 / 232 Taxman 564 (Bom.)(HC)

Editorial: SLP granted (SLP(C) No. 27091 of 2015 dated 24-9-2015) (2015) 235 Taxman 513 (SC)

131 **S. 9(1)(vii) : Income deemed to accrue or arise in India – Fees for technical services – Though construction, installation and assembly activities are *de facto* in the nature of technical services, the consideration thereof will not be assessable under Article 12 but will only be assessable under Article 7 if an "Installation PE" is created under Article 5. As Article 5 is a specific provision for installation etc., it has to prevail over Article 12. [S. 5, Art. 7, 12]**

The Tribunal had to consider whether consideration attributable to the installation, commissioning or assembly of the plant and equipment & supervisory activities thereof is assessable to tax in India under section 5(2)(b) & 9(1)(vii) of the Act and Article 5 & 7 and Article 12 of the DTAA. HELD by the Tribunal:

(i) Under s. 5(2)(b) of the Act, the consideration attributable to the installation, commissioning or assembly of the plant and equipment & supervisory activities thereof is assessable to tax in India as the said income accrues in India. S. 9(1)(vii) does not apply because the definition of 'fees for technical services' in Explanation 2 to s. 9 (1)(vii) specifically excludes "consideration for any construction, assembly, mining or like project undertaken by the recipient". Even though the exclusion clause does not make a categorical mention about 'installation, commissioning or erection' of plant and equipment, these expressions, belonging to the same genus as the expression 'assembly' used in the exclusion clause and the exclusion clause definition being illustrative, rather than exhaustive, covers installation, commissioning and erection of plant and equipment;

(ii) However, the said receipt is not assessable as business profits under Article 7(1) of the DTAA if the recipient does not have an "installation PE" in India. Under the DTAA, an installation or assembly project or supervisory activities in connection therewith can be regarded as an "Installation PE" only if the activities cross the specified threshold time limit (or in the case of Belgian & UK, where the charges payable for these services exceeds 10% of the sale value of the related machinery or equipment). The onus is on the revenue authorities to show that the conditions for permanent establishment coming into existence are satisfied. That onus has not been discharged on facts;

(iii) On the question as to whether the said receipt for installation, commissioning or assembly etc. activity can be assessed as "fees for technical services", it is seen that the DTAA has a general provision in Article 12 for rendering of technical services and a specific provision in Article 5 for rendering of technical services in the nature of construction, installation or project or supervisory services in connection therewith. As there is an overlap between Article 5 and Article 12, the special provision (Article 5) has to prevail over the general provision (Article 12). What is the point of having a PE threshold time limit for construction, installation and assembly projects if such activities, whether cross the threshold time limit or not, are taxable in the source state anyway. If we are to proceed on the basis that the provisions of PE clause as also FTS clause must apply on the same activity, and even when the project fails PE test, the taxability must be held as FTS at least, not only the PE provisions will be rendered meaningless, but for gross versus net basis of taxation, it will also be contrary to the spirit of the UN Model Convention Commentary. Accordingly, though construction, installation and assembly activities are *de facto* in the nature of technical services, the consideration thereof will not

be assessable under Article 12 but will only be assessable under Article 7 if an "Installation PE" is created;

(iv) In any event, the said consideration cannot be assessed as "fees for technical/ included services" as the "make available" test is not satisfied. The said installation or assembly activities do not involve transfer of technology in the sense that the recipient of these services can perform such services on his own without recourse to the service provider (this is relevant only for the DTAAs that have the "make available" condition). (AY. 2010-11, 2011-12)

Birla Corporation Ltd. v. ACIT (2015) 153 ITD 679 / 168 TTJ 189 / 115 DTR 1 (Jab.)(Trib.)

S.9(1)(vii) : Income deemed to accrue or arise in India – Fees for technical services – DTAA-India-Singapore – Matter remanded. [S.40(a)(i),195, Art. 12] 132

The assessee-company was engaged in the business of manufacturing and installation of structural glazing works in India. Assessee entered into a management services agreement with its Singapore holding company and made payment for same without deduction of tax at source. AO opined that payment was towards 'Fees for Technical Services' and assessee was liable to deduct TDS before making payment to non-resident holding company and thus invoked provisions of section 40(a)(i). Assessee stated that services received by it from its holding company was not 'Fees for Technical Services' as per DTAA between India and Singapore and therefore TDS was not required to be deducted and provisions of section 40(a)(i) were not attracted. Tribunal held that AO had only considered applicability of definition of term 'Fees for Technical Services' under section 9(1)(vii) and had not considered applicability of definition of 'Fees for Technical Services' under DTAA between India and Singapore and had also not examined as to which of provisions was beneficial to assessee, matter required readjudication. Matter remanded. (AY. 2008-09)

Permasteelisa (India) (P.) Ltd. v. Dy. CIT (2014) 51 taxmann.com 502 / (2015) 67 SOT 21 (URO)(Bang.)(Trib.)

Section 10 : Incomes not included in total income

S.10(10C) : Any amount received or receivable by an employee – Bank employee – Exit option scheme – Employee serving for more than ten years and at time of retirement more than forty years of age – Second exit option scheme for overall reduction of employees – Employee declaring he had not accepted any commercial employment in any company belonging to same management – Scheme fulfilling conditions in rule 2BA – *Ex gratia* amount entitled to exemption. [ITR.2BA] 133

The assessee had served for a period of more than ten years and at the time of retirement was more than forty years. For the assessment year 2008-09, he declared a total income of ₹ 6,94,390. He exercised the option of voluntary retirement under the exit option scheme and claimed *ex gratia*/compensation amount as determined under section 10(10C). Though the original authority disallowed the claim of the assessee on the ground that the scheme did not satisfy the conditions laid down under Rule 2BA of the Income-tax Rules, 1962, the Commissioner (Appeals) allowed the claim of the assessee. This was confirmed by the Tribunal. On appeal :

Held, dismissing the appeal, that the second exit option scheme was introduced to reduce the staff. It was just impossible to continue in the new environment of computerisation applied to the workers and officers. The scheme had resulted in overall reduction of the employees. The assessee had furnished the declaration that he had not accepted any commercial employment in any company or concern belonging to the same management. Thus, the Commissioner (Appeals) concluded that all the conditions laid down in Rule 2BA were fulfilled. The assessee entitled to exemption of the *ex gratia* payment under section 10(10C).(AY. 2008-09)
CIT v. Appasaheb Baburao Kamble (2015) 370 ITR 499 / 122 DTR 238 / 232 Taxman 239 (Karn.) (HC)

134 **S.10(10D) : Life insurance policy – Keyman insurance policy – Unit Linked Endowment Assurance Plan – An insurance policy, whether it involves capital appreciation or is under any other investment scheme, it meets tests laid down under section. [S. 37(1)]**
Even a "Unit Linked Endowment Assurance Plan" with the main object of guaranteed returns rather than life insurance is a "Keyman Insurance" as defined in s. 10(10D). The fact that policy was not termed as a "Keyman Insurance" and the fact that the IRDA Guidelines disapproved the issue of such policies is irrelevant. So long as policy is an insurance policy, whether it involves capital appreciation or is under any other investment scheme, it meets tests laid down under section 10(10D). Appeal of assessee was allowed. (AY. 2006-07)
Suri Sons v. ACIT (2015) 155 ITD 825 / 125 DTR 278 / 173 TTJ 460 / 44 ITR 700 (Asr.) (Trib.)

135 **S.10(14) : Special allowance or benefit – Development officer in LIC – Additional conveyance allowance – Not eligible for exemption.**
Assessee, who was working as a Development officer in LIC, had received certain amount from his employer as an additional conveyance allowance and claimed deduction under section 10(14)(i). Assessing Officer disallowed assessee's claim, which was allowed by Tribunal. On appeal allowing the appeal the Court held that since there was no evidence that additional conveyance paid was reimbursement of expenditure, assessee was not eligible for exemption as claimed.
CIT v. Kishore Kumar Paul (2015) 234 Taxman 154 (Cal.)(HC)

136 **S.10(15) : Exemption – Interest on foreign currency loans – Allowable on gross basis and not on net basis. [S.10(15) (iv)(h)]**
Interest on foreign currency loans is allowable on gross basis and not on net basis. (AY, 1997-98)
DIT v. Credit Agricole Indosuez (2015) 377 ITR 102 / 280 CTR 491 / 126 DTR 156 (Bom.) (HC)

137 **S.10(17A) : Awards and rewards in cash or kind – Amount received as an award is a capital receipt and hence not taxable.[S. 2(24), 4]**
The assessee was an editor of an English magazine claiming exemption of amounts received as awards for excellence in journalism. The AO disallowed the same on the ground that the award did not satisfy conditions of section 10(17A). The CIT(A) reversed

the order of the AO holding that the award received was not income as per section 2(24) and thus there was no question of its taxability. The Tribunal upheld the order of the AO.

The High Court following the decision of the Karnataka High Court in the case of *International Instruments (P.) Ltd. v. CIT (1982) 133 ITR 283* observed that a receipt may not be 'income' at all within the proper connotation of that term and yet may come within the express exemption under section 10, due to the over-anxiety of the draftsman to make the fact of non-taxability clear beyond doubt and hence held that an award would be a capital receipt and hence not taxable. (AY. 1991-92)

Aroon Purie v. CIT (2015) 375 ITR 188 / 231 Taxman 349 / 277 CTR 1 / 118 DTR 105 (Delhi)(HC)

S.10(19A) : Exemption – Annual value – Part of palace rented out to tenants [Wealth -tax Act, 1957, S. 5(1)(iii)] 138

If only a part of the palace is in self-occupation of the former ruler, and the rest has been let out, the exemption available under section 10(19A) will not be available to the entire place.

CIT v. H.H. Maharao Bhim Singhji (2015) 122 DTR 425 (Raj.)(HC)

S.10(21) : Scientific research association – Denial of exemption merely on ground that assessee had not filed Form 10 within time was not justified. [S. 11(2)] 139

Assessee, a scientific research institution, was registered u/s. 12AA. A.O. denied exemption u/s. 10(21) to assessee on ground that during year it had applied ₹ 13.62 crores out of total income of ₹ 14.77 crores and it had failed to furnish Form 10 as provided u/s. 11(2) within time. CIT (A) and Hon'ble ITAT held that denial of exemption merely on ground that assessee had not filed Form 10 within time was not justified, because it was approved for purposes of s. 35 and there was nothing on record to suggest that it violated any of other conditions for exemption. Therefore, assessee was eligible for exemption in respect of its income u/s. 10(21). (AY. 2007-08)

Wadia Institute of Himalayan Geology v. ACIT (2015) 155 ITD 676 (Delhi)(Trib.)

S.10(22) : Educational institution – Investments realigned within time granted in compliance with statutory regulations – Entitled to exemption [S. 10(23C)] 140

Restrictions regarding investment was amended with effect of amendment of section 10(23C) w.e.f. 1-4-1999, therefore investments realigned within time granted in compliance with statutory regulations is entitled to exemption.

All India Personality Enhancement and Cultural Centre For Scholars AIPECCS Society v. DIT(E) (2015) 379 ITR 464 / 281 CTR 1 / 126 DTR 353 (Delhi.)(HC)

S.10(23AAA) : Funds established for welfare of employees – Contribution by employer – Rejection of application by Commissioner was held to be not valid. 141

Assessee-trust was constituted for benefit of employees of a port trust. It filed application for registration under section 10(23AAA). Commissioner invoked Rule 16C of Rules and rejected said application holding that employer could not make any payment for corpus and, therefore, one of conditions laid down in section 10(23AAA) was not fulfilled. On writ allowing the petition the Court held that since as per CBDT

guideline, employer contribution in corpus was acceptable, impugned order passed by Commissioner was to be quashed and set aside.
KPT Employees Welfare Trust v. CIT (2015) 230 Taxman 20 / 119 DTR 145 / 281 CTR 498 (Guj.)(HC)

142 **S.10(23C) : Educational institution – Refusal of registration was held to be not justified – Commercial activity and making huge profit may be relevant for assessment but not at the time of registration – Matter remanded.**
AO disallowed the exemption claimed by the Petitioner under 10(23C)(iiad) of the Act on the ground that the registration was required to be obtained u/s. 10(23C)(vi) of the Act. The order of the AO was confirmed by the Tribunal. On appeal in High Court, High Court remanded matter back to the AO and held that the assessee making profit does not indicate that it is carrying on the activity solely for the purpose of making a profit and that it ceases to be for an educational purpose. Further the fact that the assessee is generating profit or is carrying on commercial activity and is making a huge expenditure in advertisement would come into stay at the time of making the assessment and not at the stage of considering the registration, matter was remanded for reconsideration.
Manas Sewa Samiti v. CCIT (2015) 128 DTR 241 / (2016) 282 DTR 302 / 236 Taxman 546 (All.)(HC)

143 **S.10(23C) : Educational institution – Audit report need not be submitted along with application for approval. [R. 2CA]**
Dismissing the appeal of revenue the Court held that the furnishing of the audit report may be necessary for seeking approval under section 10(23C), but failure to file the audit report along with the application would not be fatal to the application. And, in the event an assessee furnishes the report, the approval as sought by the assessee could not be denied. Thus, the Director General of Income-tax (Exemption) was not justified in denying the assessee approval under section 10(23C)(vi) on the ground that the audit report had not been furnished along with the application since it had been furnished by the assessee subsequently, prior to the rejection of the application. Court also held that Director General of Income-tax (E)-must be satisfied that institution exists solely for purposes of education and not profit however actual application of income not to be enquired into while granting exemption.
All India Personality Enhancement and Cultural Centre For Scholars AIPECCS Society v. DIT(E) (2015) 379 ITR 464 / 281 CTR 1 / 126 DTR 353 (Delhi.)(HC)

144 **S.10(23C) : Educational institution – Generating surplus – Need not maintain separate accounts – Accumulation of income was allowed – Exemption cannot be denied. [S.2(15), 11, 12, 13]**
Allowing the petition the Court held that exemption cannot be denied on the ground that the educational institution has generated surplus. Third proviso to section 10(23C) does not bar accumulation of income but only imposes restrictions. Exemption cannot be denied on the ground that the educational institution has not maintained separate accounts. (AY. 2004-05 to 2009-10)
Hamdard Laboratories (India) & Anr. v. ADIT(E) (2015) 379 ITR 393 / 280 CTR 428 / 126 DTR 1 / (2016) 236 Taxman 78 (Delhi)(HC)

S.10(23C) : Educational institution – Approval – Question of application of funds not to be considered at stage of approval. 145

The assessee submitted an application for grant of approval for exemption under section 10(23C)(vi) for the assessment years 1999-2000, 2000-01 and 2001-02. On rejection of the application a writ petition was filed, Allowing the petition the Court held that; Question of application of funds not to be considered at stage of approval.(AY. 1999-2000, 2000-01, 2001-02)

American School of Bombay Education Trust v. UOI (2015) 377 ITR 645 / (2016) 236 Taxman 155 (Delhi)(HC)

S.10(23C) : Educational institution – One of objects clauses providing trust could run business – No finding recorded that predominant object of trust to do business – Trust entitled to exemption.[S. 10(23C)(vi), 12A] 146

The Chief Commissioner rejected the application of the assessee for grant of approval of exemption on the ground that the assessee-trust had an intention to carry out business activity which was not permissible for charitable organisations. On a writ, allowing the petition the court held that just because One of objects clauses providing trust could run business refusal of registration was held to be not justified. The Chief Commissioner was directed to decide the assessee's application afresh.(AY. 2010-11)

Harf Charitable Trust (Regd.), Malekolta v. CCIT (2015) 376 ITR 110 / 63 taxmann.com 53 / 126 DTR 73 (P&H)(HC)

S.10(23C) : Educational institution – Assessee not only failed to supply initially audited accounts and balance-sheet for relevant assessment year but despite opportunities granted, same were not produced nor books of account were shown, rejection of claim on said ground was justified.[Article 226] 147

Assessee-society, running educational institutions, filed application seeking approval for exemption under section 10(23C)(vi) on 31-3-2010. Application was rejected on ground that it was time-barred and further assessee failed to furnish audited books of account of relevant year. On appeal dismissing the appeal the Court held that; since assessee not only failed to supply initially audited accounts and balance-sheet for relevant assessment year but despite opportunities granted, same were not produced nor books of account were shown, rejection of claim on said ground was justified. (AY.2005-06 to 2010-11)

Bhupesh Kumar Sikshan Evam Vikas Sansthan v. DGIT (2015) 379 ITR 43 / 279 CTR 308 / 122 DTR 264 / 231 Taxman 637 (Patna)(HC)

S.10(23C) : Educational institution – Assessee carrying on its activities of imparting education – Assessee not existing for the sake of profit-making – Government financing assessee to extent of 25% – Substantial finance – Assessee is entitled to exemption. 148

Held, Government has financed the assessee-institutions and its share was 25%. It was not in dispute that the assessee is carrying on its activities of imparting education. It is not existing for the sake of profit-making. Therefore, it satisfied all the legal requirements provided under section 10(23C)(iiiab), hence entitled to exemption. (AYs. 2003-04, 2005-06)

DIT(E) v. Dhamapakasha Rajakarya Prasakta B.M. Sreenivasaiah Educational Trust (2015) 372 ITR 307 / 232 Taxman 575 (Karn.)(HC)

149 **S.10(23C) : Educational institution – Merely because there are other objects of the society, refusal of registration was not justified – Matter remanded.**
Assessee, a registered society, was running a school. It applied for registration. Chief Commissioner had refused registration On writ the court held that merely because there were other objects of society did not mean that educational institution was not existing solely for educational purpose. Matter remanded. (AY. 2008-09)
Allahabad Young Men's Christian Association v. CCIT (2015) 371 ITR 23 / 274 CTR 283 / 229 Taxman 279 (All.)(HC)

150 **S.10(23C) : Educational institution – Object clause cannot be the sole test for granting exemption – No business activities carried on except education – Entitled exemption.**
Where assessee was a trust and did not carry on any other business save and except conducting education, assessee was entitled to benefit of exemption. An assessee could not be held not to exist solely for educational purposes merely on basis that object clause under which assessee is constituted contains certain generalised objects, so long as assessee had carried on no other activity save and except conducting education. (AY. 2009-10)
CIT v. Hardayal Charitable & Educational Trust (2015) 228 Taxman 330 (Mag.)(All.)(HC)

151 **S.10(23C) : Educational institution – Charging of capitation fee – Following the earlier order matter remanded. [S.11, 12A]**
Assessee, a society registered under section 12A, was running an educational institution. It filed return claiming exemption of income under section 11. Assessing Officer rejected assessee's claim on ground that it had collected capitation fee from students at time of giving admission. Tribunal held that co-ordinate Bench of Tribunal in assessee's own case relating to earlier assessment year, had remanded matter back to Assessing Officer for disposal afresh after examining as to whether assessee had in fact collected capitation fee from students. Following aforesaid order passed by co-ordinate Bench, matter was to be remanded back for disposal afresh for relevant assessment year as well.(AY.2009-10)
Dy. CIT v. Chaitanya Memorial Education Society (2014) 30 ITR 120 / (2015) 68 SOT 396 (Hyd.)(Trib.)

152 **S.10(23C) : Exemption – Merely because assessee had charged a fee for processing subsidy applications, assessee's activities could not be ceased to be charitable activities under section 2(15) of the Act – Entitled to exemption. [S. 2(15)]**
Assessee is engaged in disbursing subsidies. It had received certain amount on account of cost of application form and brochure from subsidy seekers. The A.O. is of view that amount so received is in nature of business activities. Hence, the assessee is not entitled to exemption under section 10(23C)(iv). On appeal the Appellate Tribunal held that charging processing fees or service charges was not business activities of assessee, merely because assessee had charged fees for processing subsidy applications, assessee's activities could not be cease to charitable activities under section 2(15). Therefore, assessee is entitled to exemption under section 10(23C)(iv) and addition made by Assessing Officer is not justified. (AY. 2009-10)
National Horticulture Board v. ACIT (2015) 168 TTJ 362 / 67 SOT 410 / 40 ITR 710 (Delhi)(Trib.)

S.10(23C) : Educational institution – Grant of loan by assessee – Society to sister-trust – Rejection of exemption was held to be not justified. 153

Allowing the appeal of assessee the Tribunal held that the Assessing Officer had failed to show how the assessee had violated the provisions of the Act, which would warrant rejection of the claim of exemption made under section 10(23C)(iiiad) of the Act. Hence, the Assessing Officer taxed the income in the hands of the assessee without authority of law. The order of the Commissioner (Appeals) was to be set aside. (AY. 2010-11)

Vairams Kindergarten Society v. CIT (Appeals) (2015) 40 ITR 694 (Chennai)(Trib.)

S.10(23C) : Hospitals – Income earned from house properties as rent was entitled to exemption – If the annual receipts do not exceed ₹ 1 crore. [S.11, 12AA] 154

Assessee-society was running a hospital, had two house properties and was receiving rental income. A.O. held that in order to claim exemption under said section, income should be derived from medical facility and income from house property could not be allowed as exempt.. ITAT observed that a bare reading of s. 10(23C)(iiiae) clearly shows that if the aggregate annual receipts of hospital or institution for treatment do not exceed ₹ 1 crore, it is entitled for exemption u/s. 10(23C)(iiiae). The Act does not say that the income shall be derived from the hospital or other institution. When the hospital has house property which was held under the trust, the income earned by the assessee from such house property shall also form part of the aggregate annual receipts of the institution provided the same is utilized for providing treatment. If the annual receipts do not exceed ₹ 1 crore, the assessee is entitled for exemption. (AY. 2010-11)

Dy. DIT v. Arya Vysya Maternity Home & Child Welfare Centre (2015) 154 ITD 844 (Chennai)(Trib.)

S.10(23C) : Educational institution – promote piety and learning, particularly among the native Christian population of India – "wholly or substantially financed by the Government" – Matter remanded. 155

The assessee was a theological university established to promote piety and learning, particularly among the native Christian population of India. Assessee claimed exemption under section 10(23C)(iiiab), being substantially aided by the Government. AO rejected the explanation and assessed excess of income over expenditure as total income of assessee. CIT(A) confirmed the order of AO. On appeal Tribunal set aside the matter to AO to decide whether the assesse's case falls in the category of "wholly or substantially financed by the Government". Matter remanded. (AY. 2009-10, 2010-11)

Senate of Serampore College v. JCIT (2014) 52 taxmann.com 223 / (2015) 67 SOT 89 (Kol.)(Trib.)

S.10(23C)(iiiab) : Educational institution – Profit motive – Capitation fee – Treating the donations received by it as "capitation fee" on the basis of the allegation of the persons who have made the said donation must be institution specific and not the Society as a whole is not correct-Entitle exemption.[S. 12A, 10(22), Indian Evidence Act, 1872 S. 91, 92, 101, IPC S. 181] 156

(i) The exemption u/s. 10(23C)(iiiab) is available to the society as a whole which has been formed for the sole purpose of establishing, running, managing or assisting schools and colleges in different fields. It is the trust or the society

that has to apply for registration and claim exemption. Had it been the intention of the Legislature to grant exemption only to the institutions individually or independently and not to the society as a whole, the language would have been different. The society or trust may run more than one institutions. Therefore, the argument of the Revenue that it should be institution specific and not the Society as a whole in our opinion is not correct.

(ii) As regards the question whether the trust is for profit motive, it is the allegation of the Revenue that the assessee trust was collecting the capitation fee in the garb of donation and was therefore running with a profit motive. We find the Assessing Officer has not reported the violation, if any, by the assessee trust to the Government of Maharashtra for taking any action for violation of The Maharashtra Educational Institutions (Prohibition of Capitation Fee) Act, 1987. None of the persons who have deposed against the assessee by stating that they had given donation for the purpose of getting admission has complained to the Government for any such violation by the society. It is also to be noted that those persons have filled up the requisite proforma stating that they have given donation to the assessee voluntarily and not for seeking admission. Even some of them claimed deduction u/s.80G, a fact stated by the assessee and not controverted by the Departmental Representative. Therefore, changing the stands after their wards completed their education from the institutions run by the assessee trust are contradictory. Further, it is also a fact that all donations received by the assessee trust are recorded in the books of account. There is no allegation by the Revenue that any part of such donation has been siphoned off for the benefit of any of the trustees or related persons. Nothing has been brought on record that any student has been denied admission for not giving donation. Merely because some of the donors stated that they have given the donation for admission the same in our opinion will not disentitle the society from getting exemption which is existing solely for educational purposes and which is otherwise entitled to the exemption. (ITA No. 1480/PN/2014, dt. 13.07.2015) (AY. 2008-09)

Deccan Education society v. ACIT (2015) 172 TTJ 417 / 124 DTR 1 (Pune)(Trib.)

157 **S.10(23C)(iiiad) : Educational institution – Mere surplus does not mean institution is existing for making profit. The predominant object test must be applied. The AO must verify the activities of the institution from year to year. [S.11]**

Court held that (1) Where an educational institution carries on the activity of education primarily for educating persons, the fact that it makes a surplus does not lead to the conclusion that it ceases to exist solely for educational purposes and becomes an institution for the purpose of making profit.

(2) The predominant object test must be applied – the purpose of education should not be submerged by a profit making motive.

(3) A distinction must be drawn between the making of a surplus and an institution being carried on "for profit". No inference arises that merely because imparting education results in making a profit, it becomes an activity for profit.

(4) If after meeting expenditure, a surplus arises incidentally from the activity carried on by the educational institution, it will not be cease to be one existing solely for educational purposes.

(5) The ultimate test is whether on an overall view of the matter in the concerned assessment year the object is to make profit as opposed to educating persons.
(6) The correct tests which have been culled out in the three Supreme Court judgments, namely, *Addl. CIT v. Surat Art Silk Cloth Manufacturers Association (1979) 121 ITR 1 (SC)*, *Aditanar Educational Institution v. Addl. CIT (1997) 224 ITR 310 (SC)*, and *American Hotel and Lodging Association, Educational Institute v. CBDT (2007) 301 ITR 86 (SC)*, would all apply to determine whether an educational institution exists solely for educational purposes and not for purposes of profit.
(7) In addition, we hasten to add that the 13th proviso to Section 10(23C) is of great importance in that assessing authorities must continuously monitor from assessment year to assessment year whether such institutions continue to apply their income and invest or deposit their funds in accordance with the law laid down. Further, it is of great importance that the activities of such institutions be looked at carefully. If they are not genuine, or are not being carried out in accordance with all or any of the conditions subject to which approval has been given, such approval and exemption must forthwith be withdrawn. All these cases are disposed of making it clear that revenue is at liberty to pass fresh orders if such necessity is felt after taking into consideration the various provisions of law contained in Section 10(23C) read with Section 11 of the Income Tax Act.(AY. 2000-01, 2001-02)
Queen's Educational Society v. CIT (2015) 372 ITR 699 / 275 CTR 449 / 117 DTR 1 / 231 Taxman 286 (SC).
UOI v. Pinegrove International Charitable Trust & Ors. 275 CTR 449 / 117 DTR 1 (SC).
Editorial: Decision in CIT v. Queen's Educational Society (2009) 319 ITR 160 (Uttarakhand)(HC) is reversed.

S.10(23C)(iiiad) : Educational institution – Society coaching students appearing for civil services examination – Activity education within meaning of section 2(15) – Activity without profit motive – Department allowing exemption in preceding and subsequent assessment years – Eligible for exemption [S. 2(15), 11, 12A] 158
The assessee, a registered society under the Societies Registration Act, was established with the objects to promote literacy, scientific and other educational activities to undertake research programmes and to arrange training of local boys and girls appearing at the competitive examination held by bodies such as the Union Public Services Commission and the Andhra Pradesh Public Service Commission, and claimed exemption under section 10(23C)(iiiad) of the Act. The Assessing Officer held that coaching students and preparing them for particular competitive examinations was not of the nature of imparting education and that the assessee was not a charitable institution under section 2(15) of the Act and disallowed exemption. The Commissioner (Appeals) held that the assessee was engaged in providing training and skills focused at enabling its students to obtain jobs through competitive examinations and was doing it in a systematic and structured manner. Award of formal degrees or certificates at the culmination of the training programme was not a mandatory requirement for qualifying as education. Therefore, he held that the activities of the assessee fell in the realm of "education" and that it was eligible for exemption under section 10(23C)(iiiad). On appeal by the Department :

Held, that education is one of the activity coming within the meaning of the definition of "charitable purpose". Therefore, if education is considered to mean training and developing the skill, knowledge, mind and character of students, then the activity of the assessee can be termed to be coming within the expression "education" as used in section 2(15) of the Act. Moreover, the provision contained under section 10(23C)(iiiad) used the words "any University or other educational institution" solely for educational purpose and not for the purpose of profit. If the activities of the assessee were as enumerated in the aims and objects then it had to be considered as other educational institution existing solely for educational purpose and without profit motive. Therefore, the assessee would be eligible for exemption under section 10(23C)(iiiad). However, when the Department had accepted the assessee's claim to exemption not only in the preceding assessment years but also in subsequent assessment years, under similar facts and circumstances, a contrary view should not be taken. There was no dispute that the assessee was a registered charitable institution under section 12A of the Act and it could alternatively have claimed exemption under section 11 of the Act. The Assessing Officer had ignored this aspect and had failed to examine whether the assessee was eligible for exemption under section 11 of the Act. Therefore, the order of the Commissioner (Appeals) was to be upheld.)(AY. 2007-08)

ADIT v. Hyderabad Study Circle (2015) 38 ITR 293 / 68 SOT 194 (Hyd.)(Trib.)

159 **S.10(23C)(iiiad) : Educational institution – Donations received with specific direction that receipts should form part of corpus to be excluded – Gross receipts not exceeding ₹ 1 crore – Assessee entitled to exemption.**

The assessee was a society running an educational institution. It claimed exemption under section 10(23C)(iiiad) of the Act. The Assessing Officer found that the gross receipts of the society exceeded ₹ 1 crore and therefore, he denied exemption. The Commissioner (Appeals) observed that the total receipts of the educational institution was ₹ 69,24,857 society received ₹ 39,15,102 as donations towards corpus fund and held that amounts contributed voluntarily by donors with specific direction that they should form part of the corpus would not constitute income of the society. Therefore the receipts of the educational institution were below ₹ 1 crore and exemption was to be allowed. On appeal by the Department :

Held, that once the corpus donations received by the assessee-society were separated, the annual receipts of the educational institution were only ₹ 69,24,857. Therefore, annual receipts of the educational institution of the assessee-society was below ₹ 1 crore and it was entitled to exemption under section 10(23C)(iiiad). (AY. 2008-09)

ACIT v. Shiksha Samiti (2015) 38 ITR 616 (Delhi)(Trib.)

160 **S.10(23C)(iv) : Fund or institution – Charitable purposes – Printing and publication of newspaper – Change of law – Not carrying on activity of profit and not charitable in nature according to new law – Not entitled for exemption. [S. 2(15)]**

The assessee was engaged in the business of printing and publication of newspaper. In the assessee's own case, the Privy Council had held that the activity of the assessee to be that of a charitable trust providing service in the nature of general public utility. For the assessment year 2009-10, the assessee claimed exemption under section 10(23C)(iv) of the Act. The AO rejected the claim on the ground that, since the assessee was

engaged in advancement of general public utility in the nature of trade, commerce or business, for which consideration was charged against the provisions of section 2(15) of the Act, the assessee could not be treated as a charitable trust. The Commissioner (Appeals) allowed the exemption on the basis of notification issued by the Central Board of Direct Taxes approving the assessee for exemption under section 10(23C)(iv) of the Act. On appeal by the Department:
Held, allowing the appeal, that after the insertion of the expression "not involving the carrying of any activity for profit", the decision of the Privy Council in the assessee's own case could not be followed. A more elaborated proviso had been again added under section 2(15), making it clear that, if a trust was engaged in the advancement of any object of general public utility, it could not be considered to be engaged in a charitable purpose, if it was involved in carrying on any activity in the nature of trade, commerce or business. The assessee trust was a large organisation employing a number of qualified persons including chartered accountants and advised by advocates and the income and expenditure accounts of the assessee made it clear that the assessee had definitely earned profits. Admittedly, the assessee had filed a return of fringe benefits under section 115WA of the Act. The assessee could not, on the one hand, file a return of fringe benefits and on the other, claim exemption under section 10(23C). The assessee was not entitled for exemption. (AY. 2009-10)
ACIT v. The Tribune Trust (2015) 37 ITR 468 (Chd)(Trib.)

S.10(23C)(vi) : Exemption – Mandatory object to perform education – Entitle to exemption. 161
When the object of the Trust to provide education is fulfilled, rendering other object and earning profit out of the said object does not prevent the trust to claim exemption – matter remanded for reconsideration. (AY. 2008-09)
Allahabad Young Mens Christian Association v. CCIT (2015) 371 ITR 23 / 274 CTR 283 / 229 Taxman 279 / 114 DTR 129 (All.)(HC)

S.10(23C)(vi) : Exemption – Approving authority should not merely see the objects specified in the instrument/deed, but also the activities of the Trust and how the funds are employed for the purpose of granting approval. [S.12A] 162
The Trust was registered as a public charitable trust u/s. 12A in 1976 with many objects such as relief of the poor, education, medical relief, providing scholarships, establishing hostels, orphanages, etc. and runs a polytechnic college recognized by the Govt. of Tamil Nadu. On making an application for the renewal of the approval, the Chief CIT rejected the assessee's application stating that the Trust does not exist solely for the purpose of education.
On appeal to the Court, it held that merely because there are other objectives for the Trust, other than education, that would not disentitle the Trust to exemption under section 10 (23C) (vi) of the Act. Furthermore, while considering the claim for exemption, the substance of the claim would be more relevant than the form. In other words, the authority should not be solely guided by the objects set out in various clauses in the Instrument of Trust (Deed of Trust). Rather, the authority should be guided by the activities of the Trust, as to how the funds are employed, since the exemption sought is under Chapter III of the Act, which deals with incomes which do not form part of the

total income. Accordingly, the High Court allowed the writ petition and remanded back the matter to the first respondent for fresh consideration.
Tamil Nadu Kalvi Kapu Arakkattalai v. CCIT (2015) 115 DTR 277 (Mad.)(HC)

163 **S.10(23C)(vi) : Educational institution – Memorandum providing various other objects – Rejection of application was not justified.**
The assessee established an educational institution in a rural segment. Apart from the B. Ed. course, the institution imparted education leading to the conferment of B.A., B.Sc. & M.Sc. degrees. Since receipts of the assessee institution exceeded the threshold limit of Rupees one crore, an application under section 10(23C)(vi) was filed before the Chief Commissioner. Chief Commissioner had rejected application for exemption under section 10(23C)(vi) of assessee, running educational institution on ground that its memorandum of association provided for various other objects apart from educational activities. Court held that mere presence of objects in memorandum providing for other charitable activities would not disentitle a society to claim approval under section 10(23C)(vi), where it is established that institution is, in fact, carrying on only educational activities. Accordingly, the petition was allowed and the proceedings should be remitted back to the Chief Commissioner for a fresh decision.
Neeraj Janhitkari Gramin Sewa Sansthan v. CCIT (2015) 228 Taxman 167 (Mag.) (All.) (HC)

164 **S.10(23C)(via) : Educational institution – Exemption was not claimed in return – Commissioner granted exemption – Revenue cannot complain against granting of exemption – Appeal – Grounds not pressed by the counsel at the time of hearing cannot be taken in appeal before the High Court. [S. 11, 12A, 260A]**
The assessee was a trust registered under the Bombay Public Trust Act, 1950 by the Charity Commissioner of Maharashtra State. It was also registered under section 12A of the Income-tax Act. Assessee did not claim exemption under section 10(23C)(via) in return where it claimed exemption under section 11, however, Commissioner by his order held that assessee trust was qualified for exemption under section 10(23C)(via) as per approval received during assessment proceedings. Tribunal confirmed said order. Where authority was satisfied with regard to essential requirements or ingredients of section 10(23C)(via), then, it was not open for revenue to complain.
The court also observed that "In a decision rendered by the Hon'ble Supreme Court reported in the case of *Daman Singh v. State of Punjab AIR 1985 SC 973*, the Hon'ble Supreme Court has commented and rather strongly on the tendency of parties to urge before the Higher Court that a particular ground in the Petition or memo of Appeal was pressed but not considered by the subordinate court or Tribunal. The tendency of parties to complain to the higher Court on such issue is strongly deprecated. It has been pointed out by the Hon'ble Supreme Court and repeatedly that several grounds are set out in memos of Appeals and Petitions. It is eventually a counsel's discretion about which of that should be pressed and which ought not. If the counsel in his discretion chooses not to press certain grounds, then, the complaint of this nature cannot be made subsequently and in a higher Court. Even if such grounds are being pressed during the course of argument before the subordinate or lower Appellate Court, yet, it is not for the parties to complain to the higher Court straightaway about such omission but to

place material that the omission of such ground and which was raised in the memo was indeed pointed out to the subordinate or lower Appellate Court by making an application for clarification and rectification and that explanation was either decided or dealt with erroneously. In the absence of such material, complaints made to higher Court cannot be entertained.(AY. 2007-08)
DIT(E) v. Bommanji Dinshaw Petit (2015) 229 Taxman 370 (Bom.)(HC)

S.10(23C)(via) : Hospital or institution – Institution consistently generating surplus, utilizing the surplus to buy assets, spending meager amount on treatment of poor patients is not existing "solely for philanthropic purpose" and "not for the purpose of profits". Fact that exemption has been allowed in the past does not mean exemption has to be continued – Rejection of application for exemption was held to be justified. 165

(i) A plain reading of s. 10(23C)(via) shows that the legislative emphasis is on a twin requirement. Firstly the purpose for which the trust is existing, which should be solely an existence for a philanthropic purpose and secondly it should not be for profit. This interpretation subserves the object of the provision. The clear language of the provision show that the intention of the legislature is to benefit those institutions which cater to variety of illness and suffering as a service to the society and solely for philanthropic purpose and not for the purpose of profit. An existence of the institution ostensibly for a philanthropic purpose and in reality for profit, would not qualify an institution for a deduction under this provision. This would not mean that such an institution cannot incidentally have a reasonable surplus which it utilizes for philanthropic purposes;

(ii) On facts, it was reflected that the petitioner was earning surplus revenue from its activities and that the assets were increasing. The fact that surplus was generated is not disputed by the petitioner. This surplus revenue was utilized for acquisition of assets which in the opinion of the CCIT was capable of generating more income. In AY 2006-07, 2007-08, 2008-09 and 2009-10, the percentage of transfer of gross surplus to the development fund was at 19.12%, 28.37%, 73.17% and 12.12% respectively. Accompanied with this, there was a huge increase in fixed assets from ₹ 63,75,577 in AY 2006-07 to ₹ 8,02,75,706 in AY 2009-10 which was approximately an increase of ₹ 7.50 crores within four years. Petitioner's cash and bank balances also increased from ₹ 1,42,420 to ₹ 1,74,15,757 during the same period which was an increase of about ₹ 1.30 crores. The petitioner had purchased land admeasuring 8,350 sq. meters for an amount of ₹ 363.63 lakhs. The reasoning as given by the CCIT that all these figures go to show that there was a systematic generation of profits from the activities of the petitioner coupled with the increase in assets which would generate more income/profits cannot be said to be without any basis, arbitrary or perverse. Hence, it was not improper for the CCIT to draw a reasonable inference that the petitioner is not existing solely for philanthropic purpose and for profits, in our opinion cannot be faulted;

(iii) The statement of expenditure incurred by the petitioner showing the concessional treatment claimed to be offered by it clearly indicates that the petitioner has spent meagre amount on the weaker section of the society which negatives the contention of the petitioner that the petitioner is existing solely for philanthropic purpose and not for profit;

(iv) A perusal of the statement of the hospital charges and fees furnished by the petitioner shows the very negligible percentage of poor/needy patients receiving treatment in the hospital of the petitioner. What is more glaring are the details in the two columns namely 'Gross Concessional Amount Receivable' and 'The amount Received from Poor patients.' These figures in no manner would inspire any confidence or make a prudent person believe that the petitioner is in fact existing for philanthropic purposes. We say so, for the reason, that it is inconceivable that poor patients would be in a position to pay large amounts as indicated by the petitioner in details given in these financial statements. The CCIT has rightly come to a conclusion that the concessional treatment as given by the petitioner for the above assessment years being meagre 3.56 %, 6.45% and 4.45% respectively, definitely does not speak of the existence of the petitioner for philanthropic purposes;

(v) One more factor which needs to be noted is in regard to the resolution passed by the petitioner which does not specify the purpose of acquisition of the land but only authorises the acquisition of the land at a particular price. The alarming figures of large surplus as generated by the petitioner and the utilization of those surplus for acquisition of assets would speak against the petitioner existing solely for philanthropic purpose and not for profit. This would disentitle the petitioner to the benefit of section 10(23)(via). If the petitioner was to solely exist for philanthropic purposes and was to conduct the hospital to achieve that object by providing treatment to the weaker sections of the society, it could not have been possible for the petitioner to achieve such a huge surplus and the consequent enabling of the petitioner to utilize such surplus funds to generate assets.

(vi) The contention on behalf of the petitioner that looking to the manner in which the exemption was allowed in the past, the CCIT ought to have granted its application under section 10 (23C)(via) of the Act is completely misconceived and contrary to the requirement of the statutory provision. It was the legal duty of the CCIT to consider independently the application of the petitioner for the assessment year in question on the basis of the material as submitted by the petitioner and applying the requirements of the provisions of sub-clause 23C(via) of section 10 decide the same independently. Any deduction and/or exemption as granted to the petitioner for earlier assessment years cannot be claimed to be of any consequence by the petitioner so as claim this deduction as a matter of right for AY 2009-10 and thereafter. Writ petition of assesse was dismissed.

Yash Society v. CCIT (2015) 375 ITR 152 / 275 CTR 510 / 231 Taxman 256 / 116 DTR 329 (Bom.)(HC)

166 **S.10(23C)(via) : Hospital or institution – Educational institution – Firm – Capital gains – Consideration received on account of relinquishment of right in firm – Appellate authorities finding not a transfer and no capital gains tax leviable – Independent of exemption – Matter remanded. [S.45]**

On the question whether the appellate authorities were correct in holding that the relinquishment of a right in the firm by the assessee and the receipt of the consideration would not amount to a transfer and no capital gains tax was leviable for the assessment

year 2001-02 and whether it was independent of exemption under section 10(23C)(via), held, in view of the decision of a Co-ordinate Bench of the Court in *CIT v. Manipal Academy of Higher Education (MAHE)(2013) 357 ITR 114 (Karn)(HC)*, the orders of lower authorities were to be set aside and the matter remanded to the assessing authority.(AY. 2001-02)
CIT v. Medical Relief Society of South Kanara (2015) 370 ITR 497 / 234 Taxman 1 (Karn.) (HC)

S.10(23C)(via) : Hospital or institutions – Charitable institution – Exemption – Continuation of grant of exemption – Fourteenth proviso – Proviso not applicable to previous year which had already expired before introduction of proviso. 167
The fourteenth proviso to section 10(23C)(via) of the Income-tax Act, 1961, is intended to ensure that any application preferred after June 1, 2006, for the purposes of grant of exemption or continuation thereof is made during the financial year immediately preceding the assessment year for which the exemption is sought. This would mean that, in the case of an assessee choosing to claim the benefit under section 10(23C) (via) for any assessment year after June 1, 2006, the application for the assessment year would necessarily have to be made during the previous year relevant to the assessment year. The proviso obviously cannot have any application to those cases where the previous year, relevant to an assessment year, had already expired before the introduction of the proviso under section 10(23C)(via). The assessment of an assessee in any assessment year is governed by the law prevailing as on the 1st day of April of the relevant assessment year. The fourteenth proviso inserted with effect from June 1, 2006, would have no application to the assessment of the assessee for the assessment years. The proviso would govern only the exemption that was to be granted with effect from the assessment year 2007-08 onwards. Writ petition of the assessee was allowed. (AY.2005-06, 2006-07)
Marthoma Medical Mission v. Chief CIT (2015) 370 ITR 418 / 121 DTR 328 (Ker.)(HC)

S.10(23G) : Interest from investments in infrastructure capital company – Failure by assessee to submit approval from competent authority before Assessing Officer and Commissioner (Appeals) – Assessee should be granted opportunity to produce required certificate – Matter remanded. 168
Failure by assessee to submit approval from competent authority before Assessing Officer and Commissioner (Appeals). Assessee should be granted opportunity to produce required certificate. Matter remanded. (AY.2005-06)
ING Vysya Bank Ltd. v. ACIT (2015) 39 ITR 250 (Bang.)(Trib.)

S.10(23G) : Any income by way of dividends – Income of financial institution from investments in infrastructure facility – Matter remanded. 169
Exemption can be allowed only if income in nature of "Business income". Income from interest on deposit, staff loan, Government securities. As there was no proper explanation as to true nature of income – Matter remanded. (AY. 1998-99 to 2009-10)
Indian Renewable Energy Development Agency Ltd. v. JCIT (2015) 37 ITR 250 (Delhi)(Trib.)

170 **S.10(26) : Member of scheduled tribe should reside in specified area – Residence refers to stay in area for a long time for purposes of livelihood - Member of scheduled tribe in one area residing in another specified area – Entitled to exemption – Certificate of exemption to be obtained under section 197 – Certificate valid for one year. [S.197, Constitution of India, Art. 366(25)]**

Any income derived by a member of a scheduled tribe from any source in the specified area is not to be included in his total income u/s. 10(26). Such a person should satisfy the following three conditions: (i) the person claiming exemption should be a member of a scheduled tribe as defined in Article 366(25) of the Constitution; (ii) he should be residing in the specified areas; and (iii) the income in respect of which exemption is claimed must be an income which accrues or which arises to him (a) from any source in the specified area; or (b) by way of dividend or interest.

A member of a scheduled tribe would be entitled to the benefit of section 10(26) only when he is posted in the specified areas. Once he is posted outside the specified areas then he ceases to reside in the specified area and the income does not accrue to him in the specified area. The scope and ambit of the word "residing" has to be given its natural meaning that a person has an abode and is living in a particular area for his work and livelihood for a reasonably long length of time. However, whether a person is actually residing or not is a question of fact to be decided on the facts of each case. Any member of a scheduled tribe declared to be so under Article 342 of the Constitution, even though he does not belong to the specified area, would be entitled to the benefit of Section 10(26) when posted to a station in the specified area and residing therein in connection with his employment. A member of scheduled tribe is bound to obtain a certificate of exemption in terms of section 197. The validity of the certificate will be for one assessment year only.

Chandra Mohan Sinku v. UOI (2015) 372 ITR 627 / 230 Taxman 118 / 276 CTR 385 / 118 DTR 65 (FB)(Tripura)(HC)

171 **S.10(37) : Capital gains – Agricultural land within specified urban limits – Compulsory acquisition – Benefit of exemption would not be available where assessee did not carry on any agricultural activity on land in question in preceding two years prior to its compulsory acquisition. [Karnataka Industrial Development Act, 1966]**

The Assessee had purchased a certain land in a village which was compulsorily acquired under the Karnataka Industrial Areas Development Act, 1966. The assessee claimed the capital gains arising from such a transfer as exempt u/s. 10(37) on the ground that the said land was agricultural land. However, the AO denied the claim on the ground that the land was not used for agricultural purposes during the two years immediately preceding the date of transfer and hence the condition laid in clause (ii) of S. 10(37) was not fulfilled, which requires that the land should be utilized for agricultural purposes during the period of 2 years immediately preceding the date of completion / acquisition. The CIT(A) and Tribunal both decided against the assessee. On appeal High Court also affirmed the view of Tribunal. (AY. 2009-10)

B.M. Muniraju v. CIT (2015) 62 taxmann.com 345 / 126 DTR 348 / (2016) 282 CTR 108 (Karn.)(HC)

Section 10A : Special provisions in respect of newly established undertakings in free trade zone, etc.

S.10A : Free trade zone – Export of computer software – Recomputation of profit is not new claim – Tribunal remitting matter to Assessing Officer to compute deduction in accordance with law – Held to be valid. 172

Dismissing the appeal of revenue the Court held that ; this was not a case where a new claim for deduction under section 10A had been made by the assessee. This claim had been made in the original return itself. It was only the figure of profit that was changed in the revised computation as a result of wrongly showing a receipt in US dollars without converting it into rupees. The Tribunal had, in fact, remitted the matter to the file of the Assessing Officer to compute the deduction in accordance with law. There was no prejudice being caused to the Revenue as a result of the directions. (AY. 2000-01, 2002-03)

PCIT v. E-Funds International India P. Ltd. (2015) 379 ITR 292 (Delhi)(HC)

S.10A : Free trade zone – Development of software and was also rendering business process outsourcing service – Onsite development – Eligible to exemption. 173

Assessee company was engaged in development of software and was also rendering business process outsourcing service. Assessee claimed a sum from export of computer software and claimed deduction. Assessing Officer disallowed said claim on ground that 'on-site' work was sub-contracted to Associate Enterprise (AE) and had not been executed by assessee itself. Tribunal allowed the claim of assessee. On appeal dismissing the appeal of revenue the Court held that; from record it was not borne out that entire 'on-site' work had been sub-contracted to AE-Even Service Agreement provided that AE to work under supervision and control of assessee – Further AE had no concern or direct dealing with end customer as AE was admittedly answerable to assessee and not to end customer. Therefore, income earned by assessee through on-site development of software by AE on behalf of assessee, would be eligible for deduction. (AY. 2007-08)

CIT v. Mphasis Software & Service India (P.) Ltd. (2015) 234 Taxman 732 / (2016) 129 DTR 342 (Karn.)(HC)

S.10A : Free trade zone – Appellate Tribunal – Cross objection – Alternative claim – If Tribunal upholds Revenue's plea that assessee is not entitled to S. 10B, it must consider the assessee's alternate plea for S. 10A deduction even if such alternate plea has not been raised before the lower authorities. [S.10B, 254(1), ITA, R. 12, 27] 174

In *CIT v. Regency Creations Ltd. (2013) 353 ITR 326 (Del)*, the High Court held that for the purposes of availing the benefit of Section 10B of the Act, the certification by the Board was mandatory and that such exemption could not be granted on the basis of the certificate issued by the Joint Director. Upon an application filed by the assessee in that case, the High Court directed the Tribunal to go into the merits of the alternative claim for entitlement under Section 10A. Based on the said direction, the present assessee filed a cross objection before the ITAT in the pending appeals of the Revenue seeking adjudication of its entitlement u/s 10A. However, the ITAT declined to permit the assessee to maintain the cross objections by following the decision of the coordinate

Bench of the ITAT in *ITO v. Neetee Clothing (P)Ltd. [2010] 129 TTJ 342 (ITAT [Del])*, on the ground that since the Assessee had not urged the plea of being entitled to the benefit under Section 10 A of the Act before the CIT (A), it could not be permitted to urge such plea for the first time before the ITAT. On appeal by the assessee to the High Court HELD reversing the Tribunal:

(i) A respondent in an appeal, if he has not filed a cross-appeal, is deemed to be satisfied with the decision. He is, therefore, entitled to support the judgment of the first officer on any ground but he is not entitled to raise a ground which will work adversely to the appellant. In fact such a ground may be a totally new ground, if it is purely one of law, and does not necessitate the recording of any evidence, even though the nature of the objection may be such that it is not only a defence to the appeal itself but goes further and may affect the validity of the entire proceedings. But the entertainment of such a ground would be subject to the restriction that even if it is accepted, it should be given effect to only for the purpose of sustaining the order in appeal and dismissing the appeal and cannot be made use of, to disturb or to set aside, the order in favour of the appellant (See *Bamasi v. CIT*). This liberty to the respondent is reserved by Rule 27 of the Tribunal Rules.

(ii) As regards the powers of the Tribunal while disposing of the appeal, Rule 12 also lays down that the Tribunal, in deciding an appeal, is not confined to the grounds set forth in the memorandum of appeal or those which the appellant may urge with its leave. It can decide the appeal on any ground provided only that the affected party has an opportunity of being heard on that ground. But it has been laid down in a number of cases that this rule does not enable the Tribunal to raise a ground, or permit the party who has not appealed to raise a ground, which will work adversely to the appellant and result in an enhancement (*CIT v. Edward Keventer (Successors) Pvt. Ltd. (1980) 123 ITR 200 followed*);

(iii) The Supreme Court in *NTPC v. CIT (1998) 229 ITR 383 SC* has also explained that the power of the Tribunal in dealing with the appeals under Section 254 of the Act is "expressed in the widest possible terms". It was further observed that "The purpose of the assessment proceedings before the taxing authorities is to assess correctly the tax liability of an assessee in accordance with law. If, for example, as a result of a judicial decision given while the appeal is pending before the Tribunal, it is found that a non-taxable item is taxed or a permissible deduction is denied, we do not see any reason why the assessee should be prevented from raising that question before the tribunal for the first time, so long as the relevant facts are on record in respect of that item. We do not see any reason to restrict the power of the Tribunal under Section 254 only to decide the grounds which arise from the order of the Commissioner of Income-tax (Appeals). Both the assessee as well as the Department have a right to file an appeal/cross-objections before the Tribunal. We fail to see why the Tribunal should be prevented from considering questions of law arising in assessment proceedings although not raised earlier."

(iv) The basis of this Court remanding the matters in Valiant Communications Ltd. cases to the ITAT was precisely to consider whether the benefit under Section 10A could be granted to those Assessees notwithstanding that they may not be entitled to the benefit under Section 10B. It was, therefore, open to the Appellant Assessee herein to seek support of the order of the CIT(A) on the ground which was not

urged before the CIT(A) as long as it was not going to be adverse to the case of the Appellant i.e. the Revenue before the ITAT. The ITAT in considering such plea was not going to be persuaded to come to a different conclusion as far as the appeal of the Revenue pertaining to the benefit under Section 10B of the Act was concerned. Particularly in the light of the order passed by this Court on 4th January 2013 in the applications filed by Valiant Communications Ltd., there should have been no difficulty for the ITAT to have examined the Appellant Assessee's cross objections. (AY.2008-09, 2009-10)

Fast Booking (I) Pvt. Ltd. v. DCIT (2015) 378 ITR 693 / 128 DTR 139 (Delhi)(HC)

S.10A : Free trade zone – Claiming deduction u/s. 80HHE for one year does not debar the assessee from claiming deduction u/s. 10A for another year – Fact that claim is not made via a revised return is no bar on the right of the Appellate Authority to consider it [S.80HHE, 139(5)] 175

(i) While an AO may not be entitled to grant a deduction or an exemption on the basis of a revised computation of income, there was no such fetter on the appellate authorities. This was recently reiterated by this Court in a decision dated 25th August 2015 in ITA No. 644/2015 (*Pr. Commissioner of Income Tax-09 v. Western India Shipyard Limited*). In *Commissioner of Income Tax v. Sam Global Securities Ltd. (2014) 360 ITR 682 (Del)*, this Court pointed out that the power of the Tribunal in dealing with appeals was expressed in the widest possible terms and the purpose of assessment proceedings was to assess the correct tax liability. The Court noted that "Courts have taken a pragmatic view and not a technical view as what is required to be determined is the taxable income of the Assessee in accordance with law." In *M/s. Influence v. Commissioner of Income Tax 2014-TIOL-1741-HC-DEL-IT* a similar approach was adopted when the AO in that case refused to accept the revised computation submitted beyond the time limit for filing the revised return under Section 139(5) of the Act. This Court noted that the decision in *Goetze (India) Ltd. v. Commissioner of Income-Tax [2006] 284 ITR 323 (SC)* "would not apply if the Assessee had not made a new claim but had asked for recomputation of the deduction."

(ii) Making of a claim under Section 80HHE of the Act in one assessment year will not preclude an Assessee from claiming the benefit under Section 10A of the Act in respect of the same unit in a succeeding assessment year. The purpose of the Section 80HHE(5) of the Act was to avoid double benefit but that would not mean that if for a particular assessment year the Assessee wants to claim a benefit only under Section 10A of the Act and not Section 80HHE, that would be denied to the Assessee. (ITA No. 607/2015, dt. 06.10.2015) (AY.2002-03)

CIT v. E-Funds international India Pvt. Ltd. (Delhi)(HC); www.itatonline.org

S.10A : Free trade zone – Separate undertakings – Material on record was found to be insufficient to treat each 31 units of assessee as separate undertakings, hence benefit was limited to only 13 eligible undertakings – Benefit not dependent on treatment of facts by assessee. 176

Assessee was a public limited company engaged in providing software development services through its software development undertakings set-up in Software Technology

Park (STP). It had 31 independent software development units or undertakings set up at distinct locations. In original return, assessee had claimed deduction under section 10A only in respect of 13 units but in revised return number of units eligible for benefits under section 10A was increased from 13 to 31 and separate Form 56F was filed for each of these 31 units. AO restricted the claim of deduction to 13 mother' undertakings. However, no material was produced to establish that assessee had treated 31 units as distinct undertakings. Besides, no evidence was placed on record to establish that each and every unit had a separate bank account and no fresh investments were made. Dismissing the appeal the Court held that since deduction under section 10A is available to each undertaking, and material on record was found to be insufficient to treat each of 31 units as separate undertaking, 31 units could not be treated as separate undertakings for purposes of availing benefit under section 10A. View of AO was up held. Benefit not dependent on treatment of facts by assessee. (AY. 2005-06)
HCL Technologies v. ACIT (2015) 377 ITR 483 / 278 CTR 345 / 231 Taxman 895 (Delhi) (HC)

177 **S.10A : Free trade zone – Post amendment from assessment year 2001-02, claim of set-off of business loss for assessment year 2002-03 against profits of erstwhile section 10A unit for assessment year 2005-06 are allowable.**
The assessee engaged in the business of manufacturing and export of gems and jewellery claimed deduction u/s. 10A. Subsequently, assessee filed a revised return withdrawing its claim under section 10A and claimed set off of unabsorbed business loss brought forward from assessment year 2002-03 against the profits of the erstwhile 10A unit. The AO rejected assessee's contention and held that set-off of business loss could not be allowed against the profits of the erstwhile 10A unit as relevant assessment year was first assessment year after the expiry of the tax holiday period. The CIT(A) confirmed the AO's order. The Tribunal set aside the AO's order.
The High Court observed that as per the CBDT Circular No. 7 of 2003, dated 5-9-2003, losses arising in assessment year 2001-02 and subsequent years were to be allowed while computing income under section 10A. The High Court held that by virtue of the *non-obstante* clause and by virtue of wording of sub-clause (ii) of section 10A(6) the revenue could not have disallowed this claim of set off. (AY. 2004-05, 2005-06)
CIT v. Shantivijay Jewels Ltd. (2015) 374 ITR 520 / 118 DTR 297 / 231 Taxman 627 / 281 DTR 570 (Bom.)(HC)

178 **S.10A : Free trade zone – Computer software – Carrying on business both in unit within software technology park and another unit – Maintaining separate accounts for two units – Software technology park unit not formed splitting up or reconstruction or transfer of used assets of an existing unit – Entitled to exemption.**
The assessee was engaged in the business of computer software development and business process outsourcing. During the financial year 2005-06, the assessee ran its business from a unit not registered with the Software Technology Parks of India in rented premises. In this period the assessee applied for permission to set up a unit registered with the Software Technology Parks of India at the ground floor of the same premises for development of computer service/information technology enabled services. The assessee started the business in the newly set up unit during the financial year

2006-07. The assessee continued to carry on its business from the other unit also. Separate books of account were maintained by the assessee for the two units. In respect of the unit registered with the Software Technology Parks of India the claim for deduction under section 10A, made by the assessee was rejected on the ground that it was formed by splitting of the existing unit. The Commissioner (Appeals) extended the benefit under section 10A to the unit registered with the Software Technology Parks of India for the three assessment years 2007-08, 2008-09 and 2009-10. This was confirmed by the Tribunal. On appeals:
Held, dismissing the appeals, that the unit established by the assessee for which section 10A exemption was claimed was not formed by splitting up or reconstruction or transfer of the used assets of an existing unit and, hence, the assessee was entitled to exemption under section 10A. (AY. 2007-08, 2008-09, 2009-10)
CIT v. Quest Informaties P. Ltd. (2015) 372 ITR 526 / 234 Taxman 316 (Karn.)(HC)

S.10A : Free trade zone – Total turnover – Expenses incurred in foreign currency on telecommunication charges and providing technical services outside India should be excluded from total turnover for purpose of computation of deduction. 179
Expenses incurred in foreign currency on telecommunication charges and providing technical services outside India should be excluded from total turnover for purpose of computation of deduction. (AY. 2004-05)
CIT v. Tech Mahindra Ltd. (2015) 229 Taxman 298 (Bom.)(HC)

S.10A : Free trade zone – For purpose of computation of deduction down linking charges could not be excluded from export turnover or total turnover. 180
For purpose of computation of deduction down linking charges could not be excluded from export turnover or total turnover.(AY. 2001-02)
CIT v. Infosys Technologies Ltd. (2015) 229 Taxman 335 (Karn.)(HC)

S.10A : Free trade zone – Business income – Sale of software was to be treated as a business profit and, not as capital gains, and, thus, assessee would be entitled to deduction.[S. 28(i)] 181
Consideration received by assessee on sale of software was to be treated as a business profit and, not as capital gains, and, thus, assessee would be entitled to deduction.(AY. 2001-02)
CIT v. Infosys Technologies Ltd. (2015) 229 Taxman 335 (Karn.)(HC)

S.10A : Free trade zone – Export turn over – Expenses in foreign currency – Matter remanded. 182
Appellate Authorities held that expenses in foreign currency should be allowed from export turnover for computation of deduction. It was necessary for authorities to determine on basis of material produced by assessee as to whether technical services was rendered in post-sales services or pre-sales services and then decide as to whether assessee was entitled to exclusion of expenditure incurred towards technical services - Matter remanded.(AY. 2001-02)
CIT v. Infosys Technologies Ltd. (2015) 229 Taxman 335 (Karn.)(HC)

183 **S.10A : Free trade zone – Manufacture or production should have commenced in previous year – Registration as STPI unit not a requirement – Entitled to exemption – Circular issued u/s. 10B is not relevant for deciding the claim u/s. 10A [S. 10B, 80HHE]**
The assessee, in support of the plea for claiming deduction under section 10A, filed a copy of the communication dated March 4, 2000, from the Software Technology Parks of India according permission for setting up a 100% EOU. According to the Assessing Officer, the assessee was entitled to the benefit from March 4, 2000. The Commissioner (Appeals) placed reliance on a circular issued in the context of section 10B and came to the conclusion that the assessee would be entitled to the benefit derived from "export" after the unit was approved as STPI, i.e, on March 4, 2000. The Tribunal held that the circular issued under section 10B was not applicable to restrict deduction under section 10A and in any event, the circular, which was issued on January 6, 2005, could not be made applicable to the assessment year 2000-01. On appeal to the High Court:
Held, the circular issued under section 10B was not applicable to a case falling under section 10A. The Assessing Officer had restricted the deduction based on an artificial cut off date (i.e.) March 4, 2000, which was not the correct method of computation for benefit flowing under section 10A. Appeal of revenue was dismissed. (AY. 2000-01)
CIT v. Soffia Software Ltd. (2015) 370 ITR 146 / 120 DTR 162 / 234 Taxman 749 / 281 DTR 594 (Mad.)(HC)

184 **S.10A : Free trade zone – Splitting up or reconstruction – Denial of exemption was held to be not justified.**
Assessee-firm was constituted on 1-4-2009 but STP registration was granted on 4-9-2009. Assessee's claim of deduction under section 10A was denied as Assessing Officer found that as per balance sheet of assessee there were no assets and that assessee had used second-hand laptops of partner for doing business and thus, there was violation of conditions of section 10A(2)(iii). Further, he found STP registration was granted sometime after assessee firm was formed and, thus, denied deduction claimed under section 10A. There was nothing on record to suggest that business of assessee firm was carried on by other entity including partners in individual capacity and subsequently, business of said entity was split or there was a reconstruction. Further, it was found that laptops and printer were newly purchased, may be by partner, which were used for business of assessee-firm and nothing was there on record to support case of Assessing Officer that those laptops and printer were used earlier for some other business by partner. The Hon'ble Appellate Tribunal held that the Assessee had not violated any of conditions in section 10A(2) of clause (ii) or (iii) and thus, it was entitled to deduction.(AY.2010-11)
APS Technologies v. ITO (2015) 152 ITD 33 / 69 SOT 105 / 167 TTJ 33 (UO)(Pune)(Trib.)

185 **S.10A : Free trade zone – Survey – Undisclosed income surrendered – Eligible exemption. [S.133A]**
Even undisclosed income surrendered by assessee is eligible for exemption if department does not show that the assessee has any other source. (AY. 2007-08)
Bridal Jewllery Mfg. Co. v. ITO (2016) 175 TTJ 257 / 45 ITR 119 / (2016) 129 DTR 185 (Delhi)(Trib.)

S.10A : Free trade zone – Special Economic Zone – Amount reduced from export turnover required to be proportionately reduced from total turnover. [S.10AA] 186
Dismissing the appeal of revenue the Tribunal held that, there was no factual justification for treating the expenditure incurred in foreign currency for telecommunication, freight, insurance and foreign travel as amounts required to be reduced from the export turnover. If the amounts were reduced from the export turnover, they were also required to be proportionately reduced from total turnover. The CIT(A) was justified to rework the deduction u/s. 10AA. (AY. 2009-10)
Dy. CIT v. Timken India Manufacturing P. Ltd. (2015) 41 ITR 208 (Bang.)(Trib.)

S.10A : Free trade zone – Export of computer software – Computation – No expenses were incurred for delivery of computer software outside India – Excluding 10 per cent of telecommunication expenses from export turnover – No warrant for excluding higher sum. 187
Dismissing the appeal of revenue, the Tribunal held that,according to the agreement communication expenses were to be borne by the customer. In such circumstances, there could be no expenses incurred by the assessee for delivery of computer software outside India. Nevertheless, the assessee had on his own, on a conservative approach, disallowed 10 per cent. of the telephone expenses as incurred by the STPI unit as attributable to delivery of software outside India. (AY.2009-10)
Dy. CIT v. WS Atkins India P. Ltd. (2015) 41 ITR 397 / 70 SOT 628 (Bang.)(Trib.)

S.10A : Free trade zone – Freight, telecommunication and insurance charges – To be excluded from both export and total turnover. 188
The Tribunal held that the Assessing Officer has to exclude freight, telecommunication and insurance charges incurred in foreign currency from both the export turn over as well as total turnover while computing deduction.(AY. 2006-07)
Tektronix Engineering Devt. India P. Ltd. v. Dy. CIT (2015) 39 ITR 212 / 69 SOT 1 (Bang.) (Trib.)

S.10A : Free trade zone – Software technology park unit – Loss – Carry forward and set off – Carry forward of loss of software technology park unit to be allowed against profits of other income of section 10A units – Direction of the Dispute Resolution Panel is binding on the Assessing officer. [S. 144C(10)] 189
That the losses of the software technology park unit were to be allowed to be set off against other income. According to section 144C(10), every direction of the Dispute Resolution Panel is binding on the Assessing Officer. Therefore, the Assessing Officer could not deviate from the directions of the Dispute Resolution Panel. The order of the Dispute Resolution Panel was to be confirmed. (AY. 2009-10)
Dy. CIT v. HSBC Electronic Data Processing India P. Ltd. (2015) 39 ITR 83 (Hyd.)(Trib.)

S. 10A : Free trade zone – Communication charges – To be excluded from both export and total turnover. 190
Held that communication charges were to be excluded from both export turnover and total turnover. (AY. 2009-10)
Dy. CIT v. HSBC Electronic Data Processing India P. Ltd. (2015) 39 ITR 83 (Hyd.)(Trib.)

191 **S.10A : Free trade zone – Telecommunication and insurance charges – To be excluded from both export and total turnover.**
Tribunal held that while computing the deduction the Assessing Officer has to exclude the telecommunication and insurance charges incurred from both the export turnover as well as the total turnover.(AY. 2006-07)
Cypress Semiconductor Technology India P. Ltd. v. Dy. CIT (2015) 39 ITR 468 (Bang.)(Trib.)

192 **S.10A : Free trade zone – Foreign exchange gain excluded from export turnover is also to be excluded from total turnover.**
Held that if any expenditure was reduced from the export turnover, it was to be excluded from total turnover also. Therefore, the Assessing Officer was to exclude the foreign exchange gain, which was excluded from the export turnover from total turnover also for computing deduction under section 10A of the Act. (AY. 2006-07)
NTT Data India Enterprise Application Services P. Ltd. v. ACIT (2015) 38 ITR 362 (Hyd.) (Trib.)

193 **S.10A : Free trade zone – Profits of eligible unit not to be set off against unabsorbed depreciation of another unit. [S. 10B]**
Tribunal held that the deduction under section 10A had to be allowed to the eligible unit without setting off the unabsorbed depreciation of another unit.(AY. 2009-10)
Watson Pharma P. Ltd. v. Dy. CIT (2015) 168 TTJ 281 / 38 ITR 97 / 115 DTR 65 / 54 taxmann.com 88 (Mum.)(Trib.)

194 **S.10A : Free trade zone – Total income – Deduction to be given at the stage of computation of profits and gains of business at the first instance – Order of CIT (A) allowing the loss to be carried forward was affirmed. [S.72]**
The assessee had two STPI units eligible for claiming deduction u/s. 10A of the Act. The assessee set off total profit from Domestic business against the loss from the non STPI unit and the balance loss was claimed as carry forward. The AO observed that the deduction u/s. 10A of the Act, should be restricted to the profit of the unit eligible for deduction u/s. 10A of the Act and the total income have been shown at nil instead of claiming of loss. This issue is covered by the Judgment of Hon'ble Jurisdictional High Court in the case of *CIT. v. Black & Veatch Consulting (P.) Ltd. (2012) 348 ITR 72 (Bom.) (HC))*, wherein it was held that Section 10A is a provision which is in the nature of a deduction and not an exemption. This was emphasized in *Hindustan Unilever Ltd. v. Dy. CIT [2010] 325 ITR 102 / 191 Taxman 119 (Bom.)*. The deduction u/s. 10A has to be given effect to at the stage of computing the profits and gains of business. This is anterior to the application of the provisions of Section 72 which deals with the carry forward and set off of business losses. (AY. 2007-08)
Aditya Birla Minacs Worldwide Ltd. v. DCIT (2015) 69 SOT 18 (Mum.)(Trib.)

195 **S.10A : Free trade zone – Unabsorbed business loss – Depreciation – Deduction to be calculated before reducing unabsorbed loss and depreciation from profits of undertaking – Share application money – Income from variation in rates of foreign exchange – Matter remanded.[S.56]**
Deduction to be calculated before reducing the unabsorbed loss and depreciation from the profits of the undertaking.

Followed, *UOI v Onkar S. Kanwar [2002] 258 ITR 761 (SC).*
AO held that the income from variations in the rate of foreign Exchange in respect of share application money had no relevance to the nature of business income eligible for deduction under section 10A of the Act and, accordingly, included it in the income under the head "Other sources". The CIT(A) held that the gain on exchange fluctuation in respect of share application money would not be eligible for deduction under section 10A of the Act. On appeal :
Tribunal held that the CIT(A) had neither adjudicated nor disposed of the issue whether or not the income from variation in foreign exchange rates in respect of share application money should be excluded from the assessee`s income. Therefore, the matter was restored to the Assessing Officer to adjudicate the issue. Matter remanded. (AY. 2005-06, 2007-08)
Canam International P. Ltd. v. ACIT (2015) 37 ITR 38 (Delhi)(Trib.)

Section 10AA : Special provisions in respect of newly established Units in Special Economic Zones

S.10AA : Special Economic Zones – Foreign exchange fluctuation gain to be excluded from export and total turnover. 196
It was held that foreign exchange fluctuation gain on sales would be excluded from both export turnover and total turnover for purpose of computing deduction under section 10AA. (AY. 2009-10)
DCIT v. Madras Engineering Industries (P.) Ltd. (2014) 34 ITR 703 / (2015) 67 SOT 152 (URO) (Chennai)(Trib.)

S.10AA : Special Economic Zones – Manufacture – After purchasing unfinished handicraft goods applied various processes, incurred substantial labour expenses – Entitled to exemption. 197
Assessee, engaged in manufacture and export of handicraft goods, claimed deduction under section 10AA. A.O. denied deduction on ground that assessee purchased VAT exempted goods which were in fact finished handicraft items and, thus, assessee had exported articles and things not manufactured by it, but had exported purchased finished items. However, certificates issued by several Government authorities revealed that assessee purchased unfinished handicraft goods and applied various processes like cutting, polishing, repairing, remaking, etc., and for that purpose, incurred substantial labour expenses. The view of the A.O. was not correct because the assessee purchased unfinished handicraft goods and applied various processes like cutting, polishing, repairing, remaking, etc., and for that purpose, incurred substantial expenses for labour, which has not been doubted by the AO. The assessee also incurred electric expenses which was also accepted by the A.O. The assessee was engaged in manufacturing activities and this fact is established from various certificates issued by the Government and concerned authorities. Hence, Assessee was entitled to deduction. (AY. 2009-10)
ITO v. Makers Mart (2013) 158 TTJ 145 / (2014) 29 ITR 44 / (2015) 152 ITD 501 (Jodh.) (Trib.)

Section 10B : Special provisions in respect of newly established hundred per cent export-oriented undertakings.

198 **S.10B : Export oriented undertakings – Deemed Export Drawback, Customer claims, Freight subsidy & Interest on fixed deposit receipts (under lien for LC & bank guarantee) are all derived from the undertaking & are eligible for deduction.**

Allowing the appeal of assessee, the Court held that; Once an income forms part of the business of the income of the eligible undertaking of the assessee, the same cannot be excluded from the eligible profits for the purpose of computing deduction u/s. 10B of the Act."As regards the decision of the ITAT in not accepting the Assessee's plea in regard to 'customer claims' 'freight subsidy' and 'interest on fixed deposit receipts' even while it accepted the Assessee's case as regards 'deemed export drawback', the contention of the Assessee as regards customer claims was that it had received the claim of ₹ 28,27,224 from a customer for cancelling the export order. Later on the cancelled order was completed and goods were exported to another customer. The sum received as claim from the customer was non-severable from the income of the business of the undertaking. The Court fails to appreciate as to how the ITAT could have held that this transaction did not arise from the business of the export of goods. Even as regards freight subsidy, the Assessee's contention was that it had received the subsidy in respect of the business carried on and the said subsidy was part of the profit of the business of the undertaking. If the ITAT was prepared to consider the deemed export drawback as eligible for deduction then there was no justification for excluding the freight subsidy. Even as regards the interest on FDR, the Court has been shown a note of the balance sheet of the Assessee [which was placed before the AO] which clearly states that "fixed deposit receipts (including accrued interest) valuing ₹ 15,05,875 are under lien with Bank of India for facilitating the letter of credit and bank guarantee facilities." the interest earned on such FDR ought to qualify for deduction under Section 10B of the Act. (AY. 2008-09)

Riviera Home Furnishing v. ACIT (2016) 237 taxman 520 (Delhi)(HC)

199 **S.10B : Export Oriented undertakings – Assembling of instruments and apparatus for measuring and detecting ionizing radiators is a manufacturing activity producing an article or thing – Eligible for deduction.**

Assembling of instruments and apparatus for measuring and detecting ionizing radiators is a manufacturing activity producing an article or thing – Eligible for deduction.(AY. 2003-04, 2004-05)

CIT v. Saint Gobain Crystals and Detectors India (P.) Ltd. (2015) 231 Taxman 573 / (2016) 380 ITR 226 (Karn.)(HC)

200 **S.10B : Export oriented undertakings – Development Commissioner granting approval to assessee – Board of Approval ratifying this subsequently – Ratification relates back to date on which Development Commissioner granted approval – Entitled to exemption.**

The assessee claimed deduction under section 10B, for the assessment year 2007-08, as a 100% export oriented unit. It had obtained approval from the Development

Commissioner approving the assessee as 100% export oriented unit. However, on the ground that there was no ratification of the decision of the Development Commissioner by the Board of Approval, the Assessing Officer denied the deduction under section 10B. The Commissioner (Appeals) held that the assessee was entitled to deduction under section 10B as not only was there approval given by the Development Commissioner but the approval was also subsequently ratified by the Board of Approval. This was confirmed by the Tribunal. On appeal:

Held, Circular No. 68 issued by the Export Promotion Council for EOUS and SEZS, dated May 14, 2009, made it clear that from 1990 onwards the Board of Approval had delegated the power of approval of 100% export oriented undertakings to the Development Commissioner and, therefore, the Development Commissioner, while granting the approval of 100% export oriented unit, exercises delegated powers. In any case when at the relevant time the Development Commissioner granted approval of the 100% export oriented unit in favour of the assessee, which came to be subsequently ratified by the Board of Approval the ratification shall be from the date on which the Development Commissioner granted the approval. Hence, both the Commissioner (Appeals) as well as the Tribunal have rightly held that the assessee was entitled to deduction under section 10B as claimed.(AY. 2007-08).

CIT v. ECI Technologies Pvt. Ltd. (2015) 375 ITR 595 / 128 DTR 236 (Guj.)(HC)

S.10B : Export oriented undertakings – Part activities out sourced – Deduction cannot be denied – Succession – Successor entitled to exemption for unexpired period. [S.10B(7A)] 201

Deduction cannot be disallowed if part of the activities are outsourced to third parties by the assessee which are to be performed under the direct control and supervision of the assessee. Successor entitiled to exemption for un expired period. (AY. 2007-08 to 2009-10)

MKU (Armours) (P) Ltd. v. CIT (2015) 376 ITR 514 / 119 DTR 169 / 279 CTR 504 / 234 Taxman 790 (All.)(HC)

MKU (P) Ltd. v. CIT (2015) 119 DTR 169 / 279 CTR 504 (All.)(HC)

S.10B : Export Oriented undertakings – Loss suffered by assessee in a unit eligible for exemption cannot be set off against income from any other unit not eligible for exemption. 202

The assessee is a public limited company engaged in the business of manufacturing and selling cables, wires and stainless steel wires. It has a 100% EOU and is eligible for exemption u/s. 10B, loss from which it was setting off against income of non-eligible units. The AO disallowed the set-off on the ground that since income was exempt, the losses of the unit too could not be set off against income of any other unit(s). The CIT(A) confirmed the action of the AO. However the Tribunal reversed the order of the AO.

The High Court, allowing the revenue's appeal, relied on its own decision in the case of *CIT v. TEI Technologies (P.) Ltd.(2014) 361 ITR 36* and observed that the aim of such provisions was to ensure that "double benefit does not result to an assessee in respect of the same income, once under Section 10A or Section 10B or under any of the provisions

of Chapter VIA and again under any other provision of the Act." The High Court held that the only object was to ensure that here is no double benefit arising to the assessee in respect of the same income and hence tax-exempt income of the assessee, eligible under Section 10B could not have been set off against the losses from tax-liable income. *CIT v. Kei Industries Ltd. (2015) 118 DTR 306 / 231 Taxman 697 / 373 ITR 574 (Delhi) (HC)*

203 **S.10B : Export oriented undertakings – Manufacture – Preparation of data for printing amounted to manufacture.**

Held, dismissing the appeal, that the work which ultimately resulted as the culmination of the assessee's efforts of compiling, editing, digital designing, etc. was "transmitted or exported from India to any place outside India by any means". It was, therefore, computer software that are produced or manufactured, to qualify for benefit under section 10B. (AY. 2003-04 to 2006-07)

CIT v. Kiran Kapoor (Ms.) (2015) 372 ITR 321 / 231 Taxman 474 / 274 CTR 343 / 115 DTR 97 (Delhi) (HC)

Editorial: Order in Kiran Kapoor v. ITO [2014] 32 ITR 156 (Delhi)(Trib.) is affirmed.

204 **S.10B : Export oriented undertakings – Manufacture or production of an article or thing – Entire plant assembled outside India from goods supplied and manufactured in India – Assembled machines partially disassembled for proper packaging for export, transportation and installation – Entitled to exemption.**

Dismissing the appeal of revenue the Court held, (i) that the assessee had assembled the entire plant outside India from the goods supplied and manufactured in India. This would include the expenditure incurred for commissioning and providing technical services outside India, after excluding expenses in the form of payment made in foreign exchange for technical services provided outside India. It was not the case of the Revenue that the assessee had made payment in foreign exchange for technical services provided outside India.

(ii) That the assessee did not self-manufacture or produce most of the articles or things which were exported and used for setting up the plant. It had undertaken detailed engineering drawings and as per the specification and drawings, the actual manufacture and production work was outsourced. Throughout the process, inspection was carried out and only after approval, were the goods dispatched. The goods were reinspected, checked, assembled and disassembled, before they were exported out of India. Only upon the satisfactory performance and ensuring that there was perfect matching, were the goods exported. Therefore, the activities qualified and should be treated as manufacture or production of goods by the assessee itself.

(iii) That it would be incongruous and inappropriate in the context of section 10B to hold that the assessee, a 100 per cent export oriented unit, which had refurbished a mini cement plant in Zambia and established a mini steel mill in Kazakhstan, was not engaged in "manufacture" or "production" of articles or things. It was accepted that in case the mini steel plant and refurbished cement mill had been completely assembled in the unit in Noida and exported as such, the assessee would qualify and would be a manufacturer or a person engaged in production of articles or things. However, the

benefit under section 10B, it was asserted by the Revenue, should be denied for what was exported were separated or disassembled parts of the mini cement and steel plant, as it was not possible to export after fabrication and assembly the entire plant itself. The fabrication and assembly had to be undertaken in view of the size and logistics at the location where the plant had to be upgraded or set up. The reasoning deflated the object and purpose of section 10B. Export of goods and things can take various forms and section 10B accepts and admits such interpretation. The word "production" has a wider connotation than the word "manufacture" and illustratively every manufacture could be categorised as production but not vice versa. The word "production" in section 10B has been used in addition to the word "manufacture" and also an expanded scope and ambit is envisaged for the term in the context of section 10B, Explanation 4.(AY. 2007-08, 2008-09)
CIT v. Aar Ess Exim P. Ltd. (2015) 372 ITR 111 / 230 Taxman 441 / 116 DTR 145 / 281 CTR 143 (Delhi)(HC)

S.10B : Export oriented undertakings – Disallowance of claim based on incomplete investigation was rightly deleted by Tribunal. 205
Assessee was engaged in manufacture and export of granite monuments and claimed deduction under section 10B. Assessing Officer observed that sale value of granite blocks by three related companies to assessee was lesser than value of sale by said companies to unrelated parties. He, therefore, reduced business profit by certain amount and computed deduction under section 10B on balance profits on ground that such amount of profit was shifted from related parties to assessee. Tribunal allowed the appeal of assessee. On appeal by revenue, dismissing the appeal the Court held that; in granite dimensional blocks trade, price may vary depending upon size of block and uniformity in colour, defects, etc., and since findings of Assessing Officer were breft of details and based on incomplete investigation, disallowance made by Assessing Officer under section 10B was to be deleted. (AY. 2009-10)
CIT v. Cauvery Stone Impex (P.) Ltd. (2015) 230 Taxman 233 (Mad.)(HC)

S.10B : Export oriented undertakings – Assessee – When the assessee has the required infrastructure in place, the business can be treated as set-up and accordingly the expenses incurred between the date of set-up and the date of commencement can be taken on revenue account. 206
The assessee was in the business of voice activation and local number portability, i.e. BPO services, which were made available to M/s. Omniglobe International, USA – the holding company. The assessee was incorporated on 19-03-2004 and claimed deduction under section 10B, of the Income-tax Act for a period commencing from 01-04-2004 to 31-5-2004, contending that it had obtained approval as a 100% EOU under the STPI scheme and had commenced operations from 01-04-2004. The AO held that the assessee had commenced its operations only from 01-06-2004, i.e. the date on which the assessee entered into the "service agreement" with its parent company and, therefore, the expenditure incurred between 01-04-2004 to 31-05-2004 should be capitalised. The Commissioner (Appeals) and Tribunal upheld the order of the Tribunal.
On an appeal, the Court keeping in view the nature of business activity of the assessee held that training, imparting skills to employees recruited, or testing their performance

cannot be treated as a pre-setup expenditure. The moment employees were recruited and enrolled, and infrastructure to use their service was in place, setup was complete. It was indicative of the fact that business operations had been set up. In the BPO industry, training of employees is an important, essential and integral element of the business activities and when the assessee has the infrastructure in place, the business can be treated as set-up. Accordingly, the High Court reversed the order of the lower authorities. (AY. 2005-06)

Omniglobe Information Tech India Pvt. Ltd. v. CIT (2014) 369 ITR 1 / (2015) 115 DTR 265 / (2016) 68 taxmann.com 112 (Delhi)(HC)

207 **S.10B : Export oriented undertakings – Computer software – Approval from STPI after end of previous year relevant to assessment year – Question of granting exemption does not arise. [Industries (Development and Regulation) Act, 1951, S. 14]**

The assessee was engaged in manufacturing and export of computer software and had commenced a 100% export of computer software during the assessment year 2005-06 and claimed exemption under section 10B. The Assessing Officer held that the assessee had applied for registration as a 100% export-oriented undertaking to the Software Technology Parks of India on March 24, 2005, and obtained the approval only in May, 2005. Hence, in terms Circular No. 1 of 2005, dated January 6, 2005, (2005) 271 ITR (St.)6) of the Central Board of Direct Taxes, the assessee was not eligible for the benefit under section 10B. Accordingly, he disallowed the entire claim of exemption under section 10B on the ground that the assessee had obtained the approval from the STPI only in May, 2005, which was after the end of the previous year relevant to the assessment year 2005-06. Held allowing the appeal of revenue, that the approval was granted during May, 2005, only and, therefore, prior to that date or the assessment year, relevant to the date of registration, the benefit of section 10B would not be available as the requirement of approval by the competent authority was not available as on the date, from which the assessee claimed the exemption. (AY. 2005-06)

CIT v. Live Connection Software Solutions P. Ltd. (2014) 51 taxmann.com 454 / (2015) 370 ITR 356 / 119 DTR 355 / 280 CTR 109 (Mad.)(HC)

208 **S.10B : Export oriented undertakings – All business profits of the undertaking are eligible for deduction and it is not necessary to show that they have a "direct nexus" with the undertaking.[S.10B(4)]**

Sub-section (4) of section 10B stipulates that deduction under that section shall be computed by apportioning the profits of the business of the undertaking in the ratio of turnover to the total turnover. Thus, notwithstanding the fact that sub-section (1) of section 10B refers the profits and gains as are derived by a 100% EOU, yet the manner of determining such eligible profits has been statutorily defined in sub-section (4) of section 10B of the Act. As per the formula stated above, the entire profits of the business are to be taken which are multiplied by the ratio of the export turnover to the total turnover of the business. Sub-section (4) does not require an assessee to establish a direct nexus with the business of the undertaking and once an income forms part of the business of the undertaking, the same would be included in the profits of the business of the undertaking. Thus, once an income forms part of the business of the eligible undertaking, there is no further mandate in the provisions of section 10B to exclude

the same from the eligible profits. (ITA No. 219/2014 and 239/2014, dt. 13.11.2014)(AY. 2008-09, 2009-10)
CIT v. Hritnik Export Pvt. Ltd. (Delhi)(HC); www.itatonline.org

S.10B : Export oriented undertakings – No prohibition on use of business premises and transfer of employees and customers of other company – Transfer of only small percentage of employees and customers – Formation of assessee not by reconstruction – Exemption allowable – Disallowance of expenses would also increase the exemption. 209
Dismissing the appeal of revenue the Tribunal held that there was no transfer of old plant and machinery during the financial years 2004-05, 2005-06 and 2006-07 and the plant and machinery purchased by the assessee from F in the financial year 2007-08 did not exceed 20 per cent of the total plant and machinery of the assessee during that financial year. The manufacturing activity carried on by the assessee in the assessment years earlier to assessment year 2008-09 was by use of new plant and machinery. There was no prohibition in the use of the business premises of F by the assessee and of the employees and customers of F. The transfer of employees and customers was only a small percentage of the total employees and customers of the assessee. The Department failed to rebut these findings with evidence to the contrary. Deduction under section 10B of the Act was allowable. Tribunal also held that, the Commissioner (Appeals) was justified in holding that the disallowance of the expenditure would only increase the claim of deduction under section 10B of the Act. (AY. 2007-08)
Dy. CIT v. Jeans Knit P. Ltd. (2015) 40 ITR 567 / (2016) 156 ITD 671 / 135 DTR 66 / 178 TTJ 252 (Bang.)(Trib.)

S.10B : Export oriented undertakings – Export turnover – Total turnover – Travel and communication expenses are to be excluded. 210
Dismissing the appeal of revenue the Tribunal held that; while computing exemption under section 10B, travel expenses and communication charges incurred in foreign currency are to be excluded from export turnover as well as total turnover. (AY. 2003-04, 2005-06 to 2008-09)
ACIT v. Triad Software (P.) Ltd. (2014) 34 ITR 605 / (2015) 68 SOT 39 (Chennai)(Trib.)

S.10B : Export oriented undertakings – Expenses excluded from purpose of export turnover to be excluded from total turnover also. 211
The Tribunal held that the expenses excluded from the purpose of export turnover were to be excluded from the total turnover also. (AY. 2007-08)
ACIT v. ToCheung Lee Stationery Mfg. Co. P. Ltd. (2015) 41 ITR 590 (Chennai) (Trib.)

S.10B : Export oriented undertakings – After AY 2001-02 when S. 10A / 10B became "deduction" provisions instead of "exemption" provisions, the deduction has to be computed before adjusting brought forward unabsorbed losses / depreciation. [S.10A] 212
The assessee set off of brought forward losses of ₹ 4,11,06,003/- against the income resulting into total taxable income of Nil, whereas the deduction under section 10B of the Act at ₹ 7,68,41,580/- was claimed as against the income of EOU units of ₹ 8,01,88,716/-. The Assessing Officer was of the view that the brought forward losses

and unabsorbed depreciation were required to be set off against the total income of the assessee first and thereafter, deduction under section 10B of the Act should be allowed. Accordingly, the Assessing Officer recomputed the deduction under section 10B of the Act by granting the deduction after allowing set off of brought forward losses. The contention of the assessee before the CIT(A) was that the stage of granting of deduction under section 10B of the Act was before set off of brought forward unabsorbed losses or depreciation, in view of various decisions. The CIT(A) noted that the CBDT has issued Circular dated 16-7-2013 that the brought forward unabsorbed depreciation should be set off before granting deduction under section 10A or 10B of the Act. Further, the Hon'ble Supreme Court in *Himasingka Seide Ltd. v. CIT, Civil Appeal No.1501 of 2008,* dated 19-9-2013 had decided the issue in favour of the Department by dismissing the assessee's appeal. On appeal the Tribunal allowed the appeal of the assessee following the ratio of decision of Bombay High Court in *CIT v. Black & Veatch Consulting Pvt. Ltd. (2012) 348 ITR 72 (Bom.)(HC).* (AY. 2005-06)
Vishay Components India Pvt. Ltd. v. ACIT (2015) 174 TTJ 354 / 128 DTR 178 / (2016) 45 ITR 471 (Pune)(Trib.)

213 **S.10B : Export oriented undertakings – Interest income – Book profit [S.115JB]**
In view of decision of Tribunal in earlier year, issue of deduction in exemption under section 10B towards allocation of head office expenses/expense of other division and interest income earned by 100% E.O.U. under normal income and MAT provisions was to be decided in favour of assessee.(AY. 2003-04, 2005-06)
Aditya Birla Nuvo Ltd. v. ACIT (2015) 68 SOT 403 (Mum.)(Trib.)

214 **S.10B : Export oriented undertakings – Exemption allowed in earlier years cannot be withdrawn on the ground that undertaking is not approved under S. 14 of Industrial Development and Regulation Act. [Industrial Development and Regulation Act. S 14]**
Where exemption under section 10B was allowed in earlier years, same could not be withdrawn in subsequent year on ground that undertaking is not approved by Board under section 14 of Industrial Development and Regulation Act. (AY. 2003-04, 2005-06)
Aditya Birla Nuvo Ltd. v. ACIT (2015) 68 SOT 403 (Mum.)(Trib.)

215 **S.10B : Export oriented undertakings – Export turnover – Expenditure incurred outside India-is to be excluded from both export and total turnover.**
It was held that where assessee-company incurred expenditure in delivering software services outside India, same was to be excluded from both export turnover and total turnover while computing exemption under section 10B to maintain parity.(AY. 2008-09)
Microsoft Global Services Center (India) (P.) Ltd. v. ACIT (2015) 67 SOT 209 (URO)(Hyd.)(Trib.)

216 **S.10B : Export oriented undertakings – Approval by Board appointed by Central Government as 100 per cent. export oriented undertaking-Approval under Software Technology Park of India is not sufficient – Exemption is not available. [Industries (Development and Regulation) Act, 1951, S. 14]**
The assessee claimed deduction under section 10B of the Act. The Assessing Officer rejected the claim of the assessee on the grounds that, since the assessee's software

technology park unit did not have any new computer system and other necessary equipment for the purpose of carrying on software development, the assessee was not a 100 per cent export oriented undertaking. The Commissioner (Appeals) allowed the exemption on the ground that the Software Technology Parks of India had granted approval to the assessee as a 100 per cent. export oriented undertaking eligible for exemption under section 10B of the Act. On appeal by the Department:
Held, that in order to claim exemption under section 10B, an undertaking must be approved by the Board appointed by the Central Government in exercise of the powers conferred by section 14 of the Industries (Development and Regulation) Act, 1951 and the rules made under the Act. There was nothing on record to suggest that the assessee was a hundred per cent export oriented undertaking approved by the Board. Units set up under the Software Technology Parks Scheme were different from units approved by the Board. Hence the assessee, not having been approved by the Board appointed by the Central Government, it was not entitled for exemption under section 10B of the Act. (AY. 2003-04 to 2006-07)
Vishwak Solutions P. Ltd. v. ACIT (2015) 38 ITR 522 / 68 SOT 118 (URO) (Chennai)(Trib.)

S.10B : Export oriented undertakings – Export turnover – Profits arising out of fluctuation of rates of foreign exchange – Form part of export turnover – Assessee dealing in manufacture and export of fasteners – Sale of scrap – Proceeds not includible in turnover.[S.10A, 80HHC] 217

The assessee claimed deduction on foreign exchange rate difference and scrap sale turnover as export turnover and total turnover. The Assessing Officer included the foreign exchange difference amount and scrap sale turnover in the domestic sales on a view that the profits and gains derived by an eligible undertaking from export of eligible articles and that the foreign exchange difference could not be included in the eligible amount. The Commissioner (Appeals) confirmed the order of the Assessing Officer. On appeal :
Held, that the connotation of "export turnover" under section 10B is no different from that under sections 10A or 80HHC of the Act, the meaning ascribed to export turnover in such decisions will apply with full vigour in the context of section 10B as well. Therefore the foreign exchange fluctuation difference had to be considered as part of export turnover and total turnover. While the assessee was engaged in the business of manufacturing export of fasteners, the sale of scrap could not be included in "total turnover or domestic turnover". (AY. 2009-10)
Universal Precision Screws v. ACIT (2015) 38 ITR 233 / 164 TTJ 84 (Delhi)(Trib.)

S.10B : Export oriented undertakings – Interest from fixed deposit receipts placed for maintaining margin money – Close nexus with business activity of assessee – To be treated as business income – Eligible for deduction. 218

The Assessing Officer treated the interest income on fixed deposit receipts as income from other sources, on the ground that it was not derived from the eligible business and denied the deduction On appeal:
Held, that the deposit having been made for the purposes of keeping margin money or for availing of any other credit facility from banks, the interest income had close

connection with the business activity of the assessee and the income was to be treated as income from business of the assessee and was eligible for the benefit under section 10B. (AY. 2009-10)
Universal Precision Screws v. ACIT (2015) 38 ITR 233 / 169 TTJ 84 (Delhi)(Trib.)

219 **S.10B : Export oriented undertakings – Income from interest and sale of scrap – Not to be excluded if income intrinsically connected to business of assessee. [S.10A, 56]**
The assessee considered the income from interest and sale of scrap for the purposes of computation of deduction under section 10B of the Act as income derived from the operations of business. The Assessing Officer treated it as income from other sources and excluded the income from interest and sale of scrap from the computation of deduction. The Dispute Resolution Panel confirmed this. On appeal: Held, that where the income sought to be taxed was intrinsically connected to the business of the assessee and the provisions falling under sections 10A and 10B of the Act form a code within the code, no disallowance was called for. Therefore, the Assessing Officer was to compute the deduction taking into account interest and sale scarp as business income. (AY. 2009-10)
Watson Pharma P. Ltd. v. Dy. CIT (2015) 168 TTJ 281 / 38 ITR 97 / 115 DTR 65 / 54 taxmann.com 88 (Mum.)(Trib.)

220 **S.10B : Export oriented undertakings – Business income or income from other sources – Freight charges – Assessable as business income – Duty entitlement pass book scheme – Would not form part of eligible profit. [S. 28(i), 57(iii)]**
The assessee was engaged in the business of manufacture and export of readymade garments. The assessee paid a sum of ₹ 81.30 lakhs on cost plus freight and insurance basis on export of goods, which was then recovered from customers by way of freight charges at ₹ 74.15 lakhs, resulting in a negative impact on the profits of the assessee. The Assessing Officer assessed the freight charges as income from other sources. The Commissioner (Appeals) held that even assuming freight to be an independent source of income, the expenditure incurred by the assessee was to be allowed under section 57(iii) of the Income-tax Act, 1961 which resulted in a loss under the head "Income from other sources". On appeal by the Department:
Held, that the receipt on account of freight was based on the freight and insurance expenses incurred by the assessee on overseas customers and the source of the receipt did not fall in any distinct and independent source of income, apart from the assessee's business of manufacture and export of goods outside India. Hence the receipt was a part of the assessee's business. Tribunal also held that the duty entitlement pass book scheme receipt would not form part of the eligible profit of the assessee's export oriented undertaking under section 10B(1) read with section 10B(4) of the Act. (AY. 2007-08)
ACIT v. S. K. International (Export) Co. (2015) 38 ITR 33 (Mum.)(Trib.)

221 **S.10B : Export oriented undertakings – Unabsorbed depreciation – Deduction is available without setting off unabsorbed depreciation of other unit. [S.10A]**
The revenue has filed the appeal before the Tribunal and raised the question that the Hon'ble DRP erred in directing the Assessing Officer to allow deduction under section

10B of the Act in respect of its Goa unit without setting off unabsorbed depreciation of another eligible unit. The revenue prayed that the order of DRP be set aside and the order of Assessing Officer be restored.
The Tribunal followed the decision of Hon'ble Bombay High Court in the case of *CIT v. Black & Veatch Consultancy Pvt. Ltd. (2012) 348 ITR 72 (Bom.)* where it was held that the brought forward unabsorbed depreciation and losses of the unit the income which is not eligible for deduction under section 10A of the Act cannot be set off against the current profit of the eligible unit for computing the deduction under section 10A of the Act. The Tribunal dismissed the appeal filed by the Department. (AY. 2009-10)
Dy. CIT v. Watson Pharma P. Ltd. (2015) 168 TTJ 281 / 38 ITR 97 / 115 DTR 65 / 54 taxmann.com 88 (Mum.)(Trib.)

S.10B : Export oriented undertakings – Computer software – Disallowance of expenses and addition to income – Such income eligible for exemption. 222
The assessee was a 100 per cent. export oriented unit and exported computer software. It claimed exemption under section 10B of the Act. The AO held that in the absence of relevant material, the total turnover was domestic turnover and not eligible for exemption under section 10B of the Act. He disallowed certain expenses and added them to the income of the assessee. The Commissioner (Appeals) held that the Assessing Officer had sufficient material on record and there was no reason for not allowing exemption under section 10B and also observed that if expenses were disallowed, the profits of the assessee would increase which would mean that the assessee would become entitled to enhanced exemption under section 10B of the Act. On appeal by the Department: Held, dismissing the appeal, (i) that the assessee was eligible for exemption under section 10B of the Act. Tribunal also held that whatever disallowances were made, such income in turn became eligible for exemption under section 10B of the Act. Therefore the addition was to be deleted. (AY. 2010-11)
Dy. CIT v. Vertex Infosoft Solution P. Ltd. (2015) 37 ITR 521 / 70 SOT 351 (Chd.)(Trib.)

S.10B : Export oriented undertakings – Computation – Exemption to be allowed before set off of brought forward business losses. [S.72] 223
Tribunal held that exemption under section 10B has to be allowed before set off of brought forward business losses of assessee. (AY. 2010-11)
ITO v. Clear Water Technology Services (P.) Ltd. (2014) 36 ITR 528 / 52 taxmann.com 115 / (2015) 67 SOT 15 (URO)(Bang.)(Trib.)

Section 11 : Income from property held for charitable or religious purposes.

S.11 : Property held for charitable purposes – Option of setting apart 25 percent of total income – If such an option is exercised when return is filed, it would be treated as in conformity with provisions. 224
Dismissing the appeal of revenue the Court held that law does not mention any specific mode of exercising option of setting apart 25 per cent of total income for charitable purpose to be spent in succeeding year in terms of Explanation 2 to section 11 and,

therefore, If such an option is exercised when return is filed, it would be treated as in conformity with provisions.(AY. 1994-95)
CIT v. G. R. Govindarajulu & Sons (2015) 378 ITR 1 / 235 Taxman 199 / 280 CTR 303 (SC)

225 **S.11 : Property held for charitable purposes – Charity Commissioner giving directions from time to time – Amounts charged or surcharges levied on bills given to indoor patients – To be treated as income from activities of trust – Hospital is entitled to exemption. [S.2(15), Bombay Public Trust Act, 1950, S. 41A].**
On appeal by revenue dismissing the appeal the Court held that; the Tribunal concurred with its earlier order in relation to exemption. When the facts were identical to the assessment order under consideration, then there was no difficulty in applying and following its views for the earlier assessment years. The Tribunal's order did not raise any substantial question of law. When section 41AA was inserted in the Bombay Public Trust Act, 1950 by the Maharashtra Act, 1985, with an avowed and specific purpose, despite the directions of the Charity Commissioner, the Revenue could not insist that the amounts charged or surcharges levied should not be treated as income from the activities of the trust. The authorities under the Income-tax Act are supposed to scrutinise the papers and related documents of the trust or the assessee so as to bring the income to tax and in accordance with the Income-tax Act. In such circumstances, the concurrent findings did not in any manner indicate that the directions issued by the Charity Commissioner are incapable of being complied with or liable to be ignored. The directions issued did not change the character of the receipts.(AY 2008-09)
DIT(E) v. Jaslok Hospital and Research Centre. (2015) 378 ITR 230 / 60 taxmann.com 331 (Bom.)(HC)

226 **S.11 : Property held for charitable purposes – Activities through another charitable institution – Business held in trust for charitable purpose, section 11(4A) was held to be not applicable – Denial of exemption was held to be not valid. [S. 2(15), 12, 13]**
Allowing the petition the Court held that; the order passed by CIT(A) was in complete violation of principles of natural justice as no opportunity of being heard was given, Since, trust's activities are charitable u/s. 2(15), exemption cannot be denied. Charitable trust may carry out the objects through another charitable institution. Business was held in Trust section 11(4A) was held to be not applicable. (AY. 2004-05 to 2009-10)
Hamdard Laboratories (India) & Anr. v. ADIT(E) (2015) 379 ITR 393 / 280 CTR 428 / 126 DTR 1 (2016) 236 Taxman 78 (Delhi)(HC)

227 **S.11 : Property held for charitable purposes – Stock exchange – Entitle to exemption. [S.2(15)]**
Dismissing the appeal of revenue the Court held that Stock exchange registered as a charitable trust. Profits to be used for services of public utility hence, Stock exchange is entitled to exemption.(AY. 1995-96 to 2007-08)
CIT v. Jaipur Stock Exchange Ltd. (2015) 377 ITR 469 / 120 DTR 189 (Raj.)(HC)

S.11 : Property held for charitable purposes – Accumulation of income – Information was furnished after last date of filing of return but before date of completion of assessment, it was entitled to benefit of accumulation of income.[S. 2(15), 12A, Form no. 10] 228

The Assessing Officer disallowed the benefit of accumulation and this was upheld by the Tribunal. On appeal to the High Court,

Held, that the required information was furnished through Form 10 along with the return and subsequently on March 10, 1997, the assessee submitted another letter to the Assessing Officer intimating the specific purpose for which the amount was sought to be utilised. The information was furnished before the completion of the assessment. The disallowance of accumulation was not justified.(AY. 1996-97)

Samaj Seva Nidhi v. ACIT (Inv.) (2015) 376 ITR 507 / 62 taxmann.com 317 (T&AP)(HC)

S.11 : Property held for charitable purposes – Claim of exemption was made first time before CIT(A) by filing audit report and Form No. 10 – Tribunal was justified in allowing the claim.[S. 10(20), 12AA] 229

Upto assessment year 2002-03, assessee, a local authority, was enjoying benefit under section 10(20). Later on, it decided to avail benefit of section 11 and applied for registration under section 12A. Registration was granted by Commissioner on retrospective basis with effect from 1-4-2003. Meanwhile, assessment for assessment year 2005-06 was completed by Assessing Officer without allowing any exemption under section 11. Assessee after receipt of registration under section 12AA obtained an audit report as required and same was filed along with Form No. 10 before Commissioner (Appeals) and claim for exemption was made for first time in respect of assessment year 2005-06. Commissioner rejected said claim as said claim was not made in original return. Tribunal held that appellate proceedings before Commissioner were a continuation of assessment and, therefore, late filing of required documents would not disentitle the assessee from benefits of section 11. On appeal dismissing the appeal of revenue the Court up held the order passed by Tribunal.(AY. 2004-05, 2005-06)

CIT v. Mumbai Metropolitan Regional Iron & Steel Market Committee (2015) 378 ITR 103 / 232 Taxman 344 (Bom.)(HC)

S.11 : Property held for charitable purposes – Maintaining gaushalas and tending to other animals and birds, anonymous donation received would not be taxable. [S. 2(15), 158BC] 230

Assessee was a charitable trust engaged in maintaining gaushalas and tending to other animals and birds. Assessee received donations from identified donors and also anonymous donations. Assessing Officer after excluding identified donations, brought to tax anonymous donations. Commissioner (Appeals) after examining objects of assesee-trust and work carried out, concluded that assessee trust was a trust which had been established to fulfil charitable and religious purpose. Tribunal also upheld finding of Commissioner (Appeals). On appeal by revenue, it was contended that trust not being one for religious purposes but only for charitable purposes, anonymous donations were liable to be taxed under section 115BBC. Dismissing the appeal of revenue the Court held that taking care of animals was to be considered as charitable

as well as religious activities, therefore, anonymous donation received would not be taxable. (AY. 2007-08)
DIT v. Bombay Panjrapole Trust (2015) 232 Taxman 821 / 126 DTR 149 (Bom.)(HC)

231 **S.11 : Property held for charitable purposes – Accumulation of income – Just because more than one object is mentioned, benefit of accumulation cannot be denied. [Form No 10]**
As long as objects of assessee-trust, are charitable in character and purposes mentioned in Form 10 are for achieving objects of trust, merely because more than one purpose have been specified and details about plan of such expenditure has not been given, same would not be sufficient to deny benefit under section 11(2) to assessee. (AY.2005-06)
DIT v. Envisions (2015) 378 ITR 483 / 232 Taxman 164 (Karn.)(HC)

232 **S.11 : Property held for charitable purposes – Management and development programme – Consultant charges are part and parcel of institute of management studies – Surplus funds was applied for attainment of object of institute – Entitled to exemption – Allowance of depreciation – No double deduction. [S.32]**
Dismissing the appeal of revenue the Court held that letting out halls for marriages, sale and advertisement rights had not been found to be a regular activity undertaken as part of business. The income was generated from giving various halls and properties of the institution on rentals only on Saturdays and Sundays and on public holidays when they were not required for educational activities and could not be said to be a business which was not incidental to attainment of the objects of the Trust. This being merely an incidental activity and income derived from it having been used for the educational institute and not for any particular person and separate books of account having been maintained, this income could not be brought to tax. As regards acquisition of property the deduction was allowed earlier was towards application of funds of the trust for acquiring assets, the depreciation is permissible as deduction considering the use of the assets.
DIT(E) v. Shri Vile Parle Kelavani Mandal (2015) 378 ITR 593 / 232 Taxman 499 / (2016) 286 CTR 219 (Bom.)(HC)
Editorial: SLP is granted, (SLP) (C) No.27759 of 2015) DIT(E) v. Shri Vile Parle Kelavani Mandal (2015) 378 ITR 35 (St) / 235 Taxman 519 (SC)

233 **S.11 : Property held for charitable purposes – A charity is not entitled to exemption if it carries out activities not as per the objects. The fact that such *ultra vires* objects are also charitable is not relevant. Fact that CIT has granted registration u/s. 12A does not preclude AO from examining compliance with S. 11. Incidental objects to attain the main object, even if significant in value, are permissible. Under principles of consistency, AO is not permitted to change view in the absence of a change in facts. [S. 2(15), 12A]**
The Assessee contended that it was a charitable institution engaged in running a hospital (both Allopathic and Ayurvedic) and the same constituted a charitable purpose within the meaning of Section 2(15) of the Act. It was urged that as the Assessee had

applied its income for charitable purposes, the same was exempt under Section 11 and 12 of the Act. The Assessee further contended that it had been granted registration under Section 12A of the Act after considering the nature of its activities and, therefore, it was not open for the AO to deny the exemption under Section 11 of the Act. The CIT(A) accepted the contentions. However, the Tribunal held that the Assessee's activities relating to Allopathic system of medicine had more or less supplanted the activities relating to Ayurvedic system of medicine and concluded that pre-dominant part of the Assessee's activities exceeded the powers conferred on the trustees and the objects of the Assessee Trust were not being followed. The Tribunal held that whilst the activities of the Assessee relating to providing medical relief by the Ayurvedic system of medicine were *intra vires* its objects, the activities of providing medical reliefs through Allopathic system of medicine was *ultra vires* its objects. Consequently, the Assessee was not entitled to exemption under Section 11 of the Act in respect of income from the hospital run by the Assessee, which offered medical relief through Allopathic system of medicine. Accordingly, the Tribunal directed that the income and expenditure of the Assessee from the activities relating to the two disciplines of medicine, namely Ayurveda and Allopathy, be segregated. On appeal by the assessee to the High Court HELD: that charity is not entitled to exemption if it carries out activities not as per the objects. The fact that such ultra vires objects are also charitable is not relevant. Fact that CIT has granted registration u/s 12A does not preclude AO from examining compliance with S. 11. Incidental objects to attain the main object, even if significant in value, are permissible. In the circumstances, it would not be apposite to permit the Revenue to challenge a position that has been sustained over several decades without there being any material change. Order of Tribunal is set aside. (AY.2006-07)
Mool Chand Khairati Ram Trust v. DIT(E) (2015) 377 ITR 650 / 280 CTR 121 / 234 Taxman 222 (Delhi)(HC)

S.11 : Property held for charitable purposes – Educational institution – No evidence of receipt of capitation fees – Entitled to exemption. [S. 10(23C), 12, 12A, 13] 234
Charitable trust running educational institutions, there was no evidence of receipt of capitation fees. Cash found in possession of chairman of trust assessed in his hands. There was no evidence of utilisation of income for non-charitable purposes. Charitable trust is entitled to exemption. (AY. 2002-03 to 2008-09)
CIT v. Balaji Educational and Charitable Public Trust. (2015) 374 ITR 274 / 231 Taxman 267 / 281 CTR 165 (Mad.)(HC)
Editorial: Order in ACIT v. Balaji Educational and Charitable Public Trust (2011) 11 ITR 179 (Chennai) (Trib.) is affirmed.

S.11 : Property held for charitable purposes – Major part of donation was spent on religious and other charitable purposes as well as on free food distributed in Rain Baseras in evening or Prasad distributed on various functions. Trust was entitled for benefit of exemption. [Ss. 2(15), 12A] 235
Dismissing the appeal of revenue the Court held that; All authorities recorded concurrent findings of fact that assessee-Trust stood registered under section 12A which was still valid and objects of trust were charitable in nature. Details of expenses showed

that major part of donation was spent on religious and other charitable purposes as well as on free food distributed in Rain Baseras in evening or Prasad distributed on various functions. Donation was provided to a Hospital for maintenance of Polytrauma ward and other activities. Activities of assessee clearly fell within meaning of charitable purposes under section 2(15) and assessee trust was entitled for benefit of exemption under section 11/12.
CIT v. Mandir Shree Ganesh Ji (2015) 230 Taxman 83 (Raj.)(HC)

236 **S.11 : Property held for charitable purposes – Investment contravening the provisions – Exemption on entire income cannot be denied. [S.13]**
Exemption under section 11 can be denied only to extent of investment contravening provisions of section 11(5) read with section 13(1)(d) and not on entire income. (AY. 1997-98 to 2001-02)
CIT v. Orpat Charitable Trust (2015) 230 Taxman 66 (Guj.)(HC)

237 **S.11 : Property held for charitable purposes – Accumulation of income – Assessee had fulfilled its obligation hence no disallowance was called for.[R. 17, Form 10]**
Assessee-society was constituted for welfare of employees of a bank in event of retirement, death or disability. Assessee had accumulated a certain sum under heading 'Further utilization'. Assessee submitted that accumulation was done for aims and objectives of society and that sum would only be used for purpose of making payments to members or their legal representatives in case of their death, retirement or permanent disability. On appeal by revenue the Court held that the assessee had fulfilled its obligation as required under section 11(2) and, thus, no disallowance under section 11(2) was called for.(AY. 1996-97)
DIT v. NBIE Welfare Society, New Delhi (2015) 370 ITR 490 / 229 Taxman 277 / 115 DTR 149 (Delhi)(HC)

238 **S.11 : Property held for charitable purposes – After considering running expenses and capital expenses on medical equipment's from gross receipts, percentage of profit was only 14.06 % hence exemption is allowable.**
AO disallowed the exemption on ground that 85 per cent of net income had not been spent on charitable activities. Facts revealed that after deducting running expenses and capital expenses on purchase of medical equipments from gross receipts, percentage of profit was 14.6 per cent, which was lower than 15 per cent permitted to be accumulated as per Act. On appeal by revenue dismissing the appeal the Court held that since 85 per cent of trust income had been applied towards object of trust, assessee would be entitled to exemption under section 11.
CIT v. Lilavati Kirtilal Mehta Medical Trust (2015) 229 Taxman 276 (Bom.)(HC)

239 **S.11 : Property held for charitable purposes – Exempt income – In computing the income of charitable institutions income exempt u/s. 10 has to be excluded – The requirement in s. 11 with regard to application of income for charitable purposes does not apply to income exempt u/s. 10[S.2(45), 10(33), 10(38)]**
The High Court had to consider whether an assessee enjoying exemption u/s. 11 could claim that the income exempt u/s. 10(33) and 10(38) had to be excluded while

computing the application of income for charitable or religious purpose. HELD by the High Court:
There is nothing in the language of sections 10 or 11 which says that what is provided by section 10 or dealt with is not to be taken into consideration or omitted from the purview of section 11. If we accept the argument of the Revenue, the same would amount to reading into the provisions something which is expressly not there. In such circumstances, the Tribunal was right in its conclusion that the income which in this case the assessee trust has not included by virtue of section 10, then, that cannot be considered under section 11. (AY.2007-08)
DIT (E) v. Jasubhai Foundation (2015) 374 ITR 315 / 120 DTR 373 / 280 CTR 551 (Bom.) (HC)

S.11 : Property held for charitable purposes – Local authority – Exemption was not to be denied merely on basis that view of AO was not reversed or set aside by Tribunal on merits. [S.10(20), 10(20A), 12AA] 240
The assessee was a local authority created by the Government of Maharashtra. Up to the year 2002-03, income of local authorities was not taxable under the provisions of sections 10(20) and 10(20A). However, the said provisions were amended with effect from 1-4-2003, as a result of which this income became taxable. Subsequently, the assessee applied for exemption under section 10(23C) and for that purpose filed an application for registration under section 12AA. That was granted but the Assessing Officer noted that the issue of exemption under section 11 in the case of assessee was raised in the assessment year 2004-05 and there as well the claim was disallowed.
The AO once again sought an explanation for the subsequent year and on the same point. The assessee submitted that for the assessment years 2003-04 to 2006-07, the claim had been allowed by the CIT(A) and also by the Tribunal and hence, the same order should be followed. However, that Appeal of the revenue was not dismissed on merits according to the AO but on technical grounds, therefore, he disallowed the claim.
On appeal to the High Court:
It cannot be concluded that the assessee must be denied the exemption and unless requisite satisfaction to the contrary is recorded. Once the denial of exemption is only on the ground that the Assessing Officer asserted that for the earlier years his view was not reversed or set aside by the Tribunal on merits that he proceeded to deny the exemption. However, the Tribunal in the order under challenge applied the correct tests which was to be applied by this Court in the order in relation to SRA. For all these reasons, the view taken by the Tribunal as also the Commissioner (Appeals) is a possible one and in the backdrop of the facts and circumstances. The appeal, therefore, does not raise any substantial question of law. It is accordingly dismissed. (AY. 2007-08)
DIT(E) v. Maharashtra Housing & Area Development Authority (MHADA) (2015) 228 Taxman 297(Mag.) (Bom.)(HC)

S.11 : Property held for charitable purposes – Foreign shares – Will – Pending for probate – No infirmity in the order – Rejection of application was not justified.[S. 11(5)] 241
One 'R' by a will bequeathed his entire property including shares in a foreign country to assessee-trust. However, said will of 'R' was under challenge in probate proceeding

and same was pending adjudication. CIT(A) held that there was no violation of section 11(5) as till will was probated and it was affirmed that will was genuine, trust would not acquire legal right on foreign shares, there was no infirmity in impugned order.
CIT v. Niranjanbapu Education and Charitable Trust. (2015) 228 Taxman 193 (Mag.) (Guj.)(HC)

242 **S.11 : Property held for charitable purposes – Educational institution – Capital expenditure incurred for attainment of object of institution – Entitled to exemption. [S. 12A, 12AA, 13(3)]**
If capital expenditure is incurred by an educational institution for attainment of the object of the society, it would be entitled to exemption under section 11. Therefore, the assessee was eligible for exemption under section 11. (2007-08)
CIT v. Silicon Institute of Technology (2014) 272 CTR 319 / (2015) 370 ITR 567 / 230 Taxman 415 (Orissa)(HC)

243 **S.11 : Property held for charitable purposes – Accumulation of income – Purpose of accumulation declared by assessee to be treated as sufficient – No disallowance can be made.**
Held it was clear from the assessment order that the aim and objective of the assessee was to work for the welfare of its members. This undoubtedly was the purpose and objective of the society. The assessee had clarified and stated that the money would only be used for the purpose of making payments to its members or their legal representatives in case of their death, retirement or permanent disability. The Tribunal also referred to the scheme floated by the assessee in detail. In view of the factual findings, the Assessing Officer could not have disallowed the accumulation under section 11(2) and added it to the total income of the assessee.(AY.1996-97)
DIT(E) v. NBIE Welfare Society (2015) 370 ITR 490 / 229 Taxman 490 (Delhi)(HC)

244 **S.11 : Property held for charitable purposes In order to claim exemption of income it is not mandatory for assessee-society to obtain approval under section 10(23C)(vi). [S.10(23C)(vi)]**
In order to claim exemption of income under section 11, it is not mandatory for assessee-society to obtain approval under section 10(23C)(vi). (AY.2009-10)
Dy. CIT v. Chaitanya Memorial Education Society (2014) 30 ITR 120 / (2015) 68 SOT 396 (Hyd.)(Trib.)

245 **S.11: Property held for charitable purposes – Donation – capital in nature – Denial of exemption was held to be not justified. [S. 12AA]**
Allowing the appeal of assessee the Tribunal held that as long as objects of a society were charitable in nature in years earlier to year in which registration under section 12AA was granted, and no adverse findings were given with regard to existence of assessee-society for charitable purposes benefit of exemption under section 11 was to be given. (AY. 2003-04, 2008-09)
Sree Sree Ramkrishna Samity v. Dy. CIT (2015) 44 ITR 687 / (2016) 156 ITD 646 (Kol.) (Trib.)

S.11 : Property held for charitable purposes – Charging fees cannot be reason to deny exemption [S. 2(15), 12AA] 246

Allowing the appeal, the Tribunal held that in terms of clause 15 of the trust deed, no funds should be applied or paid or distributed among the trustees and they had to be applied towards furtherance of the objects of the trust. The profit of the assessee was applied only for charitable activity and there was a prohibition in the trust deed to divert the funds for any other object. Merely because the assessee was charging fees for diagnostic service, it could not be inferred that the assessee was not doing any charitable activity. Moreover, diagnostic service facilitated the doctors to give proper treatment at the appropriate time. Therefore, providing diagnostic services would fall within the meaning of medical relief. Hence the assessee was entitled to deduction under section 11 of the Act. (AY. 2011-12)

Lions Club of Anna Nagar Charitable Trust v. Dy. CIT(E) (2015) 40 ITR 746 (Chennai) (Trib.)

S.11 : Property held for charitable purposes – Necessity of holding regular classes or wholesome educational activities cannot be the only criteria to be called educational activities eligible for benefits.[S. 2(15) 12A] 247

The assessee foundation was registered under section 12A with the objects to establish, run and operate on non-profit basis schools, regional centres of the foundation for brilliant students and to hold, organize, promote and sponsor conventions, seminars & conferences. Its objects, *inter alia,* included helping students in their aptitude for higher professional studies. The main objects of the company specifically provided that the foundation will be a non-profit organization.

The Assessing Officer took a divergent view on the assessee educational activities by holding that they are no educational activities as regular classes are not held.

Following the decisions of the Hon'ble Supreme Court in Assam State Text Book *Production & Publication Corpn. Ltd. v. CIT* which held that board though being only in the publication of books falls within the meaning of educational institution. It is not necessary to hold regular classes to be regarded as an educational institution and the Hon'ble Supreme Court in *American Hotel & Lodging Association, Educational Institute v. CBDT* wherein it was held that publication of curriculum, reproduction of text books, faculty development programmes are to be held as educational activities, the ITAT held that there was no merit in the order of AO to give a restricted meaning to the scope of meaning of term educational activities. Thereby AO's necessity of holding of regular classes or wholesome educational activities to be only eligible to be called educational activities eligible for benefits u/s. 11 cannot be sustained.(AY. 2009-10)

ITO v. Science Olympiad Foundation (2014) 151 ITD 273 / 33 ITR 451 / (2015) 170 TTJ 105 (Delhi)(Trib.)

S.11 : Property held for charitable purposes – Denial of exemption – Trust or institution – Investment restrictions – Capitation fee – No evidence, hence addition was held to be not justified. [S. 13] 248

The Tribunal held that no specific, reliable or cogent evidence was found during the course of search to prove that the assessee society received any capitation fee or any

cash belonged to it. Therefore the additions made in the hands of assessee society are wholly unwarranted and are deleted and there is no question of violation of section 11(3) or 13. (AY. 2003-04, 2004-05, 2009-10)
Indo Global Education Foundation v. DCIT (2015) 169 TTJ 437 / 39 ITR 489 (Chd.)(Trib.)

249 **S.11 : Property held for charitable purposes – Accumulated income – Entitled to deduction if income is accumulated or set apart for application of objects in India, to extent does not exceed 15 % of said income, without any conditions or formality of filing of Form No 10. [S.12]**
The assessee-trust was registered u/s. 12. It got considerable receivables towards fees, interest, etc. at the year end. In view of the unspent income, the option provided under Explanation (2) to section 11(1) had been exercised by assessee to carry over the unspent income including the receivables toward spending in the subsequent assessment year or during the year of receipt. The assessee claimed the surplus as per clause (2) of Explanation to section 11(1) without assigning any reasons. assessee is entitled for flat deduction without any condition or formality of filing Form No. 10, if income is accumulated or set apart for application of objects of trust in India, to extent to which income so accumulated does not exceed 15 per cent of said income. (AY. 2011-12)
V. Ramakrishna Charitable Trust v. Dy. CIT (2015) 155 ITD 727 / (2016) 132 DTR 65 / 177 TTJ 225 (Chennai)(Trib.)

250 **S.11 : Property held for charitable purposes – Promote advance medical science and to promote the improvement of public health and medical education in India – Endorsing products of companies – Entitle to exemption. [S. 2(15)]**
Dismissing the appeal of revenue the Tribunal held that denial of exemption on ground that assessee receiving money for endorsing products of companies on claiming of health and nutritional benefits is not justified there is no violation of provisions of S. 2(15) of the Act. Assessee is entitled to exemption. (AY. 2009-10)
ADIT(E) v. Indian Medical Association (2015) 41 ITR 222 / 68 SOT 377 (Delhi)(Trib.)

251 **S.11 : Property held for charitable purposes – Accumulation of income – Earmarking of existing bank fixed deposits is sufficient compliance.**
In order to claim deduction u/s. 11(2) it is not necessary that deposits have to be made out of current year's income, earmarking of existing bank fixed deposits, which is free from any lien, towards income accumulated u/s. 11(2) - during year would be sufficient compliance. (AY. 2004-05)
Dharmodayam Co. v. ITO (2014) 154 ITD 574 / (2015) 41 ITR 140 (Cochin)(Trib.)

252 **S.11 : Property held for charitable purposes – Objects of general public utility – Mixed objects – Supermarket business – Not entitled to exemption. [S.2(15), 12A]**
Assessee was a public charitable trust and claimed exemption under section 11, however, Assessing Officer denied same on ground that major income and expenditure of assessee trust was from running a supermarket on commercial basis and not by charitable and religious activities. Dismissing the appeal the Court held that where assessee trust carried on supermarket business and there was no nexus between

supermarket business and an activity incidental to attainment of objects of assessee trust, assessee would be disentitled for exemption. (AY. 2007-08, 2008-09)
Ashish Super Mercato v. Dy. CIT (E) (2015) 68 SOT 64 (Cochin) (Trib.)

S.11 : Property held for charitable purposes – Even post insertion of proviso to S.2 (15) but before 1-4-2016, S. 11 benefit cannot be denied to business activities carried by the trust in the course of actual carrying out of such advancement of any other object of general public utility. [S.2(15)] 253

Trusts are entitled to carry out activities in the nature of trade, commerce or business etc. as long as these activities are carried out in the course of actual carrying out of advancement of any other object of general public utility. On facts, activity of auctioning commercial plots for maximum revenue cannot be regarded as a profit-making exercise benefit cannot be denied. (AY. 2009-10 2011-12)
Hoshiarpur Improment Trust v. ITO (2015) 155 ITD 570 / 173 TTJ 273 / (2016) 45 ITR 682 (Asr.)(Trib.)

S.11 : Property held for charitable purposes – Promote education on banking – Charitable in nature – Eligible for exemption. [S. 2(15)] 254

The assessee was an institute set up to encourage the study of the theory of banking and for that purpose the assessee instituted a scheme of examination for various diplomas and certificate. The assessee claimed exemption under section 11 of the Act. The Assessing Officer rejected the claim of the assessee on the grounds that the assessee had generated huge surplus and did not promote any charitable activities for the public at large. The Commissioner (Appeals) sustained the order of the Assessing Officer. On appeal:
Held, allowing the appeal, that the assessee was set up for the purpose of development of banking personnel in the banking industry. The income and properties of the assessee were applied solely towards the promotion of the objects of the assessee as set forth in the memorandum of association. Since the assessee had given benefit to persons in the banking industry, the activities of the assessee were covered by the definition of "charitable purpose" in section 2(15) of the Act. Hence the assessee was eligible for exemption under section 11 of the Act.(AY.2008-09)
Indian Institute of Banking and Finance v. Dy. CIT(E) (2015) 39 ITR 323 / 69 SOT 598 (Mum.)(Trib.)

S.11 : Property held for charitable purposes – Educational institution – No violation of aims and objects at the stage of construction – Exemption is available – Capitation fees – Additions were deleted. [S. 12, 13] 255

Tribunal held that there was no violation of aims and objects of assessee, at stage of construction of educational building. Corpus of funds towards construction of building proved, hence, exemption is allowable. Tribunal also held that due to failure by Department to prove assessee received capitation fees and cash belonged to assessee, additions to be deleted. (AYs. 2003-04, 2004-05, 2009-10)
Dy. CIT v. Indo Global Education Foundation (2015) 39 ITR 489 / 169 TTJ 437 (Chd.)(Trib.)
Sukhdev Sigh v. Dy. CIT (2015) 39 ITR 489 / 169 TTJ 437 (Chd.)(Trib.)

256 **S.11 : Property held for charitable purposes – Development and research in banking technology – There is no profit motive – Entitled to exemption. [S.2(15), 12AA]**

(i) The ratio laid down in *Sole Trustee, Loka Shikshana Trust v. Commissioner of Income-Tax, Mysore 101 ITR 234 (SC), CIT vs. Andhra Chamber of Commerce 55 ITR 722 (SC)* and *Additional Commissioner of Income-tax, Gujarat v. Surat Art Silk Cloth Manufacturers Association 121 ITR 1* is that in the case of entity or organization whose objects are several, some of which are charitable and non-charitable; the test of predominant object for which the organization was set up is alone to be applied. Therefore, in the present case, the research and development in the Information Technology in the Banking Sector is the prime object for which the Appellant society was created by the Reserve Bank of India as is evident from the genesis of the organization. Offer of M.Tech course, Ph.D. programmes are only incidental for attainment of main objects of the organization. The primary object of promoting the technology in banking and financial sectors does not fall within the ambit of expression 'education' as defined above, since the said activity does not involve systematic instruction, schooling or training given to the young in preparation for the work of the life. The projects undertaken and the research activities by the society are only aimed at improvement of technology in Indian Banking and Financial sectors. As a result of developments in these areas, society at large shall be benefited and shall promote the welfare of general public. The improvement in technology related to Banking Sector leads to economic prosperity which enures benefits to entire community. Therefore, these objects can be said to be for advancement of any other objects of general public utility, which is a fourth limb in the definition of 'charitable purpose' in Section 2(15) of the Act. The principle enunciated by Hon'ble Apex Court in the case of *CIT v. Andhra Chamber of Commerce 55 ITR 722* holds good. When an object seeks to promote or protect the interests of a particular trade or industry, that object becomes an object of public utility, but not so, if it seeks to promote the interests of those who conduct the said trade or industry. The distinction between the protection of the interests of individuals and the protection of interests of an activity which is of general public utility goes to the root of the whole problem: *CIT v. Andhra Chamber of Commerce, (1965) 55 ITR 722, 727 (SC); Addl. CIT v. Ahmedabad Millowners' Association, (1977) 106 ITR 725, 738 (Guj)*]. Applying the ratio laid down in the above cases to the facts of the present case, we have no demur to hold that the objects of the Appellant are aimed at improving the Information Technology in the Banking and Financial Sector. The question of private gain or profit motive cannot be attributed to the appellant society as the Reserve Bank of India is the creator of the appellant society. Therefore, undoubtedly, the objects of the trust fall within the ambit and scope of the expression "general public utility services", which is a fourth limb of the definition of word "charitable" as defined under Section 2(15) of the Act.

(ii) As regards the proviso to Section 2(15) of the Act, it is clearly discernible from the CBDT's Circular No.11 of 2008, dated 19-12-2008 and speech of the Hon'ble Finance Minister that the intention of Parliament in introducing the proviso to Section 2(15) of the Act is to deny exemption to those organizations or entities, which are purely commercial or business in nature or the commercial business

entities, which wear the mask of a charity. The genuine charitable organizations are not affected in any way. It was further clarified that Chambers of Commerce and similar organizations rendering service to its Members could not be affected by introduction of the proviso. We, therefore, are required upon to find out whether the objects of the Appellant society are commercial or business in nature. Keeping this in mind, it is to be examined what is meant by the expression "commercial or business". The words 'trade', 'commerce' and 'business' were enumerated and elucidated in *Institute of Chartered Accountants of India v. Director-General of Income-tax (Exemptions) [2012] 347 ITR 99 (Delhi).*

(iii) Applying the tests enumerated, by no stretch of imagination, it can be said that the Reserve Bank of India had set up the Appellant society with a profit motive. It is most significant to note that the provisions of the Reserve Bank of India do not empower it to carry on any activity with profit motive. The activities of the appellant society are charitable and are not in the nature of commercial, or business. When the main objects of the appellant society are not business, the incidental activity, which is pursued for attainment of the main objects, cannot be called "business", merely because the appellant society renders services against payment as fees or cess, even if resulting in profit. The Hon'ble Apex Court in the case of *CIT v. Andhra Chamber of Commerce – (1965) 55 ITR 722* – laid down the principle that if the primary purpose of institution was advancement of objects of general public utility, it would remain charitable, even if some incidental or ancillary activity or the purpose for achieving the main purpose, was profitable in nature.

(iv) The rational that can be culled out from the above decisions is that once the primary objects of an institution are established to be in the nature of charity, then the proviso to section 2(15) of the Act cannot be made applicable. In other words, the existence of the proviso in substance will not make any difference. The proviso will hit only such cases where the entity or organization is carrying on business activity with a profit motive in the garb of charitable purpose. It will not however affect the case of institutions which are genuinely carrying on charitable activities. The words used by the legislature in the proviso "In the nature of trade, commerce or business". If we give due importance to the above mentioned words, the only conclusion will be that the proviso will effect only such cases where the activities of a charitable institution can be considered to be in the nature of trade, commerce or business. In fact, the same controversy, which has been there in the past, whether a charitable institution is carrying on the activities only of charitable nature or is carrying on activities which are in the nature of business, is emerging from this proviso also. In other words, the proviso will not give rise to any new controversy which had not been in the past. The further words used in the proviso, that for a cess or fee or any other consideration, have to be read alongwith the nature of activities, i.e., trade, commerce or business. When an institution is carrying on activities in the nature of trade, commerce or business obviously it will be charging fee, etc. It may be charging fee even when rendering/ providing services as part of charitable activity in order to supplement its income for carrying on charitable activities. In that case the proviso will not have any

implication as the activities would not be in the nature of trade, commerce or business. Accordingly, the proviso inserted in the definition of 'charitable purpose' will not substantially have any impact on the meaning of charitable purpose.

(v) What needs to be considered is as to whether the charging of amounts from the banks for the services rendered by the appellant society would make the activity 'commercial' as held by the Assessing Officer. The mere fact that the appellant society had generated surplus, during the course of carrying on the ancillary objects, shall not alter the character of the main objects so long as the predominant object continues to be charitable and not to earn the profit. Please refer to the judgments rendered by the Hon'ble Apex Court in the cases of *Addl. CIT vs. Surat Art Silk Cloth Manufacturers' Association [1980] 121 ITR 1* and *CIT v. A.P. State Road Transport Corporation [1986] 159 ITR 1.* The ratio laid down in the cases (Surat Art Silk Cloth Manufacturers Association, Aditanar Educational Institution and American Hotel and Lodging Association Educational Institute) is that mere existence of surplus from the activity does not mean that it will cease to be one existing solely for charitable purpose. The test to be applied is only the nature of predominant activity to determine whether the institution is existing for charitable purpose or otherwise. Therefore, in the instant case also, the mere fact that there was a surplus from the ancillary activities carried on by the appellant society does not mean that its objects ceases to be charitable.(ITA No.1712/Hyd/2014, dated 30-6-2015) (AY. 2011-12)

Institution for Development and research in Banking Technology (IDRBT) v. ADIT (2015) 42 ITR 219 (Hyd.)(Trib.)

257 **S.11 : Property held for charitable purposes – Anonymous donations – Cash credits – Identity of donors was established – Donations cannot be assessed as anonymous donations. [S. 12A,68, 115BBC]**

(i) The trust is registered u/s. 12A of the Act. There is no dispute that the entire voluntary donations have been disclosed by the trust as income in the Income and Expenditure account. The income so disclosed has been applied for charitable purposes as provided u/s. 11(1) of the Act and hence cannot be included in total income of the trust. Adding part of the voluntary donations again as unexplained cash credits u/s. 68 to the total income of the trust amounted to taxing the same income twice which is not permissible.

(ii) To obtain the benefit of the exemption under section 11, an assessee is required to show that the donations were voluntary. In the instant case, the assessee had not only disclosed its donations, but had also submitted a list of donors. The fact that the complete list of donors was not filed or that the donors were not produced, did not necessarily lead to the inference that the assessee was trying to introduce unaccounted money by way of donation receipts. That was more particularly so in the facts of the case where admittedly, more than 75 per cent of the donations were applied for charitable purposes;

(iii) Section 68 had no application to the facts because the assessee had in fact disclosed the donations as its income and it could not be disputed that all receipts, other than corpus donations, would be income in the hands of the assessee. There

was, therefore, full disclosure of income by the assessee and also application of the donations for charitable purposes. It was not in dispute that the objects and activities of the assessee were charitable in nature, since it was duly registered under the provisions of section 12A;

(iv) Section 115 BBC of the Act were not violated by the trust and the donations received from the nine donors cannot be categorized as anonymous donations. To be excluded from the definition of expression "anonymous donation" the person receiving the voluntary contributions referred to in section 2(24)(iia) is required to maintain a record of identity indicating the name and address of the contributor and such other particulars as may be prescribed. Since no other particulars have been prescribed under the provisions the person receiving the donation is under obligation to maintain the identity of donors indicating the name and address only. On perusal of the details furnished by the trust it is seen that the trust has not only furnished the names and addresses of the donors but also furnished a number of other details in respect of such donors viz. their PANs, copy of ITRs, copy of bank statements their confirmations, financial statements, computation of income etc. In view of the above, it is held that the trust has established the identity of donors as provided u/s 115BBC of the Act and the donations cannot be categorized as anonymous donations and subjected to tax as per provisions of section 115BBC of the Act.(AY. 2010-11)

ITO v. Saraswati Educational Charitable Trust (2015) 42 ITR 393 (Luck.)(Trib.)

S.11 : Property held for charitable purposes – Charitable institutions are eligible to a blanket deduction of 15% of the gross receipts without being required to satisfy any condition [S. 12AA] 258

Dismissing the appeal of revenue the Tribunal held that; The decision of the Hon'ble Supreme Court in A.L.N Rao Charitable Trust reported in 216 ITR 697(SC) clearly held that there is a blanket exemption with regard to the 25% (now 15%) of gross receipts as per second part of Section 11(1)(a) of the Income Tax Act. This exemption of 15% is not dependent on any other condition except that the trust or society should be registered u/s. 12AA of the Income Tax Act. The only issue to be examined here is whether the provisions of section 11(1) (a) and 11(2) have been since amended and if so, whether the aforesaid decision would apply to the amended provisions also? It is apparent from the reading of the provisions that section 11(1)(a) was almost identical during the AY 69-70 and during AY 2010-11. As regards the provisions of section 11(2) are concerned, even the amended sub-section (2) operates qua the balance of 85 per cent, of the total income of the previous year which has not got the benefit of tax exemption under sub-section (l)(a) of section 11. Section 11(2), as amended, does not operate to whittle down or to cut across the exemption provisions contained in section 11(1)(a)so far as such accumulated income of the previous year is concerned. As held by the Hon'ble Supreme Court in the case of A.L.N Rao Charitable Trust reported in 216 ITR 697(SC), it has to be appreciated that sub-section (2) of section 11 does not contain any *non obstante* clause like "notwithstanding the provisions of sub-section (1)". Consequently, it must be held that after section 11(l)(a) has full play and if still any accumulated income of the previous year is left to be dealt with, and to be considered for the purpose of

income tax exemption, sub-section (2) of section 11 can be pressed into service and if it is complied with then such additional accumulated income beyond 15 per cent, can also earn exemption from income-tax on compliance with the conditions laid down by sub-section (2) of section 11. As such, this judgment of the Hon'ble Supreme Court is squarely applicable to the appellant's case. The appellant is thus eligible for exemption of 15% of gross receipts 11(l)(a) of the Income Tax Act.(ITA No. 1093/Chd/2013, dt. 30.04.2015) (AY. 2010-11)
ITO v. Bhartiya Vidya Mandir Trust (Trib.)(Chd); www.itatonline.org

259 **S.11 : Property held for Charitable purposes – Computation of income – Depreciation – Precedent – High Court – Decision of jurisdictional High Court binding upon authorities within its jurisdiction – Commissioner (Appeals) justified in granting relief. [S. 32]**
The assessee-trust claimed depreciation on certain assets. The Department disallowed the claim on the ground that it would amount to double deduction as capital expenditure had been treated to have been applied for the objects of the trust. The Commissioner (Appeals), following the decision of the Delhi High Court, allowed the depreciation. On appeal by the Department :
Held, dismissing the appeal, that when the decision of the jurisdictional High Court was available on any issue, under well-established law, it was binding upon the authorities working under the jurisdiction of the High Court. The order of the Commissioner (Appeals) was correct. (AY. 2008-09, 2009-10)
Dy. CIT (E) v. Bhardwaj Welfare Trust (2015) 38 ITR 482 (Delhi)(Trib.)

260 **S.11 : Property held for charitable purposes – Business income – Trade associations – Receipts from specific services to members without any profit motive entitled to exemption. [S. 2(15), 28(i)]**
Assessee Association undertook activities like conducting Environment Management Centres, meetings, conferences and seminars and issuance of certificates of origin. The revenue authorities denied assessee's claim for exemption of income under section 11 for the reason that the activities of assessee association was hit by the newly inserted proviso by the Finance (No. 2) Act in section 2(15) with effect from 1-4-2009 and thereby falling under section 28(iii) being profit of business. It was held that where the main object of the Institution was 'charitable' in nature, then the activities carried out towards the achievement of the said, being incidental or ancillary to the main object, even if resulting in profit and even if carried out with non-members, were all 'charitable' in nature. The basic principle underlying the definition of 'charitable purpose' remained unaltered even on amendment in the section 2(15) with effect from 1-4-2009, though the restrictive first proviso was inserted therein. Assessee Association was eligible for exemption u/s. 11 (AY. 2009-10)
Indian Chamber of Commerce v. ITO(E) (2015) 67 SOT 176 (URO) / 167 TTJ 1 / 37 ITR 688 (Kol.)(Trib.)

S.11 : Property held for charitable purposes – Medical relief – Income earned from pharmacy being integral to main object of running hospital, it could not be excluded from computing income eligible for exemption.[S. 2(15), 12A] 261

Assessee, a charitable society registered u/s. 12A, running a hospital along with dispensary for benefit of public at large. AO held that certain activities carried on by assessee such as running pharmacy, working women's hostel etc. involved carrying on of activities in nature of trade and business and, therefore, such activities, even if meant for advancement of any object of general public utility, could not be treated as charitable purpose within meaning of proviso in s. 2(15). Since running of pharmacy by assesse was integral to running of hospital, collection received by assessee from its pharmacy could not be excluded from computing income eligible for exemption u/s. 11. Collection from other activities such as typewriting institute, working women's hostel and crèche came to less than ₹ 10 lakhs, by virtue of exclusion clause, those amounts also could not be considered for disallowing exemption u/s. 11.(AY. 2009-10)

Franciscan Sisters of St. Joseph Society v. Jt. CIT(E) (2015) 152 ITD 485 (Chennnai)(Trib.)

S.11 : Property held for charitable purposes – Depreciation – Not a case of double deduction.[S.12A, 32] 262

Held, dismissing the appeal, that the assessee was claiming depreciation on the assets owned by it. The claim to depreciation did not amount to double deduction. (AY. 2010-11)

ITO v. Ramananda Adigalar Foundation (2015) 37 ITR 80 (Chennai)(Trib.)

S.11 : Property held for charitable purposes – Museum portraying pictures, paintings, antique coins etc. – Incidental charges such as entry fee, guide fee, lift charges etc. – Entitled exemption. [S. 2(15), 12AA] 263

Where assessee, a trust registered under section 12AA, was settled with object of establishing a museum portraying pictures, paintings, antique coins etc., its activities were to be regarded as falling under category of 'general public utility' within meaning of section 2(15) and, thus, it was entitled to claim exemption under section 11 in respect of incidental charges such as entry fee, guide fee, lift charges etc. (AY. 2009-10)

Mehrangarh Museum Trust v. ACIT (2014) 48 taxmann.com 129 / (2015) 67 SOT 1 (URO) (Jodh.)(Trib.)

Section 12A : Conditions for applicability of sections 11 and 12.

S.12A : Registration – Trusts or institutions – Cancellation of registration was held to be not valid. [S.2(15), 12AA, 13] 264

DIT(E) cancelled registration of assessee holding that dominant activity of assessee was letting out choultry on daily rental basis which was in nature of business. Tribunal allowed the registration. On appeal by revenue dismising the appeal the Court held that; even if receipts from commercial activities were more when compared to overall receipts from charitable activities, it could neither lead to conclusion that activities of trust were not genuine nor could it be said that activities of trust were not being carried out in accordance with objects of trust and, thus, cancellation of registration was unjustified.(AY. 2010-11)

DIT v. Sri Kuthethur Gururajachar Charities (2015) 231 Taxman 848 (Karn.)(HC)

Editorial: SLP is granted to the revenue, (2015) 235 Taxman 517 (SC)

265 **S.12A : Registration – Trust or institution – Registration granted cannot be cancelled in view of amendment of section 2(15) as that is not a ground specified in statute for cancellation of registration – Order of Tribunal granting registration was affirmed. [S.2(15), 12AA]**

The assessee, Industrial Area Development Board, was granted registration under section 12A of the Act. The authority was of the view that there was no element of charity or providing of any services or industrial sites free of cost. Under various heads, the assessee had earned huge profit. Thereafter, taking note of the change in the definition of section 2(15), which came into effect from 1-4-2009, it was held that the activity carried on by the assessee was in the nature of trade, commerce or business or any activity of rendering any services in relation to trade, commerce or business and therefore, the consideration received irrespective of the nature of the use or application, or retention, of the income, from such activity would take the case out of section 2(15) and, therefore, proceeded to pass an order cancelling the registration granted under section 12AA.

On appeal, the Tribunal held that the registration already granted under section 12A could not be revoked for the reason that the charitable trust or institution pursuing of advancement of objects of general public utility carried on commercial activities and therefore as the conditions stipulated in section 12AA(3) did not exist in this case, set aside the order of cancellation of registration under section 12A.

On appeal: The Court held that a reading of the section 12AA(3) makes it very clear, a registration granted earlier under section 12A can be cancelled under two circumstances: (a) If the activities of such trust or institution are not genuine, (b) the activities of trust or institution not being carried out in accordance with the object of the trust or institution. Only on those two conditions being satisfied, the registration granted under section 12A could be cancelled by the authorities.

In fact, sub-section (8) to section 13 which is introduced by Financial Act, 2012 which came into effect from 1-4-2009 categorically provides that, nothing contained in section 11 or section 12 shall operate so as to exclude any income from the total income of the previous year or any receipt thereof. If the provisions of the first proviso to clause (15) of section 2 becomes applicable in the case of such person in the said previous year, the Statute has protected the interest of revenue. Notwithstanding the fact that the assessee is conferred registration under section 12A, unless the assessee falls within section 2(15), excluding the first proviso, the assessee would not be entitled to the benefit of exemption from the tax. If the case of the assessee falls with first proviso to section 2(15), the benefit of registration which flow from section 12A is not available. Anyhow, that is a matter to be considered by the Assessing Authority. But on that ground, registration cannot be cancelled, which is precisely the Tribunal has held. (AY. 2009-10)

DIT v. Karnataka Industrial Area Development Board (2015) 229 Taxman 539 (Karn.)(HC)

266 **S.12A : Registration – Trust or institution – Cancellation of registration – Finding that trust was running several educational institutions and had not violated any of the conditions for claiming exemption – Cancellation of registration was held to be not justified. [S.10(23C)(vi), 11, 12, 12AA]**

KLE was a charitable institution established with the primary object of imparting education to all irrespective of the caste, creed or sex with the preference to north

Karnataka. The society was granted approval under section 10(23C)(vi) of the Act. It had been granted registration. AO held that, the society had received donations from the parents and relatives towards admission of students in the educational institutions run by the society or by the KLE University, though the donations were voluntary contribution, they were capitation fees, the society was running a students' hostel and corporate hospital and facilities were charged, the hospital was not used for teaching purpose of its own educational institutions, the activity of the society was commercial activity and not charitable and therefore the society was not eligible for exemption under section 11. Registration granted to the assessee was cancelled and this was upheld by the Commissioner (Appeals). The Tribunal set aside the orders and restored the registration of the society granted under section 12A. On appeal to the High Court: Held, dismissing the appeal, (i) that the donations received by the society could not be construed as capitation fee for the admission of students by the KLE university; (ii) that providing hostel to the students/staff working for the society was incidental to achieve the object of providing education, namely, the object of the society; (iii) that the Revenue not properly appreciated the legal point that though the chairman and few members of the society were the chairman and members of the KLE university, they were separate legal entities; (iv) that there was no violation of any of the conditions stipulated under the Act, warranting cancellation of registration of the society. The society was entitled to registration under section 12A.(AY. 2008-09)
CIT v. Karnataka Lingayat Education Society (2015) 371 ITR 249 / 126 DTR 122 (Karn.)(HC)

S.12A : Registration – Trust or institution – Misappropriation of fund by trustees – Cancellation of registration was held to be not justified.[S.12, 13,80G] 267
Where assessee-trust was fulfilling its main object of imparting education by establishing educational institution and taking admission of students every year, only on basis that trustees were misappropriating funds of said trust, registration of trust could not be cancelled.
CIT v. Islamic Academy of Education (2015) 229 Taxman 274 / 278 CTR 149 (Karn.)(HC)
Editorial: SLP is granted to the department, CIT v. Islamic Academy of Education (2015) 234 Taxman 774 (SC)

S.12A : Registration – Trust or institution – Merely because some amendments were made in the trust deed, denial of registration was held to be not justified.[Ss. 2(15), 11] 268
Assessee-trust was constituted with an intention to carry out charitable activity of imparting education. Entire objects of trust were clearly set out. Number of classes to be conducted by trust were also mentioned in trust deed 80 persons constituted teaching and non-teaching staff in said institution. Merely because some amendments were made in trust deed, it could not be a ground to deny registration as charitable institution particularly when objects of trust were fulfilled.
CIT v. Annapoorneswari Trust (2015) 229 Taxman 202 (Karn.)(HC)

S.12A : Registration – Trust or institution – Registration for trust cannot be denied on sole ground of non-commencement of activity – Donation to other trust – Refusal of registration was not justified. 269
Commissioner denied registration to assessee-trust under section 12A by contending that assessee was not engaged in any other activities apart from carrying out activities

of distribution of free note books. Absence of activity of a trust at time of registration is not a ground to question genuineness of objectives and activities, registration for trust cannot be denied on sole ground of non-commencement of activity, therefore, registration was to be granted. Commissioner denied registration to assessee-trust under section 12A on ground that assessee made donation to another trust to tune of ₹ 50,000. Once evidence produced disclosed that funds of trust were applied for carrying on charitable activities, purpose of establishing trust was fully satisfied and it did not matter that assessee is carrying on charitable activity through another trust; registration was to be granted.

CIT v. Niranjanbapu Education and Charitable Trust (2015) 228 Taxman 193 (Mag.)(Guj.) (HC)

270 **S.12A : Registration – Trust or institution – Charitable purpose – Commissioner to look into actual activity and main activity of trust – Posh school for children of non-resident Indians on commercial lines under guise of charitable purpose – Not entitled to registration. [S. 2(15), 11]**

The Commissioner made an enquiry and was of the opinion that the assessee intended to run a posh international school in the name of charitable activity, and that therefore, it was not entitled to registration. His reasons for rejection of the application were that though the assessee said that its main object was to run educational institutions and establish institutions for training and rehabilitation of mentally retarded persons, physically handicapped persons, etc., enquiries revealed that the activity of the assessee was only to bring under its ambit the already existing school run by the managing trustee. The commencement of the school was in 2006 and the trust was formed in 2007. The school was run in a building where air-conditioned class rooms with breakfast and lunch were provided. The school was maintained and meant for the benefit of children of non-resident Indians. The fee structure indicated huge amounts collected even in kindergarten classes in the year 2006. For play school, it charged ₹ 6,000 per month. Apart from that, clause 6 of the trust deed further indicated that the assessee was at liberty having absolute discretion to accept contributions as donation and contributors had no right or control over the management or in the administration of the assessee. Held, that when the school was running on commercial lines under the guise of charitable purpose, the authorities were justified in making enquiries and rejecting the application.

Dawn Educational Charitable Trust v. CIT (2015) 370 ITR 724 / 124 DTR 191 / 233 Taxman 204 (Ker.)(HC)

Editorial : The Supreme Court has dismissed the Special Leave Petition filed by the assessee against this judgment.(SLP (C) 28616 /14 dated 13-10-2014 / SLP (C) 16157 / 14 dated 13-10-2014)

271 **S.12A : Registration – Trust or institution – Receipt of income – Entitled to registration. [S. 2(15), 10(23C)(iv)]**

Receipt of income by institution established for charitable purpose does not affect its charitable nature. Primary object of assessee to do charity through advancement of object

of general public utility. Assessee to be regarded as institution established for charitable purposes hence, assessee is entitled to registration.(AY. 2012-13)
Water and Land Management Training and Research Institute v. DIT(E) (2015) 40 ITR 559 / 70 SOT 443 (Hyd.)(Trib.)

S.12A : Registration – Trust or institution – Merely because minority status was accorded to educational institutions, it could not be regarded as being established for benefit of a particular religious community – Denial of registration was held to be not justified. [S. 2(15), 13] 272

Assessee-society which ran two educational institutions was declared as a minority institution (MEI). It applied for registration as a charitable institution. The said registration was rejected on the ground that its membership was only open to Muslim members or followers of Islam faith, educational institutions established by it were granted status of MEIs and were being run on commercial basis and it had advanced loans to its founding members thereby incurring source of income. The ITAT held that no specific case had been made out by revenue to infer either commerciality or to impugn genuineness of activities of assessee-society as complete freedom had been allowed in matter of admissions of unaided MEIs upto undergraduate level. Loans so advanced by assessee to its founding members were to facilitate construction of building which was intended to be rented by assessee as part of its school premises. assessee applied its income wholly and exclusively to objects for which it was established. Merely because minority status was accorded to educational institutions run by assessee-society, it could not be regarded as being established for benefit of a particular religious community. Therefore registration could not have been denied on this ground. (AY. 2005-06)
International School of Human Resources & Social Welfare Society v. CIT (2015) 155 ITD 662 / (2016) 176 TTJ 73 (Patna)(Trib.)

S.12A : Registration – Trust or institution – Educational activities – Franchise agreements – Denial of registration was held to be not justified. [S.2(15)] 273

The Assessee is a Pubic Charitable Trust having main object to carry out educational activities. The assessee filed an application for registration. CIT rejected the said application on the ground that the assessee has entered into the franchise agreements with Mount Litra Zee School, whereby the assessee paid franchisee fee to Zee Learn Ltd. The school will be run under the guidelines and specification from franchisor, hence there is no scope for assessee to get in to charitable activity and therefore the venture in education is purely commercial. On appeal, the Appellate Tribunal held that the application for registration cannot be rejected merely on the basis of presumptions and surmises that the income of the trust will not be utilized for charitable purpose. The conditions of the franchisor under the franchisor agreement cannot be a ground to assume that the income of the trust will not be applied for educational activity which is charitable activity under section 2(15) of the Act. Thus, the conclusion of the Ld. CIT that appellant is not engaged in charitable activities under section 2(15) of the act is incorrect.
Meritta Welfare Trust v. CIT (2015) 44 ITR 600 / 68 SOT 433 (Delhi)(Trib.)

274 **S.12A : Registration – Trust or institution – Natural justice – Matter set aside.**
Failure by authority to give sufficient opportunity to substantiate claim of assessee is contrary to principles of natural justice. Matter remanded for deciding afresh with opportunity of hearing to assessee.
Shiv Mandir Gori Sankar Viswnath Bakunt Dham v. CIT (E) (2015) 41 ITR 110 / 70 SOT 620 (Delhi)(Trib.)
Samsan Bhumi Prabhandak Saba v. CIT(E) (2015) 41 ITR 110 / 70 SOT 620 (Delhi)(Trib.)

275 **S.12A : Registration – Trust or institution – Charitable institution carrying activities outside India – Denial of Registration was held to be not valid. [S. 2(15), 11, 12AA]**
If activities of a trust are found to be charitable and property is held wholly and exclusively under trust for charitable and religious purposes, then such a trust cannot be denied registration merely because its activities are extended outside India.
Critical Art and Media Practices v. DIT(E) (2015) 153 ITD 664 / 170 TTJ 401 (Mum.)(Trib.)

276 **S.12A : Registration – Trust or institution – Rendering service to promote welfare of ex-Army personnel, their widows and dependents – Receipt of registration charges from members to provide suitable employment would not change fundamental character of charitable activity into commercial activity – Entitled to registration. [S. 2(15),11, 12AA]**
The assessee was set up by the Indian Army, under the direct control of the Ministry of Defence, to promote the well-being of retired army personnel, their widows and their dependents. It filed an application for registration as a charitable institution eligible for tax exemption. The DIT(E) rejected the application on a view that, since the organisation was charging fees for giving placement to the members of the organisation, it was a commercial activity in violation of section 2(15) of the Act. On appeal:
Held, allowing the appeal, that charging of fees or any other consideration for rendition of a service, would vitiate the charitable nature of the activity, only when the service was rendered to a trade, commerce or business and the aggregate of such fees exceeds ₹ 25 lakhs. However, the assessee was rendering service to ex-army personnel, their widows and dependents to help them to integrate in civil society by taking up suitable employment, rather than to any trade, commerce or business. The scale of fees received from the members was modest and that could not change the fundamental character of the charitable activity into a commercial activity. The activity of the assessee was of general public utility covered under the definition of charitable purpose under section 2(15) of the Act and the Director of Income-tax had wrongly rejected the registration under section 12A of the Act.
Army Welfare Placement Organisation v. DIT(E) (2015) 168 TTJ 588 / 53 taxmann.com 442 / 38 ITR 1/ 68 SOT 535 (Delhi)(Trib.)

277 **S.12A : Registration – Trust or institution – Assessee's plea that poor patients do not come forward to avail of free medical treatment is not believable. The overall conduct of the assessee suggests that it is conducting its affairs in a commercial manner & not in a charitable manner – Cancellation of registration was held to be justified. [S.2(15), 11, 12AA]**
The Tribunal had to consider whether the DIT(E) was justified in canceling the registration of the assessee u/s. 12A on the ground that it was not carrying out its main

objects and that the objects that were being carried out were not charitable in nature but were commercial in nature. HELD by the Tribunal upholding the cancellation:

(i) The assessee could not demonstrate that it has undertaken any research work as per the main object. The assessee could not even establish that it has undertaken activities in consonance with the objects incidental or ancillary to the attainment of the main object as detailed in the memorandum of association. The registration for exemption u/s. 12A is granted by the DIT(E) on the basis of objects as detailed in the memorandum of association. The assessee is bound to carry on its activities in accordance with the objects. In case the assessee, at a later date, after the registration granted to it, considers it expedient to undertake some other activity which is charitable in nature, it is obliged under the law to amend its objects clause in accordance with law and to submit the same before the DIT(E). No such exercise was undertaken by the assessee of amending its main object. As the assessee has not undertaken its activities in accordance with the objects, it is not entitled to the benefit of exemption under Section 12A of the Act and the exemption was rightly cancelled by the DIT(E).

(ii) On merits, the assessee has not undertaken any activity worth the name, which can be said to be charitable activity. The assessee obtained prime land in an expensive area on perpetual lease at a nominal rent on the condition of providing 10% totally free indoor treatment and 20% free OPD for the weaker sections of the society. Admittedly, the assessee could not comply with this condition and has not provided the required number of beds to the poor and weaker sections of the society. The plea of the assessee that the poor people do not come forward and avail free medical services, the assessee could not be blamed, is not sustainable.

(iii) Also, the assessee could not make charity to a commercial organisation, although not connected with it, by paying exorbitant amounts totalling to about ₹ 40 crores in a year and should have spent the amount in a charitable manner for the deserving sections of the society. The conduct of affairs of the assessee-society are not on charitable lines and were clearly on commercial lines. The rate schedule of its charges from the patients for diagnosis, treatment or indoor facilities including surgery etc. are exorbitant and one of the highest in the metro capital city of New Delhi. In this case, conduct of the assessee leads to the only conclusion that the assessee-society is not running its affairs in a charitable manner.

Devki Devi Foundation v. DIT(E) (2015) 118 DTR 121 / 170 TTJ 69 / 40 ITR 1 / 153 ITD 716 (Delhi)(Trib.)

Section 12AA : Procedure for registration

S.12AA : Procedure for registration – Trust or institution – Receipts from commercial activities greater than overall receipts – Not a ground specified in statute for cancellation of registration.[S. 2(15)] 278

On appeal dismissing the appeal the Court held that; the order cancelling the registration showed that the Director of Income-tax (E) had not arrived at any such finding about the violation of the two conditions. The fact that the receipts from commercial activities were more compared to the overall receipts of the charitable organisation could neither lead to the conclusion that the activities of the trust or

institution were not genuine nor could it be said that the activities of the trust or institution were not being carried out in accordance with the objects of the trust or institution and, therefore, the two conditions stipulated under the provisions of sub-section (3) of section 12AA which empowers the authority to cancel the registration, did not exist in the present case. The registration granted was cancelled in view of the amendment of the first proviso to section 2(15). That was not a ground specified in the statute for cancellation of the registration. In fact, sub-section (8) of section 13, which was introduced by the Finance Act, 2012, which came into effect from April 1, 2009, categorically provides that, nothing contained in section 11 or section 12 shall operate so as to exclude any income from the total income of the previous year or any receipt thereof. If the provisions of the first proviso to clause (15) of section 2 become applicable in the case of such person in the previous year, the statute has protected the interests of the Revenue. Notwithstanding the fact that the assessee is conferred registration under the provisions of section 12A unless the assessee falls within the provisions of section 2(15) excluding the first proviso, the assessee would not be entitled to the benefit of exemption from tax. If the case of the assessee falls in the first proviso to section 2(15), the benefit of registration which flow from section 12A is not available. However, that was a matter to be considered by the assessing authority. But on that ground the registration could not be cancelled.(AY. 2008-09)

DIT(E) v. Karnataka Badminton Association (2015) 378 ITR 700 (Karn.)(HC)

Editorial : The Supreme Court has granted special leave to the Department to appeal against this judgment, [2015] 378 ITR 10(St.)

279 **S.12AA : Procedure for registration – Trusts or institutions – Commissioner has power to look in to genuineness of Trust – Matter remanded [S.2(15), 12]**

Application made for registration under section 12AA by assessee society was rejected by Commissioner on ground that assessee had not proved its case whether activities were being run in a charitable manner and that no fresh evidence had been furnished to prove that there was any provision for free subsidised education for poor and an element of public benefit. On appeal Tribunal directed to allow registration to assessee. On appeal by revenue, the Court held that power of Commissioner to look into objects of society and genuineness of same could not be doubted when basis was of non-supply of information and as such it would be appropriate for Commissioner to undertake exercise afresh on basis of application which had been filed keeping in view material which could be produced by assessee. Matter remanded back to the Commissioner to decide the application. (AY. 2013-14)

CIT v. Sri Guru Gorakh Nath Charitable Educational Society (2015) 378 ITR 685 / 233 Taxman 189 (P&H)(HC)

280 **S.12AA : Procedure for registration – Trusts or institutions – Dissolution clause – Refusal of registration was held to be not justified.**

Dismissing the appeal of revenue the Court held that; where trust deed specifically provided that if necessary to close trust, then property of trust be handed over to other institution/trust having similar objects by passing resolution by minimum 2/3rd majority of trust and unanimous decision of committee working trustees, registration under

section 12AA could not be denied to assessee-trust on ground that trust deed did not have dissolution clause.
DIT v. Vanchhara Tirthadhipati - Chintamani Paraswaprwabhu (2015) 233 Taxman 1 (Guj.)(HC)

S.12AA : Procedure for registration – Trusts or institutions – No dissolution clause in the Trust deed – genuineness of Trust was not in doubt – Refusal of registration was held to be not justified. 281
Assessee-trust registered under Bombay Public Trusts Act, applied for registration under section 12AA. Commissioner refused to grant registration, on the ground that there was no dissolution clause and it had not explained anything related to provisions in events of its dissolution. Tribunal held that, it was found from records that assessee-trust was in existence prior to 1965 and in fact was regularly filing its return of income since many years. At no point of time, revenue had doubted genuineness and/or *bona fide* of assessee-trust, accordingly directed the Commissioner to grant registration. Impugned order was to be set aside and matter was to be remanded back for disposal afresh. Appeal of assessee was allowed, and in group matters where the Tribunal has decided the matter against the assessee, the matter was set aside.
CIT v. Tapagachha Sangh Mota (2015) 232 Taxman 715 (Guj.)(HC)

S.12AA : Procedure for registration – Trusts or institutions – Statement of providing bogus entries – Cancellation of registration was held to be not justified. [S.13(1)(c), 13(3)] 282
Assessee was a society running various educational institutions. Its claim for registration under section 12AA was allowed years back. Commissioner held that one 'S' running a company namely WNS, made a statement that he had provided bogus entries to assessee regarding purchase of software. He, thus, taking a view that there was violation of provision of section 13(1)(c) read with section 13(3), cancelled registration. Assessee brought on record various evidences to show that purchase of software from WNS was a genuine transaction. Tribunal held that registration granted to assessee could not be cancelled merely on basis of statement given by 'S'. On appeal by revenue, High Court affirmed the view of Tribunal.(AY. 2004-05)
CIT v. Apeejay Education Society (2015) 232 Taxman 619 (P&H)(HC)

S.12AA : Procedure for registration – Trust or institution – Charitable purpose – Activities of trust such as providing education, developing natural talents of women and charging fees for the same does not amount to carrying on trade commerce or business. [S. 2(15)] 283
The High Court observed that the motive of the assessee is not the generation of profit but to provide training to needy women for their development. It further observed that the nature of activities carried on by the trust was to provide education and the occasional sales made by the assessee for the trust's fund generation and furthering of objects were not indicative of trade, commerce or business. The High Court held that the proviso to section 2(15) would not apply and hence would not be liable to cancellation of registration.
DIT v. Women's India Trust (2015) 379 ITR 506 / 233 Taxman 196 / 277 CTR 180 / 118 DTR 173 (Bom.)(HC)

284 **S.12AA : Procedure for registration – Trust or institution – Huge profits – Cancellation of registration was held to be not justified. [S. 2(15)]**

The assessee-trust was registered under section 12A. The revenue authorities, observing that the assessee-trust had earned huge profits, under various heads and taking a note of the change in definition of section 2(15) which came to effect from 1-4-2009, held that the activity carried on by the assessee was in nature of trade, commerce and business. Accordingly, the DIT(E) cancelled the registration of assessee-trust, by invoking provisions of section 12AA(3). On appeal, the Tribunal held that registration granted under section 12A could not be revoked on account of commercial activities by assessee in pursuing the advancement of objects of general utility and registration could be cancelled only on arriving at a finding that the activities of the assessee were not genuine and were not carried out in accordance with the objects of the trust. The Tribunal, therefore, allowed the assessee's appeal. On appeal dismissing the appeal of revenue the Court held that In absence of any finding that activities of trust are not genuine or they are not being carried out in accordance with objects of trust, registration granted to trust under section 12A cannot be cancelled on ground that receipts from commercial activities are more compared to overall receipts of charitable organization. If case of assessee falls in first proviso to section 2(15) and, therefore, benefit of registration under section 12A is not available, this is a matter to be considered by Assessing Officer but, registration cannot be cancelled on that ground.(AY. 2008-09, 2009-10)

DIT v. Kodava Samaja (2015) 231 Taxman 708 (Karn.)(HC)

Editorial: SLP is granted to revenue, DIT v. Kodava Samaja (2016) 236 Taxman 394 (SC)

285 **S.12AA : Procedure for registration – Trust or institution – Delay in handing over possession could not be attributed to fault of trust – Entitled for registration. [S.12A]**

Trust filed an application for registration under section 12AA. Details in application showed that trust received a land as gift from donors which was registered in their favour and they had recorded in their books of account, however, there was delay on part of donor to hand over physical possession of property to trust. Hence, CIT held that there was an error in maintaining accounts by trust and activities of trust were not at all clear and, therefore, they declined registration. What had been given as gift by a registered document had been entered into books of account promptly and delay in handing over possession could not be attributed to fault of trust, thus, reason to decline registration was trivial and hence assessee was entitled for registration.

CIT v. Hare Krishna Movement (2015) 228 Taxman 298 (Mag.)(Mad.)(HC)

286 **S.12AA : Procedure for registration – Trust or institution – Non-disposal of an application for registration before the expiry of six months as provided u/s. 12AA(2) would not result in deemed grant of registration. Assessee will have to file a Writ to compel CIT to consider application. [S.11, 12, 12A]**

The Full Bench had to consider the following two questions:

(i) Whether the non-disposal of an application for registration, by granting or refusing registration, before the expiry of six months as provided under Section 12AA(2) of the Income-tax Act, 1961 would result in deemed grant of registration; and

(ii) Whether the Division Bench judgment of this Court in the case of *Society for the Promotion of Education, Adventure Sport & Conservation of Environment v. Commissioner of Income Tax (2008) 216 CTR (All.) 167* holding that the effect of non consideration of the application for registration within the time fixed by Section 12AA(2) would be deemed grant of registration, is legally correct.

HELD by the Full Bench:

(i) Sub-section (2) of Section 12AA requires that every such order granting or refusing permission under clause (b) of sub-section(1) shall be passed before the expiry of six months from the end of the month in which the application was received. The use of the expression 'shall' in sub-section (2) is, by itself, not dispositive of whether the period of six months is mandatory. The legislature has not imposed a stipulation to the effect that after the expiry of a period of six months, the Commissioner would be rendered *functus officio* or that he would be disabled from exercising his powers. Similarly, the legislature has not made any provision to the effect that the application for registration should be deemed to have been granted, if it is not disposed of within a period of six months with an order in writing either allowing registration or refusing to grant it. The submission of the assessee essentially requires the Court to read into sub-section (2) a fiction by which an application for registration should be regarded as deemed to be granted, if it is not disposed of within six months. Providing that an application should be disposed of within a period of six months is distinct from stipulating the consequence of a failure to do so. Laying down a consequence that an application would be deemed to be granted upon the expiry of six months can only be by way of a legislative fiction or a deeming definition which the Court, in its interpretative capacity, cannot create. That would be to rewrite the law and to introduce a provision which advisedly the legislature has not adopted (*Society for the Promotion of Education, Adventure Sport & Conservation of Environment v. Commissioner of Income Tax (2008) 216 CTR (All.) 167 reversed, CIT v. Sheela Christian Charitable Trust [2013] 32 taxman.com 242 (Mad.) and CIT v. Karimangalam Onriya Pengal Semipu Amaipu Ltd. [2013] 32 taxman.com 292 (Mad)* referred). Matter referred to division Bench to pass the consequential order.

CIT v. Muzafar Nagar Development Authority (2015) 372 ITR 209 / 231 Taxman 490 / 275 CTR 233 / 116 DTR 33 (FB)(All.)(HC)

Editorial: Society for the Promotion of Education Adventure Sport & Conservation of Environment v. CIT (2008) 217 CTR 568 / 5 DTR 329/ 171 Taxman 113 / [2015] 372 ITR 222 (All)(HC) is overruled.

S.12AA : Procedure for registration – Trust or institution – Condition precedent – Registration under Societies Act not required for registration under section 12AA – No adverse comment on genuineness of charitable activities, aims and objects of assessee – Assessee is entitled to registration. [S.2(15), 12A, Haryana Registration and Regulation of Societies Act, 2012] 287

The assessee filed an application for registration under section 12A of the Income-tax Act, 1961. The Assessing Officer reported that the aims and objects of the assessee were of general public utility and to provide education and was covered by the provisions of

section 2(15) of the Act and thus satisfied the conditions for grant of registration under section 12AA of the Act. The Commissioner rejected the application for registration on the ground that the assessee was not registered under the Haryana Registration and Regulation of Societies Act, 2012. On appeal:
Held, allowing the appeal, that registration under the Haryana Registration and Regulation of Societies Act, 2012 was not a requirement under section 12AA of the Act. The assessee was a registered trust and did not need to be registered under the Societies Act. The reason given by the Commissioner was wholly incorrect and alien to the provisions of section 12AA of the Act. The assessee existed for charitable activities and there was no adverse comment upon the aims and objects of the assessee and genuineness of its activities. The assessee was entitled to registration under section 12AA of the Act.
Paramount Education Charitable Trust v. CIT (2015) 40 ITR 555 / 70 SOT 44 (Chd.)(Trib.)

288 **S.12AA : Procedure for registration – Trust or institution – Charitable activities being genuine – Cancellation of registration was held to be not valid. [S.80G(5)]**
The Tribunal also held that there is no material to hold that the assessee's activities are not genuine or have not been carried out in accordance with its object. Therefore, there is no reason to cancel the registration under section 12AA or to withdraw the approval under section 80G. (AY. 2003-04, 2004-05, 2009-10)
Indo Global Education Foundation v. DCIT (2015) 169 TTJ 437 / 39 ITR 489 (Chd.)(Trib.)

289 **S.12AA : Procedure for registration – Trust or institution – Registration – Trust existed for charitable objects – Refusal of registration on the basis of commercial activity was held to be not justified. [S. 2(15), 12A]**
The CIT refused to grant the registration by holding the activities of assessee to be adventure in the nature of trade without brining any material on record. The Tribunal held that the expenses were incurred on conferences and medicines for poor patients which are directly connected with its aims and objects, it exists for charitable purpose only and therefore, it is eligible for registration under section 12AA.
Paediatric Pulmonology Programme Trust v. CIT (2015) 169 TTJ 10 (UO) / 70 SOT 565 (Chd.)(Trib.)

290 **S.12AA : Procedure for registration – Trust or institution – Mere non-intimation of amendments in trust deed to department cannot *ipso facto* lead to cancellation of registration. [S. 11]**
The assessee trust had been carrying out charitable activities for more than 40 years. It had been granted registration u/s. 12A. The assessee filed its return claiming exemption of income u/s. 11. The A.O. rejected assessee's claim holding that there had been an addition in the object clause of the assessee trust, subsequent to the grant of registration u/s. 12A, which had not been intimated to DIT(E). Thus, as per the Assessing Officer it had to be presumed that the registration originally granted u/s. 12A did not survive, which would lead to the denial of the benefits of section 11. The CIT(A) found that even the amendments in the objects remained charitable and did not cause any detriment to the original objects as mentioned in the original trust deed.

CIT(A) allowed assessee's claim for exemption of income. The honourable ITAT held that, mere non-intimation of amendments in trust deed to department cannot *ipso facto* lead to cancellation of registration because statutory requirement contained in section 12AA (3) prescribes that cancellation of registration cannot be effectuated unless a case is made out that new objects do not fit in with existing objects, i.e., new objects are 'non-charitable' in nature, or that activities are in genuine. (AY. 2009-10).
ITO v. Bhansali Trust (2015) 155 ITD 736 / (2016) 176 TTJ 193 (Mum.)(Trib.)

S.12AA : Procedure for registration – Trust or institution – Income derived from trust premises utilized exclusively for charitable purpose – Registration cannot be denied. [S.11, 12A] 291
The Assessee trust filed an application in Form No. 10A seeking registration under section 12AA of Act. The main object of assessee trust is to establish and manage Dharmashala, Choultries or rest houses, to give donation to the temples, to maintain the temples, to give donation towards construction of rooms at various pilgrims places for the benefit of pilgrims, tourists. The DIT rejected the application made by the assessee trust under section 12AA by observing that maintenance of temple is religious in nature and thus the income of the trust is utilized for both charitable and religious purposes. On appeal, the Hon'ble Appellate Tribunal held that the maintenance of the temple cannot be regarded for religious purpose as the same is for the benefit of general public. Hence, the assessee trust is entitled for registration under section 12AA of the Act.
Kaushalya Bai Srinivas Lakhotiya Charitable Trust v. DIT (E) (2015) 44 ITR 161 (Hyd.) (Trib.)

S.12AA : Procedure for registration – Trust or institution – Religious and charitable objects – Denial of registration was not justified. [S.11] 292
Assessee being the Trusts filed an application in Form No.10A seeking registration under section 12AA of the Act. The DIT(E) rejected the application of the Assessee trusts by observing that the Assessee has both religious and charitable objects. On appeal, the Appellate Tribunal held that section 12A does not prohibit charitable activities of an institution from having mixed objects i.e., both charitable and religious. The observation of the DIT(E) that the maintenance of the temple is of religious nature is not correct. The Tribunal held that the maintenance expenses incurred for the building relate to the charitable activities and not the religious activities. Thus, the assessee is eligible for the registration under section 12AA of Act.
Raghunath Das Damodardas Lohia Charitable Trust v. DIT(E) (2015) 44 ITR 161 (Hyd.) (Trib.)

S.12AA : Procedure for registration – Trust or institution – Entitled for exemption on the date of registration. [S.11] 293
The Assessee is a society registered as per West Bengal Society Registration Act, 1961. The main object of the assessee society is to render social and cultural services. The assessee took up construction the construction of old age home name as "Shesh Basanta" since 2000 with the financial support of the Siliguri Municipal Corporation for which contributions from the public were forthcoming and the same were duly accounted for

in the books of the society as receipts and expenditures. The Assessing Officer rejected the claim of exemption under section 11 of the Act observing that the assessee society is not registered under section 12AA. On appeal, the Ld. CIT(A) upheld the action of the Assessing Officer. On appeal, the Appellate Tribunal held that since the only reason for denial of exemption under section 11 was absence of registration under section 12AA which was granted to assessee society on 29.10.2010 with effect from 1.4.2010 for the relevant assessment years. Thus, the benefit of exemption should be available on the date of registration as all the assessments were pending. The Appellate Tribunal also observed that all the receipts of the donation were proved on enquiry to have been received from the claimed donors and utilized for the specific purpose (construction of old age home) for which they were received. Thus, the assessee cannot be denied the exemption under section 11 of the Act. (AY. 2003-04 to 2008-09)
Sree Sree Ramkrishna Samity v. SCIT (2015) 44 ITR 678 / (2016) 156 ITD 646 (Kol.)(Trib.)

294 **S.12AA : Procedure for registration – Trust or institution – Predominant object of assessee charitable in nature – Directed to grant registration. [S. (15)]**
Assessee one of several establishments of Central Government in various States. Tribunal held that, If the predominant object of a trust or institution is charitable and in the process of achieving that object some activity of commercial nature generating income is carried out, which again is utilised for charitable objects, it cannot be said that the trust or institution is not established for charitable purpose. Assessing Officer to grant registration if similar institutions in other States granted registration.
Central Institute of Tool Design v. DIT(E) (2015) 41 ITR 578 (Hyd.)(Trib.)

295 **S.12AA : Procedure for registration – Trust or institution – Trust can have both religious and charitable objects – Commissioner is not justified in rejecting application for registration.**
Tribunal held that, section 12AA does not make any difference between the trusts created with the object of charitable and religious purposes and, even if the trust was not created with both the objects, law does not make any disqualification for the trust to make an application for registration. The assessee could have both religious and charitable objects. The CIT was not justified in rejecting the application for registration u/s. 12AA.
Gilgal Mission India v. ITO (2015) 41 ITR 445 / 70 SOT 765 (Chennai)(Trib.)

296 **S.12AA : Procedure for registration – Trust or institution – Society had been formed to promote relationship between India and Japan without any element of profit and fees collected was utilized only for promotion of its aims and objects, it was entitled to registration.**
Assessee-society had been formed to undertake, encourage, facilitate and promote relationship between India and Japan in general without any element of profit. It was not charging any fee for services rendered by it. Fees charged by way of admission fee, monthly subscription, admission and registration fee, etc., were utilized only for promotion of aims and objects of society. Benefits of activities of trust were not confined to select segment but would flow to larger section of society. when in terms

of rules of society membership was open to Japanese corporations in Chennai as also their subsidiaries, joint venture companies and Indian individuals in Chennai, it could not be said that benefit of activities would extend to Japan. Assessee was entitled to registration u/s. 12AA.
Japanese Chamber of Commerce & Industry v. DIT(E) (2014) 160 TTJ 356 / (2015) 153 ITD 690 (Chennai)(Trib.)

S.12AA : Procedure for registration – Trust or institution – Denial of exemption – Provision of section 13 can be invoked by Assessing Officer while framing assessment and not by Commissioner while considering application for registration. [S.13] 297
Assessee-society was formed with object of establishing schools, colleges, hospitals etc. for benefit of Christian Community. The assessee filed an application seeking registration under section 12AA of the Act. The Commissioner rejected the application on the basis that the society was formed for the benefit of a particular community and there was violation of section 131(b) of the Act. On appeal allowing the claim of assessee the Tribunal held that; Commissioner could not reject its application for registration under section 12AA on ground that there was a violation of provisions of section of section 13(1)(b). Provisions of s. 13 can be invoked by A.O. while framing assessment and not by Commissioner while considering application for registration u/s. 12AA.
St. Joseph Academy v. DIT(E) (2015) 153 ITD 669 (Hyd.)(Trib.)

S.12AA : Procedure for registration – Trust or institution – Trust was established with object to protect, preserve, maintain and develop Indian breed of cows and its progeny – Held to be charitable purpose – Registration was allowed. [S.2(15)] 298
Where assessee-trust was established with object to protect, preserve, maintain and develop Indian breed of cows and its progeny, it was to be for charitable purpose within meaning of section 2(15) and, thus, assessee's application seeking registration u/s. 12AA was sustainable.
Bharatiya Govansh Rakshan Samvardhan Parishad v. CIT (2015) 153 ITD 636 (Gau.)(Trib.)

S.12AA : Procedure for registration – Trust or institution – Denial of exemption – Registration could not be denied by invoking restriction imposed u/s. 13(1)(b). [S.13(1)(b)] 299
Assessee Society was created primarily with the object for upliftment of the people of Kurni caste who were notified by the Government of India as belonging to a backward class. The application for registration was rejected by DIT(E) holding that since the society had been established for the benefit of only one community, it could not be granted registration in view of restriction imposed under section 13(1)(b), of the Act. On appeal allowing the claim the Tribunal held that ; for benefit of kurni community which was classified as a backward class, would come within exception provided under Explanation 2 to section 13 and, it could not be denied registration under section 12AA by invoking restriction imposed u/s. 13(1)(b).
Kurni Daivachara Sangham v. DIT(E) (2015) 153 ITD 673 (Hyd.)(Trib.)

300 **S.12AA : Procedure for registration – Trust or institution – Registration under Andhra Pradesh Charitable and Hindu Religious Institutions and Endowments Act is not a condition precedent for granting registration. [S.12, Andhra Pradesh Charitable and Hindu Religious Institutions and Endowments Act, 1987. S. 43]**

Allowing the appeal the Tribunal held that Section 12A read with section 12AA of the Act, does not indicate that for the purpose of obtaining registration under section 12AA a trust or institution has to get itself registered under section 43 of the Andhra Pradesh Charitable and Hindu Religious Institutions and Endowments Act, 1987. Accordingly the Tribunal directed the DIT(E) to modify his order by granting registration without insisting upon registration under section 43A of the Andhra Pradesh Charitable and Hindu Religious Institutions and Endowments Act, 1987.

Grace Gospel Ministries v. DIT (E) (2015) 39 ITR 387 / 70 SOT 617 (Hyd.)(Trib.)

301 **S.12AA : Procedure for registration – Trust or institution – No violation – Registration cannot be withdrawn.[S. 11, 12, 13, 80G]**

Tribunal held that there was no material to prove activities not genuine or not carried out in accordance with objects of trust and there was no violation against sections 11, 12 and 13 hence registration cannot be withdrawn.(AY. 2003-04, 2004-05, 2009-10)

Dy. CIT v. Indo Global Education Foundation (2015) 39 ITR 489 / 169 TTJ 437 (Chd.)(Trib.)
Sukhdev Sigh v. Dy. CIT (2015) 39 ITR 489 / 169 TTJ 437 (Chd.)(Trib.)

302 **S.12AA : Procedure for registration – Trust or institution – Assessee filing application for registration on last day of previous year – Entitled to exemption from assessment year to which previous year relates. [S.11, 12A, 153]**

The assessee, a statutory Board created by the Government of Andhra Pradesh, applied for registration under section 12A of the Income-tax Act, 1961 on March 31, 2008. The DIT(E) granted registration under section 12AA of the Act with effect from the date of filing the application. In a petition under section 154 of the Act, the assessee contended that, since the application was made on March 31, 2008, the assessee was entitled to exemption from the assessment year 2008-09. On appeal :

Held, allowing the appeal, that the DIT(E) had failed to mention the applicability of provisions under section 11 of the Act from a particular assessment year. In terms of section 12A(2) of the Act, the assessee would be entitled to exemption under section 11 of the Act for the assessment year following the financial year in which the application for registration was made under section 12A of the Act. Admittedly, the assessee had applied for registration in the financial year 2007-08. Hence, the provisions of sections 11 and 12 of the Act would be applicable to the assessee from the assessment year 2008-09 and not the financial year 2008-09. (AY. 2008-09)

Andhra Pradesh Pollution Control Board v. DIT (E) (2015) 38 ITR 539 (Hyd.)(Trib.)

303 **S.12AA : Procedure for registration – Trust or institution – No doubt as to genuineness of activities of trust and charitable nature of its objects – Order declining registration was not justified. [S.11, 12A]**

On facts allowing the appeal, the Tribunal held that the various clauses in the trust deed with regard to promotion of education and medical relief were in no way connected

with any business activity so as to deny registration and there were no records to show that the objects of the trust were for non-charitable activity. All the objects of the trust were charitable in nature and the genuineness of its activities was not in doubt. The Tribunal also observed that at the time of registration under section 12A of the Income-tax Act, 1961, the Commissioner is required to verify the objects of the trust and genuineness of its activities. If the objects of the trust are charitable and the activities are genuine, the registration is to be granted. If subsequently, it is found that the assessee is not following its objects or that the objects are not charitable or its activities are not genuine, during the course of assessment, the Assessing Officer has powers to tax such receipts of the trust which are not charitable or commercial in nature. In addition, the Assessing Officer is empowered to exclude receipts of the trust, if he finds that any funds of the trust or institution are invested or deposited in any form or mode specified in sub-section (5) of section 11 and can exclude income of such trust from the provisions of exemption if he finds that such funds were utilised for benefit of any of the persons, who has substantial interest in the trust or institution. (AY. 2012-13)
Kanakia Art Foundation v. CIT(E) (2015) 39 ITR 53 (Mum.)(Trib.)

S.12AA : Procedure for registration – Trust or institution – Registration cannot be refused on the ground that the assessee is not carrying out any activities of charitable objects. [S.80G] 304

When the object of assessee is covered by charitable purposes, registration cannot be refused on ground that assessee is not carrying out any charitable activities. Whether the assessee is not carrying out any charitable activities remains to be seen at time of assessment proceedings. As regards registration under section 80G the matter is remanded to Commissioner to decide it according to law.
Life Shines Educational and Charitable Trust v. ACIT (2015) 39 ITR 291 / 70 SOT 570 (Chennai)(Trib.)

S.12AA : Procedure for registration – Trust or institution – Failure by authority to record dis-satisfaction about object of trust and its genuineness – Order rejecting registration not sustainable. [S.12A] 305

The assessee filed an application for registration under section 12AA of the Act. The Director of Income-tax (Exemption) rejected the application of the assessee on the ground that the assessee had not commenced its activities subsequent to its creation. On appeal:
Held, allowing the appeal, that in terms of section 12AA(1)(b)(ii) of the Act, the competent authority must satisfy himself about the objects of the trust and the genuineness of its activities. The Director of Income-tax (Exemption) could enquire into the circumstances responsible for the non-commencement of the activities by the trust or the entity seeking registration and had power to call for documents or information from the applicant. Since no dissatisfaction with regard to the objects of the trust had been recorded by the DIT(E), the denial of registration was not sustainable and the assessee's application was to be accepted.
Matru Vandana Trust v. DIT(E) (2015) 39 ITR 30 / 68 SOT 275 (Mum.)(Trib.)

306 **S.12AA : Procedure for registration – Trust or institution – Proviso – The applicability of the proviso has to be evaluated on a year to year basis and it only affects the grant of exemption u/s. 11. [S.2(15), 11, 12A]**

The Proviso to S.2(15) has no bearing on the grant or denial of registration. The applicability of the proviso has to be evaluated on a year to year basis and it only affects the grant of exemption.(AY. 2009-10)

Kapurthala Improvement Trust v. CIT (2015) 171 TTJ 461 / 154 ITD 637 / 43 ITR 711 (Asr.)(Trib.)

307 **S.12AA : Procedure for registration – Trust or institution – Cancellation – Non-filing of return by assessee – Not sufficient reason for cancellation of registration.**

A perusal of section 12AA(3) of the Act, makes it clear that the power to cancel registration can be exercised only if the activities of the charitable trust or institution are not genuine or are not being carried out in accordance with its objects as the case may be. Non-filing of a return does not find a mention as a cause for cancellation of registration under section 12AA.

Shine Educational and Social Welfare Trust v. CIT (2015) 38 ITR 634 / 69 SOT 586 (Chennai)(Trib.)

308 **S.12AA : Procedure for registration – Trust or institution – Objects – Larger number of objects in trust deed – Not disentitled assessee from claiming status of a charitable trust.[S.2(15)]**

The Hon'ble Appellate Tribunal held that the Assessee shall not be disentitle from claiming status of a charitable trust merely because larger numbers of objects are stated in the trust deed and it is only sufficient to look into whether actual activities carried on by the assessee trust are coming under any of the objects stated in its trust deed. Thus, the present ground raised by the DIT E) is not sustainable in law.

Thamizh Thai Seva Trust v. DIT (2015) 67 SOT 166 (URO) / 53 taxmmann.com 215 (Chennai)(Trib.)

309 **S.12AA : Procedure for registration – Trust or institution – Assessee complied with all conditions necessary for grant of registration under section 12AA – Assessee is only a single entity but consisted of different colleges/institutions, operating under such single entity, registration under section 12AA is to be granted.[S. 2(15), 12A]**

Assessee, a private limited company, applied for registration under section 12AA. The DIT(E) held that as per statutory Form No. 10A and also under sections 12A and 12AA Assessee has to be single institution i.e., single entity and since name of assessee-company indicated a cluster of institutions, registration is refused. The Hon'ble Appellate Tribunal held that once Commissioner is satisfied about genuineness of activities of trust and objects of trust, he shall grant registration. Since Assessee had complied with all conditions necessary for grant of registration under section 12AA and since 'institutions' was used as singular noun rather than to bring more than one entity and also that assessee is only a single entity but consisted of different colleges/

institutions operating under such single entity, therefore the DIT(E) is directed to grant registration to Assessee company under section 12AA.
Mahindra Educational Institutions v. DIT (2015) 67 SOT 169 (URO) / 53 taxmann.com 156 (Hyd.)(Trib.)

S.12AA : Procedure for registration – Trust or institution – Application can be made only after commencement of charitable activity – Assessee organising lectures and seminars to benefit banking employees – Rendering service to banking business not charitable activity or purpose-Assessee is not entitled to registration.[S.2(15) 310
The assessee was a state forum of bankers which organised lectures and seminars for the benefit of bank employees, and applied for registration under section 12AA of the Act. The authorities rejected the claim of the assessee. On appeal, the assessee contended that it was not necessary for the assessee to start any activity, since the application for registration was made immediately after its establishment: Held, dismissing the appeal, (i) that by organising lectures and seminars, the capability of the employees of the bank would substantially increase and the profitability of the bank would also increase. Hence the assessee was rendering service to the banking business which could not be considered as a charitable activity or purpose. There might be an incidental benefit to the customers of the bank, but it did not mean that the assessee was doing charitable activity. (ii) That the assessee could apply for registration only after commencing the activity.
State Forum of Bankers Club (Kerala) v. ITO (2015) 38 ITR 83 / 68 SOT 427 (Cochin)(Trib.)

S.12AA : Procedure for registration – Trust or institution – Primary purpose advancement of objects of general public utility – Remains charitable even if activity incidental or ancillary to main purpose profitable in nature – Denial of registration is not justified. [S. 2(15), 11] 311
The assessee filed an application for registration under section 12AA of Act. The DIT(E) held that the main object of the assessee was to promote business activity and further that the assessee intended to engage business practices for the purpose of economic growth, which did not come under the purview of "charitable purpose" as defined under section 2(15) of the Act. Accordingly, he rejected the claim. On appeal by the assessee: Held, that when the main object of the institution was charitable in nature, the activities carried out towards the achievement thereof, being incidental or ancillary to the main object, even if resulting in profit and even carried out with non-members, were all held to be charitable in nature. The basic principle underlying the definition of charitable purposes remains unaltered even after the amendment in section 2(15) of the Act, though the restrictive first proviso was inserted therein. The assessee's primary purpose was advancement of objects of general public utility and it would remain charitable even if an incidental or ancillary activity for the purpose of achieving the main purpose was profitable in nature. Hence, the order of the Director of Income-tax (E) was not correct.
IP India Foundation v. DIT (E) (2015) 38 ITR 195 / 70 SOT 360 (Hyd.)(Trib.)

312 **S.12AA : Procedure for registration – Trust or institution – Cancellation of registration was held to be not justified.[S. 2(15), 12A]**

The assessee filed appeal before the Tribunal challenging the cancellation of the registration granted to it under section 12A by the Director of Income Tax (Exemption) vide his order passed under section 12AA(3) r.w.s. 12A of the Act.

The Tribunal held that the twin conditions mandatorily required for invoking the jurisdiction under section 12AA(3) to cancel the registration granted under section 12A do not exist in this case as the director himself has accepted in his order that the assessee is carrying on an activity of 'general public utility'. The revenue has not disputed the charitable nature of the activity of the assessee. The Tribunal also held that the receipts (booking charges, health club charges, sponsorship money, sale of tickets, advertisements) are intrinsically related, interconnected and interwoven with the charitable activities and these receipts resulted in subsidizing the cost of the assessee and there is no profit motive. The Tribunal quashed the order cancelling the registration under section 12AA(3).

Delhi & District Cricket Association v. DIT (2015) 168 TTJ 425 / 115 DTR 217 / 38 ITR 326 / 69 SOT 101 (URO)(Delhi)(Trib.)

313 **S.12AA : Procedure for registration – Trust or institution Charitable purpose – Appellate Tribunal – Rectification of mistake – Issue of withdrawal of S. 11 exemption in the light of S. 2(15) amendment is contentious and requires decision by Larger Bench of the ITAT – Matter referred to Honourable President to constitute a Larger Bench. [S.2(15), 11, 12A, 254(2), 255(4)]**

Issue of withdrawal of S. 11 exemption in the light of S. 2(15) amendment is contentious and requires decision by larger Bench of the ITAT-Matter referred to Honourable president to constitute a larger Bench.(AY. 2009-10)

Mumbai Metropolitan region Development Authority v. DIT(E) (2015) 155 ITD 314 / 40 ITR 60 / 119 DTR 393 / 170 TTJ 607 (Mum.)(Trib.)

Editorial : Refer original order in Mumbai Metropolitan region Development Authority v. DIT(E) (2015) 170 TTJ 621 (Mum.)(Trib.)

314 **S.12AA : Procedure for registration – Trust or institution Registration of trust providing medical relief cannot be cancelled on ground that trust was being run on commercial lines – Charitable institution was running a hospital, proviso to section 2(15) would not be applicable. [S. 2(15)]**

The revenue in the impugned order is only with reference to the hospital being run on commercial lines. The income of the trust is applied for charitable purpose, there can be no question of any tax liability on the assessee. If there is any short coming in the application of income for charitable purpose, then to that extent the Assessing Officer in the assessment of the assessee, is free to tax such income which is not applied for charitable purpose, cancelling the registration u/s. 12A

A would not be the appropriate course of action for the revenue, where object of assessee trust was to provide medical relief, allegation that assessee was being run

on commercial lines could not be ground to cancel registration u/s. 12AA. Charitable institution was running a hospital, proviso to section 2(15) would not be applicable.
Vivekanand General Hospital v. CIT (2014) 31 ITR 125 / (2015) 152 ITD 458 (Bang.)(Trib.)

S.12AA : Procedure for registration – Trust or institution – Not having commenced any of charitable activities enumerated in trust deed – Not entitled to registration. [S.12A] 315
Held, that the assessee had not commenced any of the charitable activities as enumerated in the trust deed. Therefore, the assessee was not entitled to registration.
Progressive Educational and Charitable Trust v. CIT (2015) 37 ITR 84 (Cochin)(Trib.)

S.12AA : Procedure for registration – Trust or institution – Failure to file activity report before Tribunal – Matter remanded to Commissioner. 316
Commissioner rejected the application of the assessee on the ground that assessee had undertaken very limited charitable activities and the funds available with the assessee also very scanty. On appeal the Tribunal remanded the matter to the Commissioner as the assessee failed to file activity report before Tribunal.
Christian Women's Association v. CIT (2015) 37 ITR 30 (Cochin)(Trib.)

S.12AA : Procedure for registration – Trust or institution – CIT, while granting registration or renewal, can only look at the nature of activities and is not concerned with potential violation of s. 11(5) or s. 13. Registration cannot be denied on ground that activities have not commenced. [S. 11, 13, 80G] 317
CIT, while granting registration or renewal, can only look at the nature of activities and is not concerned with potential violation of s. 11(5) or s. 13. Registration cannot be denied on ground that activities have not commenced. (ITA No. 1692/PN/2013. dt. 30-1-2015)
Kul Foundation v. CIT (2015) 68 SOT 310 (Pune)(Trib.)

S.12AA : Procedure for registration – Trust or institution – CIT, while granting registration or renewal, can only look at the nature of activities and is not concerned with violation of s. 11(5) or s. 13 – CIT was directed to allow the registration.[S.11(5), 13, 80G(5)] 318
While granting the exemption or renewal of exemption under section 80G(5) of the Act, the role of CIT is limited to look into the nature of activities being carried on by the institution or fund and the violation if any, of the provisions of section 13 of the Act and its various subsections are to be looked into by the Assessing Officer while deciding the issue of grant of deduction under sections 11 and 12 of the Act. The CIT while issuing the extension of exemption under section 80G(5) of the Act has a limited role to play i.e. to see whether the activities of the assessee trust were charitable in nature. Even if the ground about contravention of section 11(5) of the Act was validly taken by the CIT, that would have bearing only at the point of the assessment and would not be a material consideration in so far as the granting approval under section 80G(5) of the Act was concerned.
Ashoka Education Foundation v. CIT (2015) 118 DTR 280 / 173 TTJ 54 / 67 SOT 332 (URO)(Pune)(Trib.)

319 **S.12AA : Procedure for registration – Trust or institution – Charitable purpose – Receipts of assessee exceeded threshold limit – Cancellation of registration was held to be not justified – Exemption may be denied. [S.2(15), 11]**

Where objects and activities of assessee trust were genuine, registration of assessee could not be cancelled under section 12AA merely because receipts of assessee exceeded threshold limit as provided under second proviso to section 2(15); however, exemption under section 11 may be denied.

SAE India v. DIT (2014) 52 taxmann.com 209 / (2015) 67 SOT 15 (Chennai)(Trib.)

320 **S.12AA : Procedure for registration – Trust or institution – Government authority – Charitable purpose – Withdrawal of registration was not justified. [S. 2(15)]**

Where assessee, a Government authority, was set up for providing housing, community facilities, civil amenities and other infrastructural facilities, since said activities were charitable in nature not carried out with object to earn profits, same would not be hit by proviso to section 2(15), hence withdrawal of registration was held to be not justified.

Jaipur Development Authority v. CIT (2014) 52 taxmann.com 25 / (2015) 67 SOT 1 (Jaipur)(Trib.)

321 **S.12AA : Procedure for registration – Trust or institution – Rejection of registration – Absence of dissolution clause – Non-commencement of charitable activities – Rejection was held to be not justified. [S. 2(15), 12]**

The DIT(E) rejected the application for registration u/s. 12A on the ground that the trust had not commenced its activities and that the trust did not have a dissolution clause.

Held, the DIT (E) had not come to a finding that the activities of the trust are not genuine. Since the trust had not commenced its activities, it cannot be said that its activities are not genuine. Also, there is nothing in the Bombay Public Trusts Act, 1950, under which the trust was formed, which mandates for incorporation of mandatory clause of dissolution of any irrevocable trust. Therefore, the registration was required to be granted to the trust.(ITA No. 3566/M/2013 dated 2-1-2015)

Geeta Lalwani Foundation v. DIT(E) (Mum.)(Trib.) www.ctconline.org

Section 13 : Section 11 not to apply in certain cases.

S.13 : Denial of exemption – Trust or institution – Investment restrictions – Construction of building on land belonging to Trustee – Trust paying the rent – No violation – Trust is entitled to exemption. [S. 13(1)(c), 13(1)(3)] 322

Allowing the appeal the Court held that; the finding of the Tribunal that the present Act would fall under the definition of the term "trustee" enjoying the benefit directly or indirectly could not be countenanced because the land had been parted with by the trustee to the assessee. The assessee had put up the construction with a clause that it shall return the building to the individual and receive the compensation for the value of the building so put up. It was not the case of the Department that such part of the income or any part of the property of the trust or the institution was directly or indirectly used or built for the benefit of the persons referred to in sub-sections (1)(c), (3) of section 13. *De hors* this agreement, there was nothing to show that there was any manner of use or application of the income or property of the trust to the person set out in sub-section 13(1)(c), (3). It was only when there was an application of income or any part of the property or building directly or indirectly put to use for the benefit of the person that the provision would get attracted. There was no such application in the facts of the present case. (AY. 2009-10)

Natya Sankalpaa v. DIT (E) (2015) 378 ITR 654 (Mad.)(HC)

Editorial: ADIT(E) v. Natya Sankalpaa [2014] 3 ITR (Trib.)-OL 226 (Chennai) is reversed

S.13 : Denial of exemption – Services of trustees – Payment to trustees – Denial of exemption was held to be not justified. [Ss. 11, 12A] 323

Assessee Trust was availing services of Trustees and on account of such services there was substantial growth in Trust activities. Assessing Officer denied the exemption under section 11 on the ground that the assessee had violated the provisions of section 13(1)(c) by making payments to Trustees. CIT(A) set-aside the order of Assessing Officer. Tribunal affirmed the order of CIT(A). On appeal by revenue, dismissing the appeal of revenue the Court held that; where assessee Trust was availing services of Trustees and on account of such services there was substantial growth in Trust and its activities, payments for such services could not be said in contravention of section 13(1)(c) and benefit under section 11 could not be denied to assessee.

CIT v. CMR Jnanadhara Trust (2015) 230 Taxman 238 (Karn.)(HC)

S.13 : Denial of exemption – Trust or institution – Investment restrictions – Special exemption from CBDT – No violation – Denial of exemption was held to be not valid. [S.11(5)] 324

The assessee trust was formed, jointly by the Government of India and Government of France based on the principle of reciprocity and parity, for research in India. It was mutually decided by the two Governments that the aforesaid assessee centre would be exempt from payment of income-tax. Pursuant to aforesaid agreement, the Reserve Bank of India had allowed opening of a foreign currency account by the assessee abroad with a foreign bank to credit the grants freely received from the French Government. On appeal, The Tribunal held that the assessee had not parked any of their funds in foreign

bank account either as an investment or deposit. Pursuant to the request made by the assessee, the CBDT had issued an order stating that the income derived from property held under trust should not be included in total income of assessee to the extent such income was applied in accordance with the objects of the Centre. On appeal by revenue; dismissing the appeal the Court held that the funds of assessee Indo-French Centre were deposited with a French financial services group, and interest was earned. CBDT, by a special order, held that (i) income derived from a property held under trust would not be included in total income of assessee centre, provided it applied same in accordance with objects of Centre and that (ii) this income, even when applied abroad, had to be excluded, subject to verification. It was not averred that income derived from property held under trust was not applied in accordance with objects of centre. When interest earned which was applied for purpose/objects of Centre, would not form a part of total income and, therefore, in respect of said income, there would be no violation of section 11(5), read with section 13(1)(d).(AY. 2008-09, 2009-10)
DIT v. Indo French Centre (2015) 229 Taxman 311 (Delhi)(HC)

325 **S.13 : Denial of exemption – Trust or institution – Investment restrictions – Shares received as corpus by way of gift – No violation. [S.11, 12]**
Where assessee trust was gifted shares of a company by way of gift by another trust on 3-8-2005 and with specific direction that shares would form part of corpus, as per clause (iia) to proviso of section 13(1)(d), there would be no violation of said section on part of assessee till 31-3-2007. (AY. 2006-07)
DIT v. Ajay G. Piramal Foundation (2015) 228 Taxman 332 (Delhi)(HC)

326 **S.13 : Denial of exemption – Trust or institution – Assessee incurring development expenses on land gifted by trustees to trust by hiba (oral gift) – Subsequently land transferred to trust by way of gift deed – Trustees not beneficiaries and no violation under section 13(1)(c) – Trust entitled to exemption. [S.11]**
The Assessing Officer denied exemption under section 11 of the Act, to the assessee on the ground that the assessee had incurred expenditure on land belonging to the trustees in violation of provisions of section 13(1)(c)(ii) of the Act. The Commissioner (Appeals) allowed the exemption. On appeal by the Department:
Held, dismissing the appeal, that the trustees had initially gifted the land to the assessee by hiba (oral gift) and subsequently transferred it to the assessee by way of gift deed on March 25, 2013. As the land was not in the name of the trustees for the relevant assessment year, which was gifted orally to the assessee earlier, the trustees were not benefitted in any way. Hence, there was no violation of the provisions of section 13(1)(c) of the Act. (AY. 2010-11)
Dy. DIT (E) v. A. R. Rahman Foundation (2015) 40 ITR 726 (Chennai)(Trib.)

327 **S.13 : Denial of exemption – Trust or institution – Investment restrictions – Loans given to another charitable institution – Prohibition under section 11(2) and (3)(d) on application of income by way of payment or credit to other trusts as introduced by Finance Act, 2002 – Matter to be reconsidered in light of law. [S. 11(2), 12AA]**
The assessees were charitable trusts registered under section 12AA of the Act. The assessees advanced loans to other trusts from the unutilised portion of their income. The

AO disallowed exemption on the ground that the assessees had invested their funds in a form otherwise than prescribed in section 11(5) of the Act, in violation of the provisions of section 11(2) read with section 13(2)(d) of the Act. The Commissioner (Appeals) held that advancing money to other charitable institutions would not amount to investment or deposit. On appeal by the Department:
Held, that the Explanation to section 11(2) and (3)(d) inserted by the Finance Act, 2002 provided that, the income paid or credited to another trust or institution registered under section 12AA or approved under section 10(23C) of the Act, was to be treated as income of the assessee. Section 11(3A) empowers the Assessing Officer to allow the trust to apply the income so accumulated for other charitable or religious purposes. However, the proviso to section 11(3A) mandates that the Assessing Officer should not allow the application of income by way of payment or credit for the purposes referred to in clause (d) of sub-section (3) of section 11 of the Act. The authorities failed to consider the provisions of the Explanation to section 11(2) and (3)(d) of the Act. Hence the matter needed to be reconsidered in the light of the provisions of Explanation to section 11(2) and (3)(d) of the Act as introduced by the Finance Act, 2002. Matter remanded to the Assessing Officer. (AY.2010-11)
ITO v. Believers Church India (2015) 37 ITR 495 / 68 SOT 136 (URO)(Cochin)(Trib.)

S.13 : Denial of exemption – Trust or institution – Investment restrictions – Cash credits – Denial of exemption was held to be not justified.[S. 68] 328
The assessee was a trust formed with the objects of offering social, educational and medical facilities to poor and needy citizens. The assessee availed of and was allowed exemption under sections 11 to 13 of the Act, from its inception for more than 25 years. For the assessment years 2002-03, 2005-06 and 2006-07 the AO (a) held that the assessee was not eligible to claim exemption under sections 11 and 12 of the Act on the ground that the assessee had made investment in shares and securities in violation of section 11(5) of the Act, (b) brought the assessee's net agricultural income to tax under section 68 of the Act on the ground that the assessee did not maintain separate books of account for agricultural activities, (c) taxed the corpus donations under section 68 of the Act, (d) held that the assessee had entrusted construction activities to its sister concerns in order to benefit the trustees directly or indirectly, which was in violation of section 13(1)(c) of the Act, (e) denied the assessee the exemption under section 11 on the ground that it was carrying on business and making profits. The CIT(A) held against the assessee on all counts but granted exemption of agricultural income and directed the Assessing Officer to consider agricultural income for rate purposes. On appeals by the assessee and the Department :
Held Investment in non-specified assets constituting only 1.68 per cent of total assets. Miniscule investment is not sufficient to deny exemption. Assessee not maintaining separate books of account for agricultural activities. Failure by AO to call for record of Revenue authorities or bring material to show income not from agricultural activities. Exemption cannot be denied. Corpus donations. Assessee giving list of donors for substantial amount. Failure by AO to collect confirmation regarding donations. Exemption cannot be denied. Payment of money to sister concerns. No material to demonstrate payment not commensurate with market value of services availed of.

No violation of section 13(1)(c) and (3). Exemption cannot be denied. Trust running educational institutions. Income incidental to main activity. Exemption cannot be denied. (AY. 2002-2003, 2005-06, 2006-07)
Dy. CIT v. R. N. Shetty Trust (2015) 37 ITR 584 (Bang.)(Trib.)

Section 14A : Expenditure incurred in relation to income not includible in total income

329 **S.14A : Disallowance of expenditure – Exempt income – Recording of satisfaction is mandatory – Disallowance was held to be not justified. [R.8D]**
Dismissing the appeal of revenue the Court held that; the Assessing Officer had indeed proceeded on the erroneous premise that the invocation of section 14A is automatic and comes into operation as soon as the dividend income is claimed as exempt. The recording of satisfaction as to why the voluntary disallowance made by the assessee was unreasonable and unsatisfactory is a mandatory requirement of the law. (AY. 2009-10)
CIT v. I.P. Support Services India (P) Ltd. (2015) 378 ITR 240 (Delhi)(HC)

330 **S.14A : Disallowance of expenditure – Exempt income – No nexus between expenditure incurred and income not forming part of total income – No disallowance could be made. [R. 8D]**
Dismissing the appeal of revenue the Court held that the Assessing Officer had not recorded any finding that any expenditure incurred by the assessee was attributable for earning the exempt income. In order to disallow the expenditure there must be a nexus between the expenditure incurred and the income not forming part of the total income. Consequently, the disallowance under section 14A was rightly deleted by the Commissioner (Appeals) and the deletion affirmed by the Tribunal.(AY. 2009-10)
CIT v. Om Prakash Khaitan (2015) 376 ITR 390 / 234 Taxman 813 (Delhi)(HC)

331 **S.14A : Disallowance of expenditure – Exempt income – Borrowed funds – Investment in tax-free bonds – Common pool of funds – No presumption that investment in tax-free bonds only out of assessee's own funds – No disallowance could be made.**
The Assessing Officer, for the assessment year 2003-04, held that the assessee had kept all the funds in one common pool and in the absence of a separate cash flow statement maintained by the assessee, it was not possible to establish that the investment in the tax-free bonds was made only out of its own funds. He applied an estimation holding that since the borrowed funds of the assessee at the relevant time were 69.9 per cent. of the total funds, the utilisation of the borrowed funds for making the tax-free bonds of ₹ 10.50 crores at ₹ 716.58 lakhs and interest attributable to the borrowed funds would have to be taken into account. He applied the average rate of interest and disallowed the claim. The Commissioner (Appeals) held that no interest expenditure could be allocated to the earning of the tax-free income received by the assessee on the tax-free bonds. The Tribunal held that the Commissioner (Appeals) rightly interfered with the order of the Assessing Officer. The decision of the Commissioner (Appeals) was upheld by the Tribunal. The concurrent finding was that there was no warrant for such an estimation. On appeal :

Held, dismissing the appeal, that the view taken by the Commissioner (Appeals) as also the Tribunal was in consonance with the law.(AY. 2003-04)
CIT v. SBI DHFL Ltd. (2015) 376 ITR 296 / 63 taxmann.com 345 (Bom.)(HC)

S.14A : Disallowance of expenditure – Exempt income – Interest incurred on taxable income has also to be excluded while computing the disallowance to avoid incongruity & in view of Department's stand before High Court. 332
The ITAT referred to the decision of the Kolkatta Bench of the ITAT in *ACIT v. Champion Commercial Co. Ltd., (2012) 139 ITD 108*, which in turn referred to the decision of the Bombay High Court in *Godrej & Boyce Mfg. Co. Ltd v. CIT (2010) 328 ITR 81 (Bom.)(HC)* and held that for the purposes of Rule 8D(2)(ii), the amount of interest not attributable to the earning of any particular item of income, i.e., 'common interest expenses' that was required to be allocated would have to exclude both expenditures, i.e., interest attributable to tax exempt income as well as that attributable to taxable income. The ITAT observed that notwithstanding the rigid wording of Rule 8D (2), this interpretation was permissible in view of the stand taken by the Revenue before the Bombay High Court in Godrej & Boyce Mfg. Co. Ltd. The ITAT, therefore, was of the view that since there was no common interest expenditure in the present case no portion of interest really survives for allocation under Rule 8D(2)(ii). On appeal by the department, High Court dismissed the appeal of revenue and affirmed the order of Tribunal. (AY.2008-09)
PCIT v. Bharti Overseas Pvt. Ltd. (2016) 237 taxman 917 / 133 DTR 272 (Delhi)(HC)

S.14A : Disallowance of expenditure – Exempt income – Interest paid – Borrowed money not utilized – Matter remanded.[S.36(1)(iii)] 333
Proportionate disallowance was made of interest on capital allegedly borrowed for investment in earning tax free dividend income. Tribunal deleted disallowance but had not shown that borrowed capital was not utilised for purpose of earning exempt income. Court held that in absence of such a finding, disallowance could not have been deleted and, therefore, to this extent judgment of Tribunal was to be set aside and matter was to be remanded to Assessing Officer for readjudication. (AY.1998-99)
CIT v. Williamson Magor & Co. Ltd. (2015) 232 Taxman 533 (Cal.)(HC)

S.14A : Disallowance of expenditure – Exempt income – Satisfaction – Rule 8D cannot be automatically invoked. It cannot be invoked if the AO does not record satisfaction as to why the assessee's voluntary disallowance is not proper [R.8D] 334
Rule 8D cannot be automatically invoked. It cannot be invoked if the AO does not record satisfaction as to why the assessee's voluntary disallowance is not proper. (AY.2009-10)
CIT v. I. P. Support Service India (P) Ltd. (2015) 378 ITR 240 (Delhi)(HC)

S.14A : Disallowance of expenditure – Exempt income – Higher disallowance agreed before Assessing Officer during course of assessment – Assessee could not be bound by such offer – Restriction of disallowance was held to be justified.[S.143(3)] 335
Dismissing the appeal of revenue the Court held that the fact that a sum of ₹ 4, 47, 649 was not conceded in the return but was *ad hoc* acceptance during the course of

assessment, the assessee could not be bound by it. The Tribunal had gone into the factual aspects in great detail and interpreted the law as it stood on the relevant date. Therefore, the order of the Tribunal restricting the disallowance to ₹ 1 lakh under section 14A was justified. (AY. 2007-08)
CIT v. Everest Kento Cylinders Ltd. (2015) 378 ITR 57 / 119 DTR 394 / 232 Taxman 307 / 277 CTR 511 (Bom.)(HC)

336 **S.14A : Disallowance of expenditure – Exempt income – Major part of shares was acquired by merger – No disallowance of interest could be made. [R.8D]**
Where out of total investment, major part was of shares came to assessee by virtue of a merger and for making such investment it could not be said that assessee would have used loan fund, *suo motu* disallowance of interest in respect of balance part of investment made by assessee was justified. (AY. 2008-09)
CIT v. Cellice Developers (P.) Ltd. (2015) 231 Taxman 255 (Cal.)(HC)

337 **S.14A : Disallowance of expenditure – Exempt income – Recording of satisfaction – Interest bearing funds – Since there was no tangible material that could have enabled Assessing Officer to record satisfaction, disallowance made was unjustified [R.8D]**
Assessing Officer disallowed an amount by holding that interest bearing funds had been used to earn tax free dividend, etc. Dismissing the appeal of revenue the Court held that Section 14A requires Assessing Officer to record satisfaction that interest bearing funds have been used to earn tax free income based upon credible and relevant evidence. Since there was no tangible material that could have enabled Assessing Officer to record satisfaction in terms of section 14A, disallowance made was unjustified.(AY. 2008-09)
CIT v. Abhishek Industries Ltd. (2015) 231 Taxman 85 / (2016) 380 ITR 652 (P&H)(HC)
Editorial: Granted special leave to the department (SLP (C) No. 28216 dated 28-9-2015) CIT v. Abhishek Industries Ltd. (2015) 378 ITR 34 (St)/ 235 Taxman 510 (SC))

338 **S.14A : Disallowance of expenditure – Exempt income – No disallowance can be made in a year in which no exempt income has been earned or received by the assessee – Provision also does not apply to shares bought for strategic purposes.[S.10(33)]**
The High Court had to consider the following substantial question of law:
"Whether disallowance under Section 14A of the Act can be made in a year in which no exempt income has been earned or received by the Assessee?" HELD by the High Court: (i) The expression "does not form part of the total income" in Section 14A of the envisages that there should be an actual receipt of income, which is not includible in the total income, during the relevant previous year for the purpose of disallowing any expenditure incurred in relation to the said income. In other words, Section 14A will not apply if no exempt income is received or receivable during the relevant previous year. The decision of the Supreme Court in *CIT v. Rajendra Prasad Moody (1978) 115 ITR 519(SC)* was rendered in the context of allowability of deduction under Section 57(iii) of the Act, where the expression used is "for the purpose of making or earning such income". Section 14A of the Act on the other hand contains the expression "in relation to income which does not form part of the total income". The decision in Rajendra Prasad Moody cannot be used in the reverse to contend that even if no income

has been received, the expenditure incurred can be disallowed under Section 14A of the Act.
(ii) The investment by the Assessee in the shares of Max India Ltd. is in the form of a strategic investment. Since the business of the Assessee is of holding investments, the interest expenditure must be held to have been incurred for holding and maintaining such investment. The interest expenditure incurred by the Assessee is in relation to such investments which gives rise to income which does not form part of total income. (AY.2004-05)
Cheminvest Ltd. v. CIT (2015) 378 ITR 33 / 234 Taxman 761 / 126 DTR 289 / 281 CTR 447 (Delhi)(HC)

S.14A : Disallowance of expenditure – Exempt income – Loss in purchase and sale of shares – No proximate cause for disallowance – Allowable as business loss – Dividend stripping – Provision against not applicable for assessment years prior to 2002-03. [S.94(7)] 339
The assessee was engaged in the business of trading in stocks and shares. The Assessing Officer, for the assessment year 2001-02, disallowed the claim to deduction of expenditure/loss in the purchase and sale of units. The appellate authorities confirmed the disallowance. On appeals contending that buying and selling of units resulting in inflow of dividends but at the same time business loss on sale of the units after the record date could not be equated to the transaction in terms of section 94(7), which came into effect only from April 1, 2002:
Held, allowing the appeals, that in the case of the assessee, the assessment year was 2001-02. Therefore, section 94(7) would not be applicable, as the section had come into force only on April 1, 2002, i.e., and was not enforceable for the previous assessment year, viz., 2001-02. Thus, the assessee was entitled to claim the amount as business loss during the assessment year. Followed, *CIT v. Walfort Share and Stock Brokers P. Ltd. [2010] 326 ITR 1 (SC)* followed.(AY. 2001-02)
Patco Investment and Consultancy Services P. Ltd. v. ACIT (2015) 372 ITR 195 / 233 Taxman 110 (Mad.)(HC)

S.14A : Disallowance of expenditure – Exempt income – Interest earned on Nostro account is taxable hence no disallowance of intereat expenditure. 340
Interest earned on Nostro account is taxable hence no disallowance of intereat expenditure.(AY. 1997-98)
DIT v. Credit Agricole Indo Suez (2015) 377 ITR 102 / 280 CTR 491 / 126 DTR 156 (Bom.) (HC)

S.14A : Disallowance of expenditure – Exempt income – Disallowance of expenditure on earning non-taxable income – Disallowance only to extent of expenditure incurred by assessee in relation to tax exempt income – No reason for disallowance of sum volunrearily disallowed – No scrutiny of accounts – Entire tax exempt income lower than disallowance. 341
Allowing the appeal of assessee the Court held that the entire exempt income was ₹ 48,90,000, whereas the disallowance ultimately directed worked out to nearly 110 per

cent of that sum, i.e., ₹ 52,56,197. Section 14A or Rule 8D cannot be interpreted so as to mean that the entire exempt income is to be disallowed. The window for disallowance was indicated in section 14A and was only to the extent of disallowing expenditure "incurred by the assessee in relation to the tax exempt income". This proportion or portion of the exempt income surely cannot swallow the entire amount. (AY. 2009-10)
Joint Investments P. Ltd. v. CIT (2015) 372 ITR 694 / 233 Taxman 117 / 275 CTR 471 / 116 DTR 289 (Delhi)(HC)
Editorial: Order in Joint Investment P. Ltd. v. Asst. CIT [2014] 33 ITR 373 (Delhi) (Trib.) is set aside.

342 **S.14A : Disallowance of expenditure – Exempt income – In the absence of any tax free income earned by assessee, disallowance could not be made. [R.8D]**
In the absence of any tax free income earned by assessee, disallowance could not be made. (AY. 2008-09)
CIT v. Shivam Motors (P) Ltd. (2015) 230 Taxman 63 / 272 CTR 277 (All.)(HC)

343 **S.14A : Disallowance of expenditure – Exempt income – Concurrent finding that expenditure properly established – No disallowance could be made. [S.260A]**
Held, dismissing the appeal, that whether or not the expenditure incurred for the purpose of earning the income exempt under section 14A of the Income-tax Act, 1961, had been properly explained, is essentially a question of fact. Both the Commissioner (Appeals) and the Tribunal were of the opinion that the expenditure was properly established. There was no scope for any interference with the concurrent finding of fact recorded by the Tribunal and the Commissioner (Appeals).
CIT v. Crish Park Vincom Ltd. (2015) 371 ITR 15 / 232 Taxman 574 (Cal.)(HC)

344 **S.14A : Disallowance of expenditure – Exempt income – Borrowed funds not invested for earning tax free income – No disallowance was permissible.**
Where no borrowed funds on which interest was paid had been invested for earning tax free income, no disallowance was permissible under section 14A. (AY. 2008-09)
Addl. CIT v. Dhampur Sugar Mills (P) Ltd. (2015) 370 ITR 194 / 273 CTR 90 / 229 Taxman 271 (All.)(HC)

345 **S.14A : Disallowance of expenditure – Exempt income – No disallowance can be made for shares held as stock-in-trade.[R.8D]**
No disallowance can be made for shares held as stock-in-trade. (AY. 2008-09)
CIT v. India Advantage Securities Ltd. (2016) 380 ITR 471 (Bom.)(HC)
Editorial: Refer Dy. CIT v. India Advantages Securities Ltd. (Mum)(Trib.) itatonline. org

346 **S.14A : Disallowance of expenditure – Exempt income – Assessing officer has to adopt average value of investment of which income is not part of total income and not all investments – Matter remanded. [R.8D]**
Allowing the appeal of assessee the Tribunal held that The first condition for application of Section 14A was fulfilled as the AO expressed the opinion that a disallowance was warranted. In such eventuality the AO is required by the mandate of Rule 8D to follow

Rule 8D(2). Clauses 1, 2 and 3 detail the methodology to be adopted. The AO, instead of adopting the average value of investment of which income is not part of the total income i.e. the value of tax exempt investment, chose to factor in the total investment itself. Even though the CIT(A) noticed the exact value of the investment which yielded taxable income, he did not correct the error but chose to apply his own equity. Given the record that had to be done so to substitute the figure of ₹ 38,61,09,287 with the figure of ₹ 3,53,26,800 and thereafter arrive at the exact disallowance of .05% Findings of Tribunal and lower authorities were set aside. Appeal of assessee was allowed. (AY. 2008-09)

ACB India Ltd. v. ACIT (2015) 374 ITR 108 / 235 Taxman 22 (Delhi)(HC)

S.14A : Disallowance of expenditure – Exempt income – Mixed funds – Interest expenditure relatable to investment in tax free funds was to be computed under provisions of Rule 8D(2)(ii). [R.8D(2)] 347

Assessee-company borrowed funds and part of it was invested in earning tax free dividend income. AO invoked section 14A and disallowed certain amount from exempted income. On appeal Court held that since funds utilized by assessee being mixed funds, interest paid on borrowed fund was also relatable to interest on investment made in tax free funds. Authorities had rightly invoked provision of section 14A and interest expenditure relatable to investment in tax free funds was to be computed under provisions of rule 8D(2)(ii). (AY. 2008-09)

Avon Cycles Ltd. v. CIT (2015) 228 Taxman 368 (Mag.)(P&H)(HC)

Editorial: SLP is granted, Avon Cycles Ltd. v. CIT (2015) 231 Taxamn 226 (SC)

S.14A : Disallowance of expenditure – Exempt income – Sufficient funds for making investments in shares and mutual funds – No satisfaction recorded by Assessing Officer – Disallowance was held to be not justified.[R.8D(2)] 348

The finding that assessee had sufficient funds for making investments in shares and mutual funds coupled with the failure of the Assessing Officer to record his satisfaction clinched the issue in favour of the assessee. The voluntary deductions made by the assessee were not rejected or held to be unsatisfactory, on examination of accounts. The Assessing Officer erred in invoking sub-rule (2) without elucidating and explaining why the voluntary disallowance made by the assessee was unreasonable and unsatisfactory. There was no such satisfaction recorded by the Assessing Officer before he invoked sub-rule (2) of Rule 8D and made the recomputation.(AY. 2008-09, 2009-10)

CIT v. Taikisha Engineering India Ltd. (2015) 370 ITR 338 / 229 Taxman 143 / 275 CTR 316 / 114 DTR 316 (Delhi)(HC)

S.14A : Disallowance of expenditure – Exempt income – Disallowance only to extent of expenditure incurred by assessee in relation to tax exempt income – Rule 8D cannot be interpreted to mean that the entire tax exempt income can be disallowed – Matter remanded. [R.8D] 349

The AO has not firstly disclosed why the appellant/assessee's claim for attributing ₹ 2,97,440/- as a disallowance under Section 14A had to be rejected. Taikisha says that the jurisdiction to proceed further and determine amounts is derived after examination

of the accounts and rejection if any of the assessee's claim or explanation. The second aspect is there appears to have been no scrutiny of the accounts by the AO – an aspect which is completely unnoticed by the CIT (A) and the ITAT. The third, and in the opinion of this Court, important anomaly which we cannot be unmindful is that whereas the entire tax exempt income is ₹ 48,90,000/-, the disallowance ultimately directed works out to nearly 110% of that sum, i.e., ₹ 52,56,197/-. By no stretch of imagination can Section 14A or Rule 8D be interpreted so as to mean that the entire tax exempt income is to be disallowed. The window for disallowance is indicated in Section 14A, and is only to the extent of disallowing expenditure "incurred by the assessee in relation to the tax exempt income". This proportion or portion of the tax exempt income surely cannot swallow the entire amount as has happened in this case.(AY. 2009-10)
Joint Investments Pvt. Ltd. v. CIT (2015) 372 ITR 694 / 275 CTR 471 / 116 DTR 289 / 233 Taxman 117 (Delhi)(HC)

350 **S.14A : Disallowance of expenditure – Exempt income – Rule 8D was held to be not applicable for the relevant year. [R.8D]**
Rule 8D was not applicable to years prior to 2008-09, Assessing Officer was not justified in invoking provisions of Rule 8D for relevant assessment year. (AY. 2005-06)
Dy. CIT v. GDA Finvest & Trade (P.) Ltd. (2014) 36 ITR 161 / (2015) 68 SOT 362 (URO) (Delhi)(Trib.)

351 **S.14A : Disallowance of expenditure – Exempt income – Interest – Matter remanded.**
AO made disallowance of certain interest expenditure by invoking provisions of Rule 8D of 1962 Rules. Assessee raised a plea that it had sufficient funds to make investments and that interest-bearing borrowed funds were not used for making investments in mutual funds. Whether since aforesaid plea raised by assessee required verification, impugned order was to be set aside and, matter was to be remanded back. Matter remanded.(AY. 2008-09)
Dy. CIT v. Tejas Networks Ltd. (2015) 68 SOT 477 (Bang.)(Trib.)

352 **S.14A : Disallowance of expenditure – Exempt income – No deficiency was shown in the working furnished by assessee – Enhancement of disallowance by the Assessing Officer was held to be not justified.**
When no deficiency was shown in the working furnished by assessee - Enhancement of disallowance by the Assessing Officer was held to be not justified. (AY. 2008-09)
Dy. CIT v. DBH International (P.) Ltd. (2015) 68 SOT 332 (Delhi)(Trib.)

353 **S.14A : Disallowance of expenditure – Exempt income – Interest – Revenue has not established the nexus – Disallowance was held to be not justified.**
Where revenue could not establish a nexus between interest bearing funds borrowed and those invested by assessee for bonds, disallowance under section 14A was not justified. (AY. 2003-04, 2004-05)
Dy. CIT v. Gujarat Mineral Development Corporation Ltd. (2015) 68 SOT 283 (URO)(Ahd.) (Trib.)

S.14A : Disallowance of expenditure – Exempt income – No exempt income was shown – Interest – Failure of Assessing Officer to find evidence that interest expenses incurred by assessee not wholly and exclusively for purpose of business – Disallowance was deleted [S.37(1)] 354

Dismissing the appeal of revenue the Tribunal held that; the assessee did not show income under the head exempt income under Chapter III of the Act for which it had claimed expenditure. Until and unless both these conditions were fulfilled, the provisions of section 14A of the Act could not and should not be invoked. The Assessing Officer failed to find evidence that the interest expenses incurred by the assessee were not wholly and exclusively for the business of the assessee. The Commissioner (Appeals) was justified in deleting the disallowance under section 14A of the Act and allowing the interest expenditure under section 37(1) of the Act. (AY. 2003-04)

Dy. CIT v. SM Energy Teknik and Electronics Ltd. (2015) 40 ITR 540 / 70 SOT 324 (Mum.) (Trib.)

S.14A : Disallowance of expenditure – Exempt income – No specific disallowance of interest was made by the Assessing Officer – Deletion of disallowance was held to be justified. 355

Dismissing the appeal of revenue the Tribunal held that considering the assessment year was 2006-07, rule 8D could not be applied for making disallowance under section 14A of the Act. There was no specific disallowance made by the Assessing Officer on account of interest expenditure. It was manifest that the Commissioner (Appeals) had sustained disallowance by apportionment of total of such expenditure in the ratio of exempt income to taxable income. Neither had the Assessing Officer made any disallowance on account of interest under section 14A nor had the Commissioner (Appeals) gone into this aspect and made any enhancement. The Department's appeal for sustenance of disallowance towards interest did not arise from the order. (AY.2006-07)

ACIT v. HT Media Ltd. (2015) 40 ITR 185 (Delhi)(Trib.)

S.14A : Disallowance of expenditure – Exempt income – Interest – No borrowed funds utilised in investments – No disallowance can be made – Administrative expenses on investments – 0.5% of the average value of investments was held to be justified. 356

Tribunal held that there could be no question of disallowance of interest under section 14A because the shareholders' fund was larger than the investments yielding exempt income. Therefore, the order of the Commissioner (Appeals) was proper. Regarding 0.5 per cent of the average value of investments, the Commissioner (Appeals) followed the same yardstick of apportioning total expenditure in the ratio of exempt income which had been upheld by the Tribunal for the earlier year. Therefore, the apportionment of expenses in the ratio of exempt income to taxable income was justified.(AY. 2008-09)

ACIT v. HT Media Ltd. (2015) 40 ITR 185 (Delhi)(Trib.)

S.14A : Disallowance of expenditure – Exempt income – Rule 8D is not applicable to years prior to 2008-09. 357

The AO disallowed a sum u/s. 14A r.w.r. 8D. The CIT(A) confirmed the order of the AO. The ITAT held that, since the provisions of Rule 8D were not applicable to the year

under consideration, the disallowance was to be made u/s. 14A should be computed in a reasonable manner. Since AO had applied the provisions of Rule 8D for computing the disallowance in earlier years, the matter was restored to the AO for fresh examination. *Kisan Ratilal Choksey Shares and Securities P. Ltd. v. Addl. CIT (2015) 41 ITR 114 (Mum) (Trib.)*

358 **S.14A : Disallowance of expenditure – Exempt income – The AO must give reasons before rejecting the assessee's claim. He must establish nexus between the expenditure & the exempt income. The disallowance cannot exceed the exempt income.[R.8D]**
The AO must give reasons before rejecting the assessee's claim. He must establish nexus between the expenditure & the exempt income. The disallowance cannot exceed the exempt income. (ITA No. 4467/Del/2012, dt. 1-9-2015) (AY. 2009-10)
DCM Ltd. v. DCIT (Delhi)(Trib.); www.itatonline.org

359 **S.14A : Disallowance of expenditure – Exempt income – Rule 8D does not apply to share application money. [R.8D]**
Dismissing the appeal of revenue the Tribunal held that Share application money is only in the nature of an offer to buy shares made by the assessee. It is only after the offer is accepted by the company resulting in a concluded contract, the Assessee becomes the shareholder in a company. Till this time the Assessee becomes a shareholder, the assessee cannot have any rights to claim any dividend that may be declared by the company. In such circumstances we are of the view that while working out the average value of the investments u/r 8D(2)(iii) of the Rules the share application money should not be included. (ITA No. 267/Kol/2013, dated 07.10.2015)(AY. 2009-10)
ITO v. LGB Limited (Kol.)(Trib.); www.itatonline.org

360 **S.14A : Disallowance of expenditure – Exempt income – Interest free funds – No disallowance towards interest when interest – Free funds far exceed value of investments – Book profit – Amounts disallowed can be adopted. [S.115JB]**
No disallowance towards interest can be made when interest free funds exceed value of investments. Amounts disallowed can be adopted while computing book profit. Rule 8D can be resorted to by Assessing Officer only when he rejects claim made by assessee. On facts the Assessing Officer not rejecting claim of assessee. Matter remanded. (AY. 2009-10)
Dy. CIT(LTU) v. Microlabs Ltd. (2015) 39 ITR 585 / 70 SOT 774 (Bang.)(Trib.)

361 **S.14A : Disallowance of expenditure – Exempt income – Reasonable basis without resorting to Rule 8D. [R. 8D]**
For assessment year 2007-08 any disallowance under section 14A has to be worked out on some reasonable basis without resorting to rule 8D.(AY.2007-08)
ACIT v. Clariant Chemicals (I) Ltd. (2015) 67 SOT 244 (URO)(Mum.)(Trib.)

362 **S.14A : Disallowance of expenditure – Exempt income – Recording of satisfaction is mandatory.**
It was held that where in respect of dividend income earned by assessee, Assessing Officer straightaway proceeded to apply Rule 8D for purpose of disallowance under

section 14A without satisfying or complying with mandatory requirement of section 14A(2) or Rule 8D(1), impugned disallowance deserved to be set aside. (AY. 2009-10)
Graviss Hospitality Ltd. v. DCIT (2015) 67 SOT 184 (URO)(Mum.)(Trib.)

S.14A : Disallowance of expenditure – Exempt income – Satisfaction – Investments in subsidiaries & joint ventures are for strategic purposes and not for earning dividend and so the expenditure cannot be disallowed, (ii) If the AO does not deal with the assessee's submissions and merely says "not acceptable" it means he has not recorded proper satisfaction.[R.8D] 363
Investments in subsidiaries & joint ventures are for strategic purposes and not for earning dividend and so the expenditure cannot be disallowed. If the AO does not deal with the assessee's submissions and merely says "not acceptable" it means he has not recorded proper satisfaction. (ITA No. 538/LKW/2012, dt. 23.01.2015) (AY. 2009-10)
U. P. Electronics Corporation Ltd. v. DCIT (Luck.)(Trib.); www.itatonline.org

S.14A : Disallowance of expenditure – Exempt income – Share broker – Earning exempted income from investment in shares – 10 % of income was to be attributed towards expenditure for earning of such exempted income. 364
Assessee share broker earned dividend from investment and long term capital gains from shares. Both these incomes were exempted incomes. All these activities were carried on by assessee in a composite manner, Management and administration of its business was involved in earning said exempted incomes. Therefore 10 per cent of exempted income would be attributed to expenditure incurred for earning of said exempted income and thus, it is to be disallowed u/s. 14A.(AY. 2007-08)
Chona Financial Services Ltd. v. ACIT (2015) 153 ITD 119 (Chennai)(Trib.)

S.14A : Disallowance of expenditure – Exempt income – Even strategic investment in group concerns for purposes of control & not for earning dividend attracts disallowance. The Tribunal remanded the matter back to the Assessing Officer to make a correct computation without including investment in companies which have not paid any dividend to the assessee company. [Rule 8D(2)(iii)] 365
Even strategic investment in group concerns for purposes of control & not for earning dividend attracts disallowance. Plea that no expenditure is incurred to earn dividend is not acceptable because earning dividend is not an automatic process. The Tribunal remanded the matter back to the Assessing Officer to make a correct computation without including investment in companies which have not paid any dividend to the assessee company.(AY. 2008-09)
Coal India Limited v. ACIT (2015) 172 TTJ 103 (Kol.)(Trib.)

S.14A : Disallowance of expenditure – Exempt income – Percentage of exempt income can constitute reasonable disallowance – Expenses equal to 4 per cent. of exempt income reasonable disallowance. 366
Tribunal held that expenses equal to 4 per cent. of the exempt income earned by the assessee would constitute a reasonable disallowance.(AY. 2006-07)
Ciba India Ltd. v. Dy. CIT (2015) 38 ITR 474 (Mum.)(Trib.)

367 **S.14A : Disallowance of expenditure – Exempt income – Book profit – Adjustment of income was held to be not justified. [S.115JB]**
The Tribunal held that the assessee may have accepted disallowance u/s. 14A but once it was settled in light of the law laid down by High Court in *CIT v. Holcim India Pvt. Ltd. [2014 TIOL 1586 HC DEL IT*], that there cannot be any disallowance under section 14A unless there is corresponding exempt income and assessee had no such exempt income, adjustment under clause (f) of Explanation to Section 115JB (2) could not indeed be made. The adjustment had to meet tests of law and what cannot be considered to be 'expenditure relatable to exempt income' under law, cannot be subjected to adjustment either there is no estoppel against law. The fact that mere assessee had accepted this disallowance affects that disallowance only and nothing more than that; it does not clothe such an adjustment, in computation of book profit under section 115JB, with legality. There was no dispute that there was no corresponding tax exempt income. Therefore, adjustment in question was indeed unsustainable in law. Hence it is directed to AO to delete impugned adjustment. (AY. 2009-10)
Minda Sai Ltd v. ITO (2015) 167 TTJ 689/ 114 DTR 50 (Delhi)(Trib.)

368 **S.14A : Disallowance of expenditure – Exempt income – Growth mutual funds do not yield dividend and so s. 14A/ Rule 8D does not apply – Disallowance for administrative expenses cannot exceed allocable expenditure debited to P&L A/c.[R.8D]**
Tribunal held that (i) Growth mutual funds does not yield any dividend/exempt income, therefore, the provisions of section 14A would not apply on the investment in Growth mutual funds.
(ii) As regards the disallowance of administrative expenses in respect of the investment yielding exempt income the computation made under Rule 8D cannot exceed the total allocable expenditure for earning the exempt income debited the P&L Account. Accordingly, the AO is directed to reconsider the disallowance u/s. 14A by excluding the investment in the Growth mutual funds scheme and further to earmark and identify the item of expenditure debited by the assessee in the P&L Account which can be allocated in relation to earning the exempt income. (ITA No. 4761/Mum/2013, dt. 25.03.2015) (A.Y. 2008-09)
Manugraph India Ltd. v. DCIT (Mum.)(Trib.); www.itatonline.org

369 **S.14A : Disallowance of expenditure – Exempt income – Investments to incorporate special purpose vehicles for road projects – Investments not for earning dividend income – Expenses and interest not to be disallowed.[R.8D]**
Investments to incorporate special purpose vehicles for road projects. Investments not for earning dividend income. Expenses and interest not to be disallowed. (AY.2007-08)
L & T Infrastructure Development Projects Ltd. v. ITO (2015) 37 ITR 10 (Chennai)(Trib.)

370 **S.14A : Disallowance of expenditure – Exempt income – Calculation of disallowance at 0.05 per cent of average value of investments in shares reasonable and justifiable.**
Dividend earned on account of investment made in shares in earlier years. Failure by AO to establish nexus between investment and borrowed funds. Administrative expenditure relatable for earning of dividend income. Calculation of disallowance at

0.05 per cent. of average value of investments in shares reasonable and justifiable. (AY. 2006-07)
Dy. CIT v. Eicher Motors Ltd. (2015) 37 ITR 427 / 53 taxmann.com 317 / 67 SOT 306 (URO) (Delhi) (Trib.)

S.14A : Disallowance of expenditure – Exempt income – Object of assessee in making investment to gain holding controlling stake in group concerns and not for earning income – Provisions of section 14A cannot be invoked. [R. 8D] 371
The Assessing Officer disallowed certain expenses for earning exempted income by invoking section 14A of the Act read with rule 8D of the Income-tax Rules, 1962. The Commissioner (Appeals) confirmed this. On cross objection by the assessee :
Held, that where the primary object of investment was for holding a controlling stake in group concerns and not for earning an income out of that investment, then the provisions of section 14A could not be invoked. (AY. 2006-07 to 2010-11)
Dy. CIT v. Selvel Advertising P. Ltd. (2015) 37 ITR 611 (Kol.)(Trib.)

S.14A : Disallowance of expenditure – Exempt income – Recording of satisfaction – Assessee's share capital with reserves and surpluses far in excess of amount invested in securities fetching exempt income – Interest cannot be disallowed – Disallowance of amount equal to one-half per cent of average of value of investment was held to be proper. [R.8D] 372
Powers of Commissioner (Appeals)-Co-extensive with those of Assessing Officer-Failure by Assessing Officer in recording proper satisfaction can be made good by Commissioner (Appeals). Interest towards investment in shares and mutual funds-Assessee's share capital with reserves and surpluses far in excess of amount invested in securities fetching exempt income. Interest cannot be disallowed-Rule 8D mandatory-Disallowance of amount equal to one-half per cent. of average of value of investment was held to be proper. (AY. 2009-10)
T and T Motors Ltd. v. Add. CIT (2015) 154 ITD 306 / 37 ITR 682 (Delhi)(Trib.)

S.14A : Disallowance of expenditure – Exempt income – Disallowance u/s. 14A r.w. Rule 8D cannot exceed the exempt income.[R.8D] 373
Disallowance u/s. 14A r.w. Rule 8D cannot exceed the exempt income. (AY. 2009-10) (ITA No. 5592 /M/2012, dated 1-1-2015)
Daga Global Chemicals Pvt. Ltd. v. ACIT (Mum.)(Trib.); www.itatonline.org

S.14A : Disallowance of expenditure – Exempt income – Interest – Where the assessee is able to establish the nexus disallowance can be made under Rule 8D(2)(i) and not under Rule 8D(2)(ii)[R.8D] 374
Assessee company was engaged in share broking business. On examination of return of assessee, AO noticed that assessee had disclosed dividend income and claimed same as exempt from taxation but did not make any disallowance under section 14A, invoking Rule 8D(2)(ii), he computed disallowance. Tribunal held that workings furnished by assessee for interest disallowance were not examined at all by AO and assessee was able to prove nexus between borrowings and investments, and assessee was able to prove

nexus between borrowings and investments, interest disallowance was required to be made under Rule 8D(2)(i) and not by invoking Rule 8D(2)(i) (AY. 2008-09)
ITO v. Reliance Share & Stock Brokers (P.) Ltd. (2014) 51 taxmann.com 215 / (2015) 67 SOT 73 (Mum.)(Trib.)

Section 15 : Salaries

375 **S.15 : Salaries – Non-compete fee Director – Compensation received to safe guard the interest of business – Held to be capital receipt. [S. 4, 17, 55(2)]**
Assessee was an engineer, who was experienced in field of industrial drives. He along with another person started a company namely 'RSM' for manufacture of industrial drives. 'CT-PLC', a UK based company and world leader in industrial drives entered into a joint venture agreement with RSM, and a new company CTIL was formed. Assessee became director of CTIL. Subsequently, there was change in shareholding pattern as a result of which shareholding of RSM in CTIL was substantially reduced and shareholding of CT-PLC was increased to 85 per cent. Since assessee had knowledge, experience and capacity in field of industrial drives, to safeguard interests of joint venture company, in which stake of CT-PLC company was increased from 51 per cent to 85 per cent, CT-PLC entered into 'Non-competence Agreement' with assessee in terms of which certain compensation was paid by CT-PLC to assessee. Authorities below brought said amount to tax as salary income. On appeal allowing the appeal court held that ; since there was no employer-employee relationship between CT-PLC and assessee there was no question of taking non-compete fee as 'salary' in hands of assessee on facts, amount in question was to be regarded as capital receipt not liable to tax. (AY. 1996-97)
G. Raveendran v. CIT (2015) 375 ITR 326 / 231 Taxman 685 (Mad.)(HC)

376 **S.15 : Salaries – Accrues or arise – Diversion of income – Salary received from Government by teacher members of religious congregation is their income and subsequent entrustment of amount to the congregation would be merely application of income – Taxable in their individual hands. [S.4, 5, 192]**
Members of a religious congregation were employed as teachers in various education institutions of the state and received income from the government for their services. The AO held that the members were receiving income from salary in return for their services rendered and subsequent disbursements to the congregation were mere application of income.
The High Court observed that for the concept of diversion of income by overriding title would apply only if the diversion was effective at the stage when the amount in question left the source on its way to the intended recipient which was not the case in the present appeal. The High Court held that the diversion of income was a mere obligation of the member based on personal law and hence the payments were taxable in the hands of individuals.
Fr. Sunny Jose v. UOI (2015) 233 Taxman 454 / 276 CTR 512 / 118 DTR 41 (Ker.)(HC)

Section 17 : "Salary", "perquisite" and "profits in lieu of salary" defined

S.17 : Salaries – Profits in lieu of salary – Ex-gratia compensation on premature cessation of his services was held to be not taxable. [S.4. 15, 17(3)] 377

Assessee was an employee of company 'G. He was discharged from service under relevant rule of service Rules after giving three months' pay. Assessee also received certain amount as ex-gratia compensation on premature cessation of his services. Assessing Officer took a view that compensation so received was to be taxed under section 17(3) as 'profits in lieu of salary'. Tribunal confirmed order passed by Assessing Officer. On appeal the Court held that, since payment of ex-gratia compensation was voluntary in nature without there being any obligation on part of employer to pay any further amount to assessee in terms of service rules, it would not amount to compensation in terms of section 17(3)(i), therefore, impugned addition was to be deleted. (AY. 1994-95)

Arunbhai R. Naik v. ITO (2015) 379 ITR 511 / (2016) 236 Taxman 190 / 284 CTR 284 (Guj.)(HC)

S.17 : Salaries – Profits in lieu of salary – Expert in Industrial drives system – Restrictive covenant – Amount received under non-competition agreement not assessable as profit in lieu of salary. [S. 15, 17(3)] 378

Assessee with specialized knowledge forming private limited company. Joint venture between private limited company and foreign company. Foreign company paying consideration to assessee under non-competition agreement. There was no relation of master and servant between foreign company and assessee. Amount received under non-competition agreement not assessable as profit in lieu of salary. (AY. 1996-97)

G. Raveendran v. CIT (2015) 375 ITR 326 / 231 Taxman 685 (Mad.)(HC)

S.17 : Salaries – Profits in lieu of salary – Capital or revenue – Amount received by prospective employee for loss of employment offer is a capital receipt and is neither taxable as "salary" or as "other sources" [Ss. 15, 56] 379

Amount received by prospective employee for loss of employment offer is a capital receipt and is neither taxable as "salary" or as "other sources" (AY. 2008-09)

CIT v. Pritam Das Narang (2015) 126 DTR 170 / 281 CTR 485 / 235 Taxman 358 / (2016) 381 ITR 416 (Delhi)(HC)

S.17 : Salaries – Perquisite – Overseas employment – Federal tax – Hypothetical tax – Tax on salary paid by employer – Considering analysis statement of hypothetical tax and remanding matter to Assessing Officer to decide afresh – No interference.[S.15, 17(2)(iv)] 380

Dismissing the appeal, the Court held that the Tribunal clearly stated that consequent to the withdrawal of hypothetical tax payable in the U.S., certain amount had been paid towards tax liability of the assessee in India. Taking into consideration the amount paid towards salary and deducting the hypothetical tax payable in the U.S., the Tribunal had determined the salary received after deduction made by the employer towards

the hypothetical tax. The calculation made by the Tribunal would reveal that the computation was just and proper and no clarification was required to be given by the Tribunal, as it was for the assessee to explain as to how this amount should be treated for the purpose of determining the tax. (AY. 2009-10)
CIT v. Rajasekaran Balasubramaniam (2015) 373 ITR 326 / 233 Taxman 526 (Mad.)(HC)

Section 22 : Income from house property

381 **S.22 : Income from house property – Land appurtenant there to licence the terrace floor as the 'space' for mounting a tower/mast and antenna – Assessable as income from house property and not as business income or income from other sources. [S.28(i), 56]**
Assessee-company was owner of a terrace floor. Assessee entered into agreement with a telecom company and gave said floor on licence as space for mounting tower and antenna. Assessee claimed amount of licence fee as 'Income from house property'. Assessing Officer opined that since property was reflected as 'commercial asset', income derived therefrom was to be assessed as business income. Tribunal held that the terrace does not have any appurtenant land, hence the agreement of renting and hiring terrace was in essence an agreement of hiring space and not building and land appurtenant thereto hence, rental income was assessable as income from other sources. On appeal by assessee, allowing the appeal the Court held that; since assessee continued to be owner of terrace floor and such property could not be used for any other purpose except exploitation of its space in such a way for gaining income, impugned licence fee was to be taxed as income from house property. (AY. 2008-09)
Niagara Hotels & Builders (P.) Ltd. v. CIT (2015) 233 Taxman 180 / (2016) 286 CTR 94 (Delhi)(HC)

382 **S.22 : Income from house property – Business income – Income from letting out godowns is held to be assessable as income from house property and not as business income.[S.28(i)]**
Main business of assessee-firm was export of tobacco and for that purpose it had constructed godowns. It let out godowns when they were not in use and earned rental income therefrom. It claimed said income as business income contending that one of objectives in partnership deed was to let out godowns. Assessing Officer assessed the income under the head income from house property. On appeal, the Commissioner (Appeals) held that the income from letting out of godowns should be treated as income from business. On revenue's appeal, the Tribunal confirmed the order of the Commissioner (Appeals). On appeal to the High Court by the revenue, allowing the appeal the Court held that since letting out of godowns was not a continuous activity of assessee from year to year and assessee could let out godowns only because those were not in use at relevant time, rent received by assessee would have to be computed as income from property and character of income would not stand altered only because it was received by firm with one of objects of partnership deed to let out their godowns. (AY. 1992-93)
CIT v. Sileman Khan Mahaboob Khan (2015) 377 ITR 613 / 233 Taxman 65 (AP)(HC)

S.22 : Income from house property – Income from business – Real estate developer – Stock in trade – Rental income is held to be assessable as Income from house property. [S. 28(i)] 383

Rental income received from unsold portion of property constructed by assessee, a real estate developer, is assessable as income from house property and not business. Once it is held that income is derived from property, treatment given in books of account as stock-in-trade would not alter character or nature of income. (AY. 2000-01)

CIT v. Sane & Doshi Enterprises (2015) 377 ITR 165 / 278 CTR 316 / 232 Taxman 452/ 120 DTR 49 (Bom.)(HC)

S.22 : Income from house property – Deductions – Interest paid to partners capital accounts – Held to be allowable. [S.22] 384

Assessee-firm's business was to construct flats or commercial units and sell them at profit. Interest was paid to partners on capital contributed by them which was utilised for purpose of construction of property from which assessee earned rental income. Same had been allowed by Tribunal under section 24(b) on ground that such claim was allowed by Commissioner (Appeals) and later approved by Tribunal in earlier year. Dismissing the appeal of revenue, the Court held that since entire interest paid on partners' capital which was utilized for construction of property from which rental income was earned was allowable.(AY.2000-01)

CIT v. Sane & Doshi Enterprises (2015) 377 ITR 265 / 278 CTR 316 / 232 Taxman 452 (Bom.)(HC)

S.22 : Income from house property – Annual letting value – Mode of determination – Matter remanded. 385

For the assessment year 1986-87, the Assessing Officer followed the view taken in the earlier years in respect of the assessee to the effect that the annual value should be determined on the basis of the standard rent and not on the basis of the rateable value as determined by the municipal corporation. He further took the view that in determining the standard rent, the return on the investment should be calculated at 12% and computed the income from house property at ₹ 57,760 instead of ₹ 979 as per the return filed by the assessee. This was upheld by the Tribunal. On appeal to the High Court: Court observed that while determining the annual letting value in respect of properties which are subject to rent control legislation and in cases where the standard rent has not been fixed, the Assessing Officer shall determine the annual letting value in accordance with the relevant rent control legislation. If the fair rent is less than the standard rent, then, it is the fair rent which shall be taken as annual letting value and not the standard rent. This will apply to both self-acquired properties and general cases where the property is let out. (AY. 1986-87)

Vimal R. Ambani v. Dy. CIT (2015) 375 ITR 66 / 234 Taxman 518 (Bom.)(HC)

386 **S.22 : Income from house property – Income from other sources – Land owned by husband and building constructed thereon with joint funds belonging to himself and his wife – Common stock of property between husband and wife – Doctrine of blending – Rent from property – Assessable as income from house property. [S. 27,56]**
A building was constructed on the piece of land belonging to the husband of the assessee jointly by the wife and the husband. The cost of construction was shared in the ratio of one-third and two-thirds and the income was proportionately distributed. The Tribunal held that the rent from the property was to be assessed under the head "Income from house property" and not as "Income from other sources", though the land stood in the name of the assessee's husband. On appeal:
Held, that the land admittedly belonged to the husband of the assessee. He had raised the building with the joint funds belonging to himself and his wife. Therefore, one inference which could be drawn was that the land belonging to the husband had been thrown into the common stock of the joint property between the husband and the wife. Both of them thus became the joint owners by operation of the doctrine of blending. They admittedly had borne the cost of construction in the ratio of one-third and two-thirds. Therefore, the income arising out of the property was in fact an income arising out of house property which had to be taxed under section 22 rather than as an income arising out of other sources under section 56. (AY. 2004-05)
CIT v. Mina Deogun (Smt.) (2015) 375 ITR 586 / 233 Taxman 367 (Cal.)(HC)

387 **S.22 : Income from house property – Premises leased to Government or its organisations – Assessing Officer cannot fix imaginary figure based upon information or potential of building.**
Allowing the appeal of assessee the Court held that it was the specific case of the assessee that the rent for the premises was being paid at ₹ 10,000 per month for the structure and ₹ 3,500 per month for furniture and fittings; and that the same amount was being taken into account year after year. The Assessing Officer had every right to verify the accuracy of the facts and figures furnished by the assessee. Occasions of that nature would arise, mostly when the premises were leased to private individuals. Where, however, the premises were leased to the Government or its organisations, the scope for an assessee to show the rent at a lower figure did not arise. Further, there did not exist any particular standard to fix the rent of any premises. Much would depend upon the location and condition of the building, on the one hand, and the demand in the locality, on the other. Where the lessee is the Government, the transaction is regulated by the fixed parameters. Even if the building has potential to fetch a higher rent, Government departments are not expected to pay such rent. In case the owner of the premises is willing to lease them to the Government or its agencies, for reasons of safety and security or assured payment of rent, the discretion of the Assessing Officer to determine the reasonable rent of his choice gets virtually restricted. He could not ignore the actual payments and fix an imaginary figure, based upon the alleged information or potential of the building. This was a rare case, in which proceedings under section 271C were initiated and on a close verification of the matter, they were dropped. The figure ₹ 2.83 per square feet, mentioned in the order of the Commissioner (Appeals) was imaginary. The figure was derived by dividing the rent of ₹ 13,500 with the carpet area and not

the actual area of the building. The effort of the Telecommunications Department in addressing the letter was to resist the plea of the assessee for enhancement of the rent. Once the penalty proceedings were dropped, the suggested figure virtually lost its significance. Therefore, the rent for the premises must be taken at ₹ 13,500, unless there was any enhancement by the lessee it-self, for any subsequent period.(AY. 1995-96)
A Venkateswara Rao v. ACIT (2015) 372 ITR 136 (T&AP)(HC)

S.22 : Income from house property – Business income – Construction business – Earning money by selling property and letting it out – Enjoying property by giving use of it to another on rent rather than enjoying it by itself – To be treated as income from house property. [S. 28(i)] 388

Allowing the appeal of assessee the court held that; Income in the case of the assessee could not be treated otherwise than as arising out of house property because the assessee was enjoying the property by giving the use of it to another on rent rather than enjoying it by itself.
The contention that the main object of the assessee was dealing in property, that the object was business and, therefore, the rental income should be treated as business income, was not tenable because the object was both to earn money by selling the property as also by letting it out. It could not be said that the assessee was not authorised by the memorandum to earn profit by letting the property out.
Azimganj Estates P. Ltd. v. CIT (2015) 372 ITR 243 / 232 Taxman 625 (Cal.)(HC)

S.22 : Income from house property – Business income – Letting out of warehouses / godowns – Assessable as income from house property. [S.28(i)] 389

Where letting out of warehouses/godowns together with various services rendered to occupant did not constitute business activity of assessee, in-come arising therefrom was not assessable under section 28 as business in-come but under section 22 as income from house property. Appeal of assessee was dismissed. (AY. 1994-95)
Jyoti Estate v. Dy. CIT (2015) 229 Taxman 404 (Guj.)(HC)

S.22 : Income from house property – Business income – Rental income earned from letting out commercial complex would be assessed as income from house property and not as business income. [S.28(i)] 390

Where assessee was not engaged in any business activity, rental income earned from letting out commercial complex would be assessed as income from house property and not as business income. (AY. 2004-05, 2005-06, 2007-08, 2008-09)
Keyaram Hotels (P.) Ltd. v. Dy. CIT (2014) 52 taxmann.com 469 / (2015) 373 ITR 494 / 228 Taxman 354 (Mad.)(HC)
Editorial: SLP is dismissed (2015) 235 Taxman 512 (SC)

S.22 : Income from house property – Business income – Letting out immovable property – Assessable as income from house property – Hire charges from motor car, office equipment etc. – Assessable as business income. [S.28(i)] 391

Assessee let out immovable property along with motor car, office equipments, computers, furniture and fixture. Held rent from immovable property as income from

house property, however, hire charges for office equipments, etc., were assessed as business income referring to fact that in prior assessment year, on same facts AO accepted receipt of these hire charges as business income. Whether once in department had assessed hire charges for office equipments in preceding year as business income, then without anything being brought on record to deviate from said finding, stand of department could not be accepted. (AY. 2003-04)
CIT v. JPS Associates (2015) 228 Taxman 367 (Mag.)(Bom.)(HC)

392 **S.22 : Income from house property – Business income – Letting out of furniture and fixtures incidental to Hotel Building – Assessable as income from house property. [S. 28(i)]**
Allowing the appeal of assessee the Tribunal held that where letting out of furniture and fixture was incidental to letting out of hotel building, rental income derived in respect of same was to be taxed as 'income from house property' and not as business income. Direction of Commissioner was modified accordingly. (AY.2007-08)
Care Institute of Medical Sciences Ltd. v. Dy. CIT (2015) 68 SOT 290 (Hyd.)(Trib.)

393 **S.22 : Income from house property – Letting out of commercial complex – Assessable as income from house property not as business income. [S.28(i)]**
Assessee Company constructed a hotel on land taken on lease from Airport Authority. It also constructed some offices and shops in said commercial complex. During relevant year, assessee let out those shops and offices and derived rental income which was offered to tax as 'income from house property'. Assessing Officer found no difference between letting out of hotel rooms and renting out of shops in hotel premises especially when hotel premises, *inter alia*, includes commercial complex also, therefore, Assessing Officer brought to tax income from renting commercial premises under head Profit and gains of business and profession". Commissioner (Appeals) upheld Assessing Officer's order .On appeal Tribunal held that since letting out of commercial space, i.e., offices and shops, was not accompanied by incidental services, in such case mere physical proximity of hotel and commercial complex did not really matter as long as character of arrangement had distinct nature therefore, income derived from property in question, was to be assessed as 'income from House Property'. (AY.2009-10, 2010-11)
A.B. Hotels Ltd. v. ACIT (2015) 68 SOT 255 (URO)(Delhi)(Trib.)
A.B. Hotels Ltd. v. ACIT (2015) 68 SOT 334 (URO)(Delhi)(Trib.)

394 **S.22 : Income from house property – Business income – Income from House property – Auditorium building letting – Assessable as income from house property. [S.28(i)]**
Where assessee had exploited auditorium building by letting out, income derived from same was income from house property and not business income of assessee.(AY. 2007-08)
M. Ahammedkutty v. ITO (2015) 67 SOT 353 (Cochin)(Trib.)

395 **S.22 : Income from house property – Renting of terrace – Amount received from cellular companies for renting out of the terrace for installation of mobile antenna – Assessable as income from house property and not as income from other sources.[S.56]**
Allowing the appeal of the assessee Tribunal held that the rent was not for antenna but for space for installation of antenna. Therefore what was relevant was the space

which had been rented out and the space was part of building, hence the rent was to be assessed as income from house property and not as income from other sources. (AY. 2009-10)
Manpreet Singh v. ITO (2015) 38 ITR 55 / 114 DTR 237 / 168 TTJ 502 / 67 SOT 426 / 53 taxmann.com 244 (Delhi)(Trib.)

S.22 : Income from house property – Rent received from mobile phone company for use of terrace to install antenna is taxable as "Income from house property" and not as "Other sources". [S.56] 396
Rent received from mobile phone company for use of terrace to install antenna is taxable as "Income from house property" and not as "Other sources".(AY. 2009-10)
Manpreet Singh v. ITO (2015) 38 ITR 55 / 114 DTR 237 / 168 TTJ 502 / 67 SOT 426 / 53 taxmann.com 244 (Delhi)(Trib.)

Section 23 : Annual value how determined

S.23 : Income from house property – Annual value – In absence of any other details, ALV fixed by corporation is yardstick for determination of ALV [S.22] 397
In absence of any other details, ALV fixed by corporation is yardstick for determination of ALV. Commissioner (Appeals) had determined ALV of property of assessee at a much higher figure than what was contemplated by BBMP, and assessee had not challenged said determination, order of CIT(A) called for no interference and should be confirmed (AY. 2008-09)
Dy. CIT v Rajeev Chandrashekar (2015) 68 SOT 312 (URO)(Bang.)(Trib)

S.23 : Income from house property – Annual value – Interest free loans – Notional interest on said loan could not be included while computing Annual value of property. [S. 22] 398
Allowing the appeal of assessee the Tribunal held that where assessee let out its hotel premises, in view of fact that apart from rent assessee also received interest free loan from tenant which had no nexus with leasing of property, notional interest on said loan could not be included while computing Annual ratable value of property. (AY.2007-08)
Care Institute of Medical Sciences Ltd. v. Dy. CIT (2015) 68 SOT 290 (Hyd.)(Trib.)

S.23 : Income from house property – Annual value – Notional interest on deposit – Addition was deleted.[S.22] 399
Assessee let out property for rent of ₹ 90,000 per month and also received interest free deposit. Assessing Officer held that deposit was linked with rentals of property and accordingly made addition of notional interest at rate of 12 per cent. CIT(A) deleted the addition. On appeal by revenue dismissing the appeal the Tribunal held that; since Assessing Officer had not conducted any enquiry to find out effect of interest free deposits and did not determine fair market rent, addition on account of notional interest could not be allowed (AY.2005-06)
ACIT v. Bharati Anirudh Kilachand (Mrs.) (2015) 68 SOT 337 / 44 ITR 317 (Mum.)(Trib.)

Section 24 : Deductions from income from house property

400 **S.24 : Income from house property – Interest on loan – Held to be allowable.[S.22]**
AO disallowed claim of assessee for deduction under section 24(1) on ground that assessee did not prove with documentary evidence nexus between loan taken and acquisition of property. Commissioner (Appeals) had restricted disallowance on ground that assessee had borrowed loans for purpose of acquiring property of four sites and repaid part of loan. Since there was no material on record brought out by revenue to dislodge findings of Commissioner (Appeals), said findings were to be confirmed.(AY. 2008-09)
Dy. CIT v. Rajeev Chandrashekar (2015) 68 SOT 312 (URO)(Bang.)(Trib.)

401 **S.24 : Income from house property – Deductions-Interest – Deposit is accepted on interest, then it partakes character of borrowed money and assessee becomes eligible for deduction. [S. 24(b)]**
Assessee builder had purchased property by utilizing interest free loan taken from R for a short period. In order to repay loan, assessee had taken loan and deposits also from its tenants. Assessee utilized interest bearing security deposits for repayment of loan taken from R and claimed deduction u/s.24(b). The AO disallowed assessee's claim holding that security deposits cannot be termed as 'capital borrowed' for purpose of repayment of loan. CIT(A) allowed assessee's claim holding that interest bearing refundable deposits was nothing but capital borrowing only for purpose of s. 24(b). The ITAT held that, a person can borrow on a negotiated interest with or without security. If the deposits are interest bearing and is to be refunded back, then debt is created on the assessee which it is liable to be discharged in future. Here the concepts of debt have to be understood as per the terms of the parties. If the deposits had been security deposit simplicitor to cover the damage of the property or lapses on part of the tenant either for non-payment of rent or other charges, then such a deposit cannot be equated with the borrowed money, because then there is no debt on the assessee. A moment a deposit is accepted on interest then it partakes the character of borrowed money. It is an undisputed fact here that, these interest bearing deposits has been utilized for repayment of borrowed capital. Hence the assessee's claim u/s. 24(b) is allowable. (AY. 2009-10)
ITO v. Structmast Relator (Mumbai) (P.) Ltd. (2015) 154 ITD 768 / 127 DTR 99 (Mum.) (Trib.)

402 **S.24 : Income from house property – Deductions – Hospitals – Charitable society entitled to claim expenditure on maintenance of house property u/s. 10(23C) or 11, it was not entitled to S. 24(a) deduction on income from house property as same would amount to double deduction. [S. 10(23C), 11]**
Assessee, charitable society, claimed deduction u/s. 24(a) while computing income from house property. A.O. Disallowed the claim. CIT(A) has allowed the claim of assessee. On appeal affirming the view of AO the Tribunal held that when the assessee claimed exemption u/s. 11 or 10(23C), the standard deduction provided in s. 24(a) is not available to the assessee. When the assessee is a charitable trust/society, its income is exempted u/s. 11 or s. 10(23C) on application. Income received by the assessee shall not form part of the total income provided the same is applied for carrying out the objects

of the trust. Hence, any part of the income received by the assessee from house property is applied for maintenance of the very same house property, the same is allowed as application u/s. 11 and s.10(23C). S.10 and 11 override sections 22 to 27. Therefore, the gross rent received from house property shall be taken as income of the trust/ society. The assessee is not entitled for standard deduction of 30 per cent as provided in s. 24(a). If the standard deduction is allowed, it would amount to double deduction. Therefore, the assessee is entitled to claim the actual expenditure on maintenance of the house property as application of income, however, not entitled for standard deduction under section 24(a). (A.Y. 2010-11)
Dy. DIT v. Arya Vysya Maternity Home & Child Welfare Centre (2015) 154 ITD 844 (Chennai)(Trib.)

S.24 : Income from house property – Deductions – Interest – Capitalised as work in progress – Deduction is not available to companies. [S.23(2)]. 403
It was held that where assessee company had paid interest on borrowed fund before completion of construction of property and further had capitalized same by accounting for it in capital work-in-progress, assessee would not be entitled for deduction under section 24(b) as said deduction is applicable to self occupied properties. (AY. 2006-07)
ITO v. Janus Investments (P.) Ltd. (2015) 67 SOT 367 (Mum.)(Trib.)

S.24 : Income from house property – Deductions – Interest on borrowings – Interest on loan taken for acquiring property – Allowable. [S. 22] 404
The assessee claimed deduction of interest on term loan under section 24(b) of the Act. The authorities rejected the claim of the assessee. On appeal: Held, that once the term loan had been taken for acquiring or constructing the property, which fetched income under the head "Income from house property", the interest on such loan had to be allowed as deduction under section 24(b) of the Act. Matter remanded to the Assessing Officer to verify and ascertain the amount of loan utilised for the building and to allow deduction towards interest.(AY. 2009-10)
Universal Precision Screws v. ACIT (2015) 38 ITR 233 / 169 TTJ 84 (Delhi)(Trib.)

S.24 : Income from house property – Deductions – Interest – Interest payable to sundry creditors who supplied material for construction of property is an allowable deduction.[S. 22, 24(b)] 405
Allowing the appeal of the assessee the Tribunal held that the true nature of relationship has to be considered and restrictive meaning cannot be assigned to the term "borrowed capital" in section 24(b) of the Act. If there is direct nexus between the interest payment and construction of property, which in the present case was through creditors because they had supplied material for construction, the said interest would come within the ambit of section 24(b) of the Act and interest paid to sundry creditors who supplied material for construction of property was an allowable deduction under section 24(b) of the Act. (AY. 2005-06, 2007-08)
Jyoti Metal & Allied Industries (P) Ltd. v. ITO (2015) 67 SOT 238 (Delhi)(Trib.)

Section 28 : Profits and gains of business or profession

406 **S.28(i) : Business income – Income from house property – Company formed with main object of acquiring and holding properties – Letting of property was held to be assessable as business income and not as income from house property.[S.22]**
Company formed with main object of acquiring and holding properties. Letting of property was held to be assessable as business income and not as income from house property. (AY.1986-87, 1979-80, 1983-84, 1984-85)
Chennai Properties & Investment Ltd. v. CIT (2015) 373 ITR 673 / 231 Taxman 336 / 119 DTR 130 / 277 CTR 185(SC)
Editorial: CIT v. Chennai Properties & Investments Ltd (2004) 135 Taxman 509 / 186 CTR 680 (Mad.)(HC) & CIT v. Chennai Properties & Investments Ltd. (2004) 266 ITR 685 (Mad.)(HC) is approved.

407 **S.28(i) : Business income – Capital gains – Investment in shares – Selling shares frequently – Volume and magnitude was very high – Assessable as business income.[S.45]**
Assessee declared income arising from sale of shares as short-term capital gain. Tribunal found that assessee had regularly dealt in purchase and sale of share which indicated period of holding to be very short and that he earned only a meagre amount of dividend while gains from sale of shares was Rs. 65.45 lakhs. High Court upheld order of Tribunal that income arising from sale of shares was assessable as business income. Special leave petition filed against impugned order was dismissed. (AY. 2007-08)
Manoj Kumar Samdaria v. CIT (2015) 228 Taxman 63 (SC)
Editorial : Judgment of Delhi High Court in Manoj Kmuar Samdaria v. CIT(2014) 223 Taxman 245 (Mag)(Delhi)(HC) is affirmed.

408 **S.28(i) : Business income – Capital gains – Investment in shares – Huge transaction – Tax audit stated as share trading – Borrowed money – On facts held assessable as business income. [S. 45]**
Assessee filed return of income declaring certain short-term capital gains from share transactions. Assessing Officer found that assessee carried out transactions with as many as six brokers, borrowed funds and paid huge interest, transactions resulted in crores of rupee and classified these transaction as 'share trading' in his tax audit report attached to return of income. Based on these facts Assessing Officer held that aforesaid income was assessable as business income. Order of Assessing Officer was affirmed by Tribunal. On appeal dismissing the appeal of assessee the Court held that in the instant case, the findings of the Tribunal are based on facts particularly borrowing funds for purchase of shares, frequency of purchase and sale of shares, the quantum of turnover are all the tests to be applied to determine the nature of the transaction. Nothing has been shown to indicate that the legal principles applied or the facts found, are incorrect and/or perverse. (AY. 2006-07)
Ratanlal J. Oswal v. CIT (2015) 235 Taxman 264 (Bom.)(HC)

S.28(i) : Business income – Agricultural land – Barren land – Adventure in the nature of trade – No agricultural activities was carried on – Assessable as business income. [S. 2(13), 10, 260A, Registration Act, S.17(IA), Transfer of Property Act, S.53A] 409

Assessee purchased a piece of land used for rubber plantation. Subsequently, assessee sold said property through a broker. Assessee claimed that property sold was an agricultural land and, hence, profit arising on its sale was exempt from tax. Assessing Officer found that nature of property at time of registration was converted into a barren land by removal of earth up to rock bottom. He further noticed that assessee did not carry out any agricultural activity on said land. Assessee sold land in question within a short period of its purchase. Assessing Officer thus taking a view that purchase and sale transactions of land were adventure in nature of trade, brought profit earned by assessee to tax as business income. Tribunal upheld assessment order. On appeal dismissing the appeal the Court held that since finding recorded by authorities below was a finding of fact, no substantial question of law arose therefrom. (AY. 2008-09, 2009-10)

N. A. Baby v. Dy. CIT (2015) 234 Taxman 371 / (2016) 383 ITR 585 (Ker.)(HC)

S.28(i) : Business income – Capital gains – Purchase and sale of shares – Short period of holdings – Justified assessing the income as business. [S.45] 410

Dismissing the appeal of assessee the Court held that the assessee had all the infrastructure for buying and selling shares and that it had incurred establishment expenses and various establishment expenses had been charged to the profit and loss account which indicated an organised and systematic activity carried on by the assessee. The income earned by the assessee in the form of dividend was only in respect of very few scrips, which gave a very low rate of return as compared to the value of shares held by it. The involvement of the assessee in the trading of shares was not an occasional one but was carried on by it in a systematic and organised manner. The short period of holding of shares revealed that the assessee had no intention to hold the shares for the longer term as an investment. Therefore, the fact that trading in shares was not the main object of the assessee or that the shares were shown as stock-in-trade in the books of account of the assessee could not be of any consequence. The factual correctness of the findings of the Assessing Officer was not disputed at any stage of the proceedings. It was on the basis of the assessment for the year 2008-09 that the assessment for the year 2006-07 was reopened and the same standard had been applied in respect of the assessment for the year 2010-11 also. These findings, the factual correctness of which had been concurrently confirmed by the Commissioner (Appeals) and the Tribunal, when appreciated in the light of the principles laid down by the Supreme Court only led to the conclusion that the assessee was engaged in trading in shares and was not holding the shares as investments to contend that the accretions were only capital gains. (AY. 2006-07, 2008-09, 2010-11)

Equity Intelligence India P. Ltd. v. Dy. CIT (2015) 376 ITR 321 / 61 taxmann.com 256 (Ker.) (HC)

S.28(i) : Business income – Method of accounting – Apportionment of one time fee – Held to be justified. [S.4, 145] 411

Assessee-company engaged in business of providing facility cards to members on payment of one-time fee, apportioned membership fee over entire period of their membership.

Assessing Officer rejected claim of spreading over of membership fee and brought to tax entire receipt in year in which cards were issued. On appeal, the Commissioner (Appeals) set aside the order of the Assessing Officer. On revenue's appeal, the Tribunal upheld the order of the Commissioner (Appeals). Dismissing the appeal of revenue the Court held that, where services were rendered partially, revenue earning was to be proportionate to degree of completion of service therefore, assessee was justified in spreading over amount of membership fee and expenses. (AY. 1989-90 to 2001-02)
CIT v. Unique Mercantile Service (P.) Ltd. (2015) 232 Taxman 13 (Guj.)(HC)

412 **S.28(i) : Business income – Accrual of income – Claim made – Amount was not taxable. [S. 4]**
Merely on the basis of claim made before court amount right to receive the amount has not accrued, hence cannot be assessed as income. (AY. 2004-05)
CIT v. Sivalik Cellulose Ltd. (2015) 232 Taxman 364 (Delhi)(HC)

413 **S.28(i) : Business income – Income from other sources – Interest income – Rule of consistency – Matter remitted to Tribunal.[S. 56]**
Assessee was engaged in business of manufacture and export of garments and was also carrying on business of money lending - Assessing Officer took a view that interest income earned by assessee was to be regarded as 'income from other sources', However, Commissioner (Appeals) treated it as 'business income', on ground that assessee had been advancing money to several persons for last several years and department had also accepted that assessee's interest income as 'business income'. Tribunal remitted matter back to Assessing Officer for disposal afresh. On appeal by assessee, the Court held that; since Tribunal had failed to go into relevant portion of orders of authorities below and come to a definite finding as to nature of interest income, matter was to be remanded back to Tribunal for disposal afresh.(AY. 1998-99)
Paridhan Exports v. ACIT (2015) 232 Taxman 586 (Mad.)(HC)

414 **S.28(i) : Business income – Income from house property – Primary source of income of assessee letting out godowns and warehouses to manufacturers, traders and companies carrying on warehousing business – Assessable as business income. [S. 22]**
The assessee was engaged in the business of warehousing, handling and transport business. Held, dismissing the appeals, that the Commissioner (Appeals) as well as the Tribunal had not only gone into the objects clauses of the memorandum of association of the assessee but also into individual aspects of the business to come to the conclusion that it was a case of warehousing business and, therefore, the income would fall under the head "Business income". Thus, the income of the assessee from letting out its warehouse was chargeable under the head "Income from business" and not under the head "Income from house property".(AY 2004-05 to 2009-10)
CIT v. NDR Warehousing P. Ltd. (2015) 372 ITR 690 (Mad.)(HC)

S.28(i) : Business income – Income from house property – Business of establishing facilities as are available in an information technology park – Assessable as business income. [S.22] 415

Assessee was engaged in business of establishing facilities as available in IT Park and in letting out hotels, commercial complexes in an integrated manner with fully operational infrastructure facilities. Rental income derived from tenants was claimed as 'business income'. Revenue authorities treated 60 per cent of income as 'income from business' and 40 per cent as 'income from house property' which was affirmed by Tribunal. Tribunal accepted the contention of assessee. On appeal by assesseee allowing the appeal the Court held that since facilities given by assessee along with buildings/ commercial establishments were inseparable, and entire construction and interiors of buildings was done with sole intention of carrying on business, assessee was entitled to treat entire income as 'business income'. (AY. 2004-05)

Mysore Intercontinental Hotels Ltd. v. ACIT (2015) 230 Taxman 418 (Karn.)(HC)

S.28(i) : Business income – Advance received – Matter remanded to verify and pass appropriate order. 416

Assessee-company was dealing in medical equipments. Assessing Officer made addition of income of electro-medical maintenance centre which had not been included in books of account. Assessee produced assessment order for assessment year 1998-99 wherein it had offered said amount as income and was assessed accordingly. On appeal, High Court remanded to Assessing Officer to verify and pass appropriate order. Assessing Officer made addition with respect to advances received by assessee from customers as service charges on installation of equipments. Assessee contended that advances received from customers as service charges could not be assessed in current assessment year before expiry of warranty period, since income from advances could not be correctly ascertained, further income which was omitted to be included in return of income for relevant assessment year was offered as income in assessment year 1997-98 by assessee. (AY. 1996-97)

Kody Elcot Ltd. v. Jt. CIT (2015) 230 Taxman 420 (Mad.)(HC)

S.28(i) : Business income – Income from other sources – Assessee entering into franchise agreements with various entities to operate pizza and chicken restaurants – Services provided by assessee constituting a systematic organised activity conducted with a special purpose – Income therefrom is business income. [S. 2(13), 2(24), 56] 417

The assessee was incorporated as an Indian company and its business related to the operation and development of Pizza Hut and Kentucky Fried Chicken restaurants in the Indian subcontinent. For this purpose, it entered into technology licence agreements with K and P. In terms of these agreements, the assessee had the right to use the technology and system in the business of operating service restaurants. For the assessment years 2002-03 to 2008-09, it earned income equivalent to 110 per cent. of all costs incurred for (i) provision of support services to franchisees, (ii) collection and remittance of royalty to brand holders in the US, and (iii) assistance provided for research and development activity, etc. The Assessing Officer treated the income as "Income from other sources".

The Commissioner (Appeals) found that the act and course of services provided by the assessee constituted a systematic organised activity conducted with a special purpose as the provision of services was not an isolated transaction but the services had been continuously provided since the assessment year 1998-99 and the assessee continued even in the present date. Hence, he held that the earning of service income could not be classified under any other head but business income since all the essential parameters of classifying the activity as business were fulfilled. The Tribunal affirmed the findings of the Commissioner (Appeals). Held, dismissing the appeals, that the service income declared by the assessee for the relevant years was business income. The word "business" is one of wide import and it means an activity carried on continuously and systematically by a person by the application of his labour or skill with a view to earning income. (AY.2002-03 to 2008-09)
CIT v. Yum Restaurants (I) Pvt. Ltd. (2015) 371 ITR 139 / 115 DTR 129 / 231 Taxman 691 / (2016) 282 CTR 129 (Delhi)(HC)

418 **S.28(i) : Business income – Capital gains – Capital asset – Agricultural land – Agricultural land converted into non-agricultural land and sold within a short span of time on regular basis to companies in which he was a director, income earned was taxable as 'business income'. [S.2(14(iii), 45]**
The assessee having purchased certain land, sold same to companies in which he was a director within short span of time. The claim of the assessee was that it being a case of sale/transfer of agricultural land, which was not a capital asset within the meaning of section 2(14)(iii), there was no liability to pay tax under the Act. The AO noticed that all the aforesaid lands were purchased by the assessee in his own name and later on transferred/sold to the aforesaid limited companies where the assessee was a Director and there being a consistency and frequency of the transaction of sale and purchase, and considered income earned by assessee was in the nature of business income. The CIT(A) and Tribunal confirmed the order of AO.
On further appeal, the High Court relying on the finding of the Tribunal observed that assessee in the conveyance deed himself has recited about the land having been converted u/s.90A and the nature of the land no more remained agricultural. The High Court sustaining the finding of the tribunal further observed that no documentary evidence was led by the assessee to substantiate his claim of doing any agricultural operations. The High Court held that the conclusion arrived at by Tribunal that the lands, sold/transferred by the assessee to the private limited companies, were non-agricultural and outside the scope and meaning of section. 2(14)(iii) requires no consideration. (AY. 2008-09)
Vimal Singhvi v. ACIT (2015) 370 ITR 275 / 230 Taxman 73 / 113 DTR 157 / 273 CTR 322 (Raj.)(HC)

419 **S.28(i) : Business income – Cutting of trees of spontaneous growth in tea garden and using wood for own consumption – Not assessable as business income. [S.143(3)]**
Business of assessee was growing and producing tea and there was no intention to generate revenue from sale of trees, grown in tea garden. Tribunal concluded that cutting of trees, leaving stump as required by condition imposed by forest department was not for generating income out of trees, but for felling of wood for own consumption.

Tribunal reaffirmed view that it was not a case of business income. No question of law, arose for consideration in instant appeal.
CIT v. Peria Karamalai Tea & Produce Co. Ltd. (2015) 229 Taxman 200 (Mad.)(HC)

S.28(i) : Business income – Income from house property – Commercial activities – Assessable as business income.[S. 22] 420
Where assessee was in business of taking land, putting up commercial buildings thereon and letting-out such building with all furniture, notwithstanding fact that assessee had constructed building and also provided other facilities and there were two separate rental deeds, for two types of activities, income received by assessee would not fall within heading of 'Income from House Property'. Income assessable as business income. (AY. 2002-03)
Black Pearl Hotels (P.) Ltd. v. Dy. CIT (2015) 229 Taxman 155 (Karn.)(HC)

S.28(i) : Business income – Income from house property – Warehouse business – Assessable as business income [S.22] 421
Assessee-Corporation had primarily been set up for purpose of acquiring and building godowns and warehouses and letting them out for storage of certain notified commodities. Some of warehouses had been taken on rent and let out to companies/ farmers for storage purposes. Since activity of letting out was a part of assessee's business, income therefrom would be assessable as business income and not as income from house property.(AY. 2008-09)
CIT v. Karnataka State Warehousing Corporation (2015) 228 Taxman 346 (Karn.)(HC)

S.28(i) : Business income – AAR – DTAA-India-Portugese-USA-Netherland – Matter remanded.[S.29.] 422
Where Authority for Advance Rulings refused to look into Indo-Portugese DTAA or Indo-USA DTAA and memorandum of understanding between India and USA on ground that only Indo-Netherlands DTAA needed to be looked into, impugned ruling could not stand, therefore same was to be set aside and matter was to be remitted to consider entire matter afresh. (W. P.(C) No. 1502 of 2012 dt. 30-9-2014)
Perfetti Van Melle Holding. B.V. v. AAR (2015) 228 Taxman 201 (Mag.)(Delhi)(HC)

S.28(i) : Business income – Capital gains – Adventure in the nature of trade – Assessee acquiring right to sell property – No intention to hold property. [S.2(47) (v), 2(47)(vi),45] 423
Held, that the assessee had no intention of purchasing the property, enjoying and holding it for some time. Hence, it would not be an investment in the property. The intention behind this transaction was to sell the property at a higher price than the assessee had paid to the owner, and hence, adventure in the nature of trade. The gains were assessable as business income.
CIT v. Shahrooq Ali Khan (2015) 370 ITR 246 / 230 Taxman 417 (Karn.)(HC)

424 **S.28(i) : Business income – Capital gains – Agricultural land – No evidence by assessee to substantiate claim of carrying out agricultural operations – Sale deed clearly showing assessee as absolute owner of residential land having converted its use from agricultural – Surplus assessable as business income.[S.2(14)(iii)], 45]**

The Tribunal had recorded a finding of fact that no documentary evidence was led by the assessee to substantiate his claim of doing any agricultural operations on the land and the Assessing Officer in the assessment order had clearly mentioned that he had repeatedly asked the assessee to substantiate the claim about the exact agricultural operations having been carried on by the assessee but no satisfactory material was placed by the assessee. The Tribunal also observed that the other lands, though not converted from agricultural to non-agricultural use, were in the vicinity of the lands which were converted from agricultural to non-agricultural and, thus, the nature of the lands too could not be different. Therefore, the lands transferred by the assessee to the private limited companies were non-agricultural and outside the scope and meaning of section 2(14)(iii) defining a capital asset.(AY.2008-09)

Vimal Singhvi v. ACIT (2015) 370 ITR 275 / 230 Taxman 73 (Raj.)(HC)

425 **S.28(i) : Business income – Advance received – Entire sale consideration received as advance – On facts held as assessable as business income.**

Assessee was engaged in business of sale of imported tractor. Farmer had to make advance booking for purchasing tractor. Assessee – tractor importer maintained 'Sundry World Bank' account where receipt of advance booking was credited. AO made addition by treating such advance deposit as trading receipt. Fact revealed that advance payment for booking was actually entire sale consideration required to be paid which was used to be adjusted on date of delivery and balance amount, if any, remaining with assessee was refunded on production of original booking receipt and in absence of receipt, such payment was withheld. In many occasions even balance due to vendees on adjustment of fluctuation of rates of foreign exchange at time of booking and at time of actual delivery of tractor was not even returned to vendees. Court held on facts advance amount received as sale price was clearly in nature of trading receipt and entire amount was assessable as income of assessee. (AY. 1975-76 to 1977-78)

Modern Farm Services v. CIT (2015) 228 Taxman 106 (Mag.)(P&H)(HC)

426 **S.28(i) : Business income – Capital gains – Sale and purchase of shares on same day – No intention to purchase shares as investor – Assessable as business income.[S.45]**

The assessee declared short-term capital gains. The Assessing Officer treated the amount as business income of the assessee on the ground that the assessee had indulged in intra day transactions and that the resultant profit was to be considered as speculative profit. ITAT held that the assessee had earned the amount on purchase and sale of shares on the very same date. It was a well-established principle that the intention of a person at the time of purchase of shares was one of the most important criteria to be considered while deciding the nature of a transaction. It was a fact the assessee had been indulging in intraday transactions. Purchase and sale of shares on the very same day showed that the assessee had not intended to purchase them as an investor. Therefore it is a business income of the assessee. (AY. 2007-08)

Dy. CIT v. Kisan Ratilal Choksey Shares and Securities P. Ltd. (2015) 41 ITR 114 (Mum.)(Trib.)

S.28(i) : Business income – Accrual – Transfer of land to developer under development agreement – Income cannot be brought to tax until the assessee exercises his right in part or in full to sell his specified share of constructed area of the proposed housing project. [S. (2(14), 2(47), 5, 45] 427

The Tribunal held that anticipated business profits supposedly accruing to the assessee as a result of transfer of his land to the developer under a development agreement cannot be brought to tax until the assessee exercises his right in part or in full to sell his specified share of constructed area of the proposed housing project. Addition confirmed by the CIT(A) was deleted.(AY. 2010-11)

Dheeraj Amin v. ACIT (2015) 172 TTJ 228 / 123 DTR 8 (Bang.)(Trib.)

S.28(i) : Business income – Share dealings – Large volume – Income from share transactions was to be assessed as business income and not as capital gain. [S. 45] 428

Allowing the appeal of the revenue the Tribunal held that due to large volume of transactions of buying and selling of shares, income from share transaction was to be assessed as business income and not capital gain. (AY. 2007-08)

ACIT v. Vinod K. Sharda (2015) 153 ITD 648 (Mum.)(Trib.)

S.28(i) : Business income – Unclaimed balances – Liable to tax on credits. 429

Credits carry forward year after year. No claim from creditor. Failure by assessee to establish genuineness of liabilities. Assessee is liable to tax on credits. (AY. 2006-07, 2008-09)

Dy. CIT v. GAC Shipping (India) P. Ltd. (2015) 39 ITR 183 (Cochin)(Trib.)

S.28(i) : Business income – Fixed deposit interest – Assessable as business income. [S.10A, 263] 430

Interest income earned by assessee on fixed deposit receipts with bank which were made in course of its trading business of import and export for purposes of re-export for obtaining Letter of Credit for its purchases, was to be assessed as business income of assessee, FDs being business assets. (AY. 2009-10, 2010-11)

Zaveri & Co. (P.) Ltd. v. CIT (2014) 32 ITR 250/ (2015) 153 ITD 85 (Ahd.)(Trib.)

S.28(i) : Business income – Income from other sources – Interest income from business of leasing and financing – Assessable as business income.[S. 37(1), 56] 431

Interest income earned by the assessee engaged in the business of leasing, financing, etc., is taxable as business income and not as income from other sources, not withstanding the fact that the RBI has refused to register the assessee as an NBFC; all the expenses related to the said activity are allowable as deduction.(AY. 2006-07)

Preimus Investment and Finance Ltd. v. DCIT (2015) 171 TTJ 794 (Mum.)(Trib.)

S.28(i) : Business income – Income from house property – Developing malls and business centre on property owned by it – Letting out the same also providing various facilities in the said business centre – Assessable as business income.[S. 22] 432

Dismissing the appeal of revenue the Tribunal held that merely because income is attached to a property it cannot be sole factor for assessing the income as income from house property, it has to be seen that as to what was the primary objective of the

assessee while exploiting the property, if the property is let out simply the income is assessable as income from house property. However, if the property is exploited in a commercial manner then the income thereform is assessable as business income. In the present case the assessee had developed shopping malls/business centres on properties owned by it and let out the same by providing various services/facilities/amenities in the said malls/business centres, it can be said the basic intention of assessee was commercial exploitation of its properties by developing them as shopping centres. Thus, the income was assessable as business income. (AY. 2001-02, 2002-03, 2004-05, 2006-07, 2009-10)
ACIT v. Steller Developer (P) Ltd. (2015) 68 SOT 34 (Mum.)(Trib.)

433 **S.28(i) : Business income – Income from other sources – Interest from FDRs – Annual collection from customers – Assessable as income from other sources – Set off income against brought forward business losses – Matter restored to the file of AO. [S.56, 72]**
Assessee claimed funds parked in FDRs were related to annual collection made from its customers hence assessable as business income. Tribunal held that as the assessee has brought no material on record to suggest that it was by way of temporary deposit of surplus money or it was in the nature of advance received from intended purchasers, the claim of assessee that interest income earned by it on FDR was in nature of business was not assessable. As regards set off these incomes against brought forward business losses the matter was restored back to the file of AO. (AY. 2007-08, 2008-09)
Shree Nirmal Commercial Ltd. v. Dy. CIT (2014) 52 taxmann.com 478 / (2015) 67 SOT 78 (Mum.)(Trib.)

434 **S.28(i) : Business loss – Error trades – On behalf of clients – Allowable as business loss – Matter remanded.**
Dismissing the appeal of revenue in view of decision of *Parker Securities Ltd. v. Dy. CIT [2006] 8 SOT 257 (Ahd.)*, loss incurred on account of error trades conducted by assessee for broker on behalf of clients would be accepted as business loss and, thus, matter was to be remanded.
CIT v. HSBC Securities & Capital Markets (India) (P.) Ltd. (2015) 379 ITR 146 / 234 Taxman 341 (Bom.)(HC)

435 **S.28(i) : Business loss – Deposit paid for acquiring new business – Business not started – Loss of deposit – Not allowable as business loss. [S.37(i)]**
Dismissing the appeal, that the LPG distributorship was for a profit-making business which did not start. The deposit could not partake of the character of revenue account and a business loss. It was not allowable. Followed *Hasimara Industries Ltd. v. CIT [1998] 230 ITR 927 (SC).* (AY. 1996-97)
M. S. Ramasamy (Late) v. ITO (2015) 378 ITR 513 (Mad.)(HC)

436 **S.28(i) : Business loss – Mark-to-market – Speculation – Notional loss – Unmatured foreign exchange contracts – Loss allowable as business expenditure. [S.37(1), 43(5)]**
Revenue has raised the question as to whether the Tribunal was correct in holding that notional loss arising from unmatured foreign exchange contracts is allowable as mandated by the Supreme Court in the case of Bharat Movers (2000) 245 ITR 428

(SC). Dismissing the appeal of revenue the Court held that; The Tribunal held that the notional loss arising from unmatured foreign exchange contracts was allowable. On appeal, dismissing the appeal of revenue the Court held that, the Tribunal followed the decision of the Special Bench in *Dy. CIT v. Bank of Bahrain and Kuwait (2010) 5 ITR 301 (Trib.)(SB)* against which no appeal was filed. There was no ground made out in the appeal memo or in any affidavit why the Revenue was preferring an appeal against the order of the Tribunal when an identical question decided by the Special Bench of the Tribunal had been accepted by the Revenue. Therefore, the notional loss arising from unmatured foreign exchange contracts was allowable. High Court also referred in *CIT v. Bank of India (1996) 218 ITR 371(Bom.)(HC)* (AY 1999-2000)
DIT(IT) v. Citibank N.A. (2015) 377 ITR 69 (Bom.)(HC)
Editorial: Appeal of revenue was also dismissed in DIT(IT) v. Deutsche Bank A.G. (ITA No. 5089 of 2010 dt 1-2-2013 and DIT v. DBS Bank Ltd. (ITA No. 1914 of 2011 dt 22-3-2013)

S.28(i) : Business loss – Capital loss – Compensation bonds in lieu of debts due from Government of Iraq, receipt was nothing but 'Profit &gain of business' taxable as business income and not as capital loss – Indexation was held to be not available. [S. 45] 437

During relevant year, Government of Iraq expressed inability to pay US Dollar Component to assessee and other project exporters who had provided services under contract to it, due to its involvement in war with Iran. In consideration of assessee assigning debt receivables for work done in US $ entered in books of Central Bank of Iraq by executing Deed of Assignment, Central Government of India, pursuant to its Notification dated 24-3-1995 issued Compensation Bonds-2001 governed by provisions of Public Debts Act, 1944 and Public Debt Rules, 1945. By computing value of such bonds on indexed cost of acquisition, assessee claimed capital loss in its return. Authorities below held that since Government of India issued compensation bonds to assessee in lieu of debts due from Government of Iraq, receipt was nothing but 'Profit & Gain of business' taxable under section 28(1). On appeal dismissing the appeal the Court held that since debts payable were not on account of any advances given to Iraq Government by assessee but as consideration for services rendered, assessee's claim of capital loss, based on indexed treatment of capital gain was insubstantial and unfounded on any principle, consequently, impugned order did not require any interference. (AY. 1983-84)
Ircon International Ltd. v. Dy. CIT (2015) 377 ITR 503 / 232 Taxman 595 / 278 CTR 127 / 120 DTR 122 (Delhi)(HC)

S.28(i) : Business loss – Sale of shares at discount value to JV partners – Not a colourable transaction – Loss was held to be allowable. 438

Assessee and Plansee Tizit an Australian company, had entered into an agreement for setting up and forming a Joint Venture Company. Due to financial difficulties, assessee was unable to subscribe to shares of JV company offered by way of rights offer and decided to renounce same in favour of Plansee Tizit. Plansee Tizit agreed to buy shares of assessee at a discounted price which resulted in book loss. Assessing Officer termed selling of shares by assessee as a colourable device. Tribunal allowed the appeal of assessee. On appeal by revenue dismissing the appeal of revenue the Court held that

rights issue by JV company was for generating, augmenting capital and price paid for acquiring rights shares, could not be equated with price paid to acquire shares from shareholders, thus share sale transaction between JV partners where JV company had offered shares on rights basis resulting in loss was not a 'colourable device' and transaction could not be said to be a cover up for *de facto* or real transaction. (AY. 2000-01)
CIT v. SIEL Ltd. (2015) 231 Taxman 619 (Delhi)(HC)

439 **S.28(i) : Business loss – Chit fund – Bid loss – Matter remanded – Bad debt allowed. [S.36(2)]**
On appeal partly allowing the appeals of revenue the Court held that; (1) The matter was remitted to the assessing authority to give one more opportunity to the assessee to produce the relevant materials as set out by the authority and substantiate the deduction under the head business loss, so that the assessing authority on consideration of the material could pass an appropriate order. (ii) That the claim of bad debt and royalty payment to the parent company was allowable.(AY. 2003-04)
CIT v. Shriram Chits (Karnataka) P. Ltd. (2015) 375 ITR 289 / 231 Taxman 780 (Karn.) (HC)

440 **S.28(i) : Business loss – Loss on sale of debentures – Application money forgone by assessee for subscribing to rights issue as a matter of commercial expediency in order to make said issue successful is allowed as business loss.**
The assessee was a promoter and shareholder of a company, which declared a rights issue of secured redeemable non-convertible debentures. The company further entered into an agreement with the UTI wherein the allottees of debentures could surrender all their debentures to UTI after the application was made and UTI would pay balance allotment money and secure the debenture registered in its name. The assessee opted for the arrangement and claimed before the AO that the loss incurred on account of such arrangement was a business loss. The AO held that the assessee merely acted as a conduit in the transaction and that the assessee was not acting in his own capacity and hence the loss was not allowable as business loss. The Tribunal however held that the same was a business loss.
The High Court observed that both the UTI as well as the assessee stood to benefit - UTI picked up the debentures at a discounted rate, i.e., ₹ 389 whereas its face value was ₹ 500 each (that amount being the redeemable value at the end of the maturity period) and the assessee was entitled to one dividend warrant which enabled them to an equity share of ₹ 200. The purpose of issue was commercial and they were not issued only to attract subscriptions to the dividend warrants attached thereto. Therefore the High Court held that Assessee Company suffered loss on their sale and such loss was business loss that constituted allowable deduction.
CIT v. Abhinandan Investment Ltd. (2015) 376 ITR 153 / 118 DTR 145 / 230 Taxman 558 / 277 CTR 86 (Delhi)(HC)
CIT v. Medicare Invests Ltd (2015) 376 ITR 153 / 118 DTR 145 / 230 Taxman 558 / 277 CTR 86 (Delhi)(HC)
CIT v. Jindal Equipments Leasing and Cons. Serv. (2015) 376 ITR 153 / 118 DTR 145 / 230 Taxman 558 / 277 CTR 86 (Delhi)(HC)

S.28(i) : Business loss – Genuineness of share transactions – Share transaction – Fundamental transaction is shown to be a sham transaction, the same cannot necessarily be accepted as genuine merely because a broker's confirmation and invoices had been produced – Appeal of revenue was allowed. 441

The assessee had claimed loss on account of purchase and sale of shares and also diminution in the value of stock of shares held by the assessee at the end of the year. The AO disallowed the same on the ground that the transactions were bogus and not genuine. The AO brought on record that the transactions were of companies that were linked with the assessee company as the companies in question were promoted by one RR who was also a director of the assessee company. Also, the broker NC who had funded the purchase of shares by the assessee was not a person of means. Shares alleged to have been purchased by the assessee were not paid for and only book entries were passed. Moreover, shares were not actively traded and the certificates issued by Gauhati Stock Exchange showed that the transactions were off the floor transactions. On appeal, CIT (A) reversed the order of the AO and allowed the loss claimed by the assessee. The Tribunal also ruled in favour of the assessee holding the transactions to be genuine.

On Revenue's appeal before the High Court, the High Court reversed the Tribunal's order by observing the peculiar facts that the assessee company purchased shares of companies floated by its director and such companies held substantial shares of the assessee company. Moreover, the sale-purchase transactions were "off market" and not through any stock exchange/broker. The High Court approved AO's finding of bogus transactions as the transactions were done by book entries and no payment was made for share-purchase. Though contract notes, bills, books of account are evidence of genuine transactions, where the fundamental transaction was shown to be a sham, the same cannot necessarily be accepted as genuine merely on the basis of broker's confirmation and invoices. Accordingly, the High Court ruled in favour of the Revenue. (AY. 1997-98 to 1999-2000)

CIT v. Vishishth Chay Vyapar Ltd. (2015) 376 ITR 576 / 119 DTR 89 / 281 CTR 292 (Delhi) (HC)

S.28(i) : Business loss – Decree of a foreign Court – Loss not allowable in the year under consideration. 442

Where appellant in respect of due from foreign party has got decree of a foreign court in his favour and there was a possibility of realizing amount in near future, business loss suffered by appellant in foreign is not allowable in year under consideration. (AY. 1997-98)

United Phosphorus Ltd. v. Addl.CIT (2015) 230 Taxman 596 (Guj.)(HC)

S.28(i) : Business loss – Loss of goods in transit – Allowable as business loss. 443

Where assessee-company incurred trading loss due to loss of goods in transit in normal course of business and had written off said loss in its books of account, assessee was eligible for deduction of said loss.(AY. 1996-97 to 1998-99)

CIT v. Pyramid Timber Associates (P.) Ltd. (2015) 229 Taxman 174 (Karn.)(HC)

444 **S.28(i) : Business loss – Capital or revenue loss – Investment in 100% subsidiary for purposes of business – Loss on sale of investment.**
The nature of the investment in 100% subsidiary being for commercial expediency, loss incurred on the sale of investment was a business loss.(AY. 2003-04)
CIT v. Colgate Palmolive (I) Ltd. (2015) 370 ITR 728 (Bom.)(HC)

445 **S.28(i) : Business loss – Capital or revenue loss – Devaluation of Indian rupee – Loss incurred on account of devaluation of rupee – Allowable as business loss.**
Loss incurred on account of devaluation of rupee against the US dollar could not be disallowed. Followed, *CIT v. Woodward Governor India Pvt. Ltd. [2009] 312 ITR 254 (SC)*
Oswal Agro Mills Ltd v. CIT (2015) 370 ITR 676 / 234 Taxman 404 (Delhi) (HC)

446 **S.28(1) : Business loss – Speculation – Principal business of company – Activity of granting loans and advances on a larger scale than business of buying and selling shares – Income alone cannot be taken into consideration – Principal business of assessee was granting loans and advances. [S.73(1), Explanation]**
Dismissing the appeal the Court held that; during the year 2001-02, the assessee had a loss of a sum of ₹ 32.31 lakhs arising out of trading in shares whereas it earned a sum of ₹ 13.48 lakhs from out of interest on loans, commission and brokerage. The activity of granting loans and advances by the assessee was on a larger scale than the business of buying and selling shares. Both profit and loss were matters of chance in both the activities. Therefore, profit alone was not made the distinguishing factor. Since the business activity was also a distinct factor, the principal business of the assessee was granting loans and advances.
CIT v. Savi Commercial P. Ltd. (2015) 373 ITR 243 / 233 Taxman 289 (Cal.)(HC)

447 **S.28(i) : Business loss – Loss incurred prior to formation of firm cannot be allowed.**
Tribunal held that where loss incurred prior to formation of firm cannot be allowed. (AY. 2006-07 to 2007-08)
ITO v. Shanti Commodities (2015) 171 TTJ 641 / (2016) 156 ITD 34 (Pune)(Trib.)

448 **S.28(i) : Business loss – Speculative loss – Hedging transaction – Foreign exchange loss – Import and Export business of diamonds – Premature cancellation of such forward contracts to minimize the anticipated future losses – Not a speculative loss.[S. 43(5)]**
The Tribunal held that the foreign exchange loss incurred by the assessee on account of entering into forward contracts with the banks for the purpose of hedging the loss in connection with his import export business of diamonds cannot be held to be a speculative loss rather a business loss which can be set off against profits & gains of business subject to the condition that the assessee will have to satisfactorily prove that the maturity of hedge did not exceed the maturity of underlying transaction and further to explain the requirement/necessary for premature cancellation of such forward contracts or that such cancellation or re-bookings were done to minimize the anticipated future losses from such transactions. The Tribunal set aside the order of CIT(A) and restored back to the file of AO to decide the same accordingly after giving paper opportunity to the assessee to represent its case. (AY. 2009-10)
Jaimin Jewellery Exports (P) Ltd. v. ACIT (2014) 151 ITD 357 / (2015) 169 TTJ 121 (Mum.)(Trib.)

S.28(i) : Business loss – Capital loss – Amount paid to bank as guarantor of joint venture partner – Not allowable as business loss or business expenditure. [S. 36(1)(viii), 37(1)] 449

Tribunal held that the amount paid by assessee to banks / financing institutions as guarantor of loans to joint venture promoted by assessee was not allowable under sections 28(i), 36(1)(vii) or 37(1). (AY. 1997-98, 1998-99 1999-2000)

LML Ltd. v. JCIT (2014) 33 ITR 269 / 151 ITD 303 / (2015) 169 TTJ 10 (Mum.)(Trib.)

S.28(i) : Business loss – Speculative business – Market to market loss on derivatives cannot be treated as contingent liability – Allowed as deduction.[S.43(5)] 450

That the market to market loss on derivatives could not be treated as a contingent liability and was to be allowed as deduction.

CIT v. Kotak Securities Ltd. [2012] 340 ITR 333 (Bom) and *Edelweiss Capital Ltd. v. ITO [2010] 8 taxmann.com 157 (Mum.)* relied on. (AY. 2008-09)

Centrum Broking Ltd. v. ACIT (2015) 39 ITR 23 / 70 SOT 389 (Mum.)(Trib.)

S.28(i) : Business loss – Foreign exchange option contracts – Balance sheet – Does not constitute an ascertained liability.[S.43(5)] 451

It was held that provision for losses created on foreign exchange option contracts as on Balance Sheet date does not constitute an ascertained liability and, thus, deduction could not be allowed in respect of same as business loss. (AY. 2008-09)

Shankara Infrastructure Materials Ltd. v. ACIT (2015) 67 SOT 210 (URO)(Bang.)(Trib.)

S.28(i) : Business loss – Bad debt – Amounts advanced to for purchase of capital assets – Cannot be allowed as bad debts or business loss.[S. 36(1)(vii)] 452

Assessee claimed the amount advanced to purchase of capital asset as bad debts. Assessing Officer disallowed the said loss as capital in nature. The Commissioner (Appeals) confirmed the order of the Assessing Officer. Tribunal held that admittedly, the assessee had advanced ₹ 5 lakhs to companies for the purchase of capital assets and claimed deduction of the sum as bad debt. The amount advanced to for purchase of capital assets could not be allowed as bad debt or business loss. (AY. 2003-04)

Hindustan Times Ltd. v. Dy. CIT (2015) 38 ITR 165 (Delhi)(Trib.)

S.28(i) : Business loss – Deposits – Advances given in connection with business could not be allowed as bad debt but had to be considered as business loss. [S.36(1)(vii)] 453

Assessee claimed deposits/advances given in connection with business as bad debt of ₹ 11,08,930/-. AO also observed that any claim of bad debt cannot be allowed and the assessee has to establish that the debt has actually become bad. Further it was also required to be shown that the debt had been taken into account in computation of the income of earlier years. The AO, disallowed the claim to the tune of ₹ 5,94,454/- on ground that amount had not been taken into account in computation of income of earlier years. These amounts though could not be allowed as bad debt have to be considered as business loss. It has been submitted that the deposits/advances given in connection with business are very old and have not been recovered till now. The assessee therefore written off the amounts in the books of accounts. It is not cost

effective to enforce recovery by filing suits the smallness of amounts and the facts and circumstances of the case, claim has to be allowed as business loss therefore, allow the claim of the assessee. Deposits / advances given in connection with business could not be allowed as bad debt but had to be considered as business loss.(AY. 2006-07)
Smita Conductors Ltd. v. Dy. CIT (2015) 152 ITD 417 (Mum.)(Trib.)

454 **S.28(i) : Business loss – Loss due to fraud & financial irregularities has to be allowed in the year of detection.[S.37(1), 145]**
Loss due to fraud and financial irregularities have to be allowed as a deduction in the year of detection. This is in line with the Board circular No.35D(XLVII-20)(F.No.10/48/65-IT(A-I) dated 24.11.1965. The Hon'ble Supreme Court in the case of *Associated Banking Corporation of India Limited. v. CIT (1965) 56 ITR 1(SC)* has held that "the loss by embezzlement must be deemed to have occurred when the assessee came to know about the embezzlement and realized that the amount embezzled could not be recovered". In another decision, the Hon'ble Supreme Court in the case of *Badridas Daga v. CIT (1958) 34 ITR 10 (SC)* has held that "the losses which have been suffered by the assessee as a result of misappropriation by an employee have (1) which was incidental to the carrying on the business and should therefore be deducted in computing the profit of the business."(AY. 2005-06)
ACIT v. Boots Piramal Health Care Ltd. (2015) 43 ITR 355 (Mum.)(Trib.)

455 **S.28(i) : Business loss – Loss on valuation of interest rate swap contracts – Mark-to-market loss on interest rate swap contracts is not a notional loss – Deductible. [S.37(1)]**
It is an undisputed fact that the assessee has made the valuation of interest rate Swap contracts as at the end of the year. It is also an undisputed fact that assessee had incurred losses on such valuation. The said losses have been claimed as deduction in the P&L Account. It is also an undisputed fact that the assessee has made the entries following Accounting Standard, AS-11 of the ICAI. Such losses being treated as mark to market the losses have been allowed by the Tribunal in series of cases following Special Bench decision in the case of *Dy. CIT v. Bank of Bahrain & Kuwait (2010) 132 TTJ 505 (Mum)(SB)(Trib)*. The Hon'ble Supreme Court in the case of Woodward Governor India Pvt. Ltd. 179 Taxman 326 (SC) has considered such losses as allowable and not of contingent in nature. (AY. 2008-09)
IDBI Capital Market services Ltd. v. DCIT (2015) 42 ITR 379 (Mum.)(Trib.)

456 **S.28(1) : Business loss – Loss on account of forward contract entered into by the assessee to hedge against the loss arising on account of fluctuations in foreign exchange is an allowable deduction. Contrary view in Vinod Kumar Diamonds is not good law. [S.37(1)]**
The assessee was exposed to the risk arising in fluctuation out of exchange rate and as a prudent business man it would like to hedge its risk. Accordingly, the assessee had booked the forward contracts and utilised the same during the year or in the succeeding years. The pattern of the assessee reflected that it entered into forward contracts during the normal course of business and utilised the same for business allowing them to run up to the date of contract. The assessee was engaged in the export of diamonds and the

forwards contract was entered into in respect of foreign exchange to be received as a result of export and the same was done to avoid the risk of loss due to foreign exchange fluctuations. The claim has to allowed after taking note of the claim of forward contracts and the accounting policies, i.e. AS-11 (revised) and applying the ratio laid down by the Apex Court in the case of *CIT v. Woodward Governor India Pvt. Ltd. 294 ITR 451 (SC)*. The issue i.e. loss on account of forward contract entered into by the assessee to hedge against the loss arising on account of fluctuations in foreign exchange arose before the Tribunal in a series of cases and the claim has been allowed. The learned D.R. for the Revenue had placed reliance on M/s. Vinod Kumar Diamonds Pvt. Ltd ITA No. 506/Mum/2013 dated 03.05.2013. The said decision is contrary to the view taken in Badridas Gauridu P. Ltd. 261 ITR 256 (Bom). We find no merit in the said reliance. (AY. 2009-10, 2010-11)
ACIT v. Venus Jewel (Mum.)(Trib.); www.itatonline.org

S.28(iv) : Business income – Value of any benefit or perquisites – Converted into money or not – Waiver of loan – Assessing as business income was held to be not justified. 457
The assessee-company borrowed funds from IC, an associate concern, from time-to-time at commercial rate of interest. Similarly, the assessee had advanced loan to MBPL, another associate concern.
There was default on the part of MBPL and the assessee waived the loan granted to MBPL together with interest. At the same time, IC waived loan advanced to the assessee together with interest.
The Assessing Officer treated the amount of loan and interest waived by IC as business income under section 28(iv) and made addition accordingly.
On appeal, the Commissioner (Appeals) deleted the additions.
On revenue's appeal, the Tribunal upheld the order of the Commissioner (Appeals).
On appeal to the High Court; When in earlier years revenue did not accept loan transactions from IC and to MBPL both, as business transactions, it could not apply section 28(iv) by terming such waiver as income of assessee arising from its business. Further if both transactions were loan transactions and one part of it was treated as business income, then second part could not have given a different character and what assessee derived by way of loan having been shown as income and what was amount written off by assessee could be adjusted against each other. (AY. 2005-06)
CIT v. Digiwave Infrastructure & Services Ltd. (2015) 232 Taxman 399 (Bom.)(HC)

S.28(iv) : Business income – Value of any benefit or perquisites – Converted into money or not – Loan for capital asset – One time settlement – Waiver of loan was held to be not assessable as business income. 458
The assessee was engaged in business of manufacturing cloth and textile. It was declared a sick company by BIFR. In course of assessment, the Assessing Officer found that ICICI bank had waived principal amount of loan recoverable from assessee in one time settlement. The Assessing Officer took a view that loan waived off constituted assessee's taxable income under section 28(iv). The Tribunal, however, held that the cessation of liability to repay bank loan taken to purchase a capital asset did not result in a revenue receipt and it was not taxable under section 28(iv). On revenue's appeal Court

dismissed the appeal following the ratio in *Mahindra & Mahindra Ltd. v. CIT (2003) 261 ITR 501 (Bom)(HC)* and *Solid Containers Ltd. v. Dy. CIT [2009] 308 ITR 417 (Bom.)(HC)*. The Court also observed that issue specifically came up for consideration in the matter of Mahindra and Mahindra and it was held that the said provision would apply only when a benefit or perquisite is received in kind and has no application where benefit is received in cash or money. Following this decision in the case of *CIT v. Xylon Holdings (P.) Ltd. [2012] 211 Taxman 108/26 taxmann.com 333* this Court held that the waiver would not come within the purview of section 28(iv). Accordingly the Court held that the view taken by the Tribunal is rational and judicious. (AY. 2007-08)
CIT v. Santogen Silk Mills Ltd. (2015) 231 Taxman 525 (Bom.)(HC)

459 **S.28(iv) : Business income – Benefit or perquisite arising in course of business – Difference between combined share capital of companies prior to amalgamation and equity share capital after amalgamation transferred to general reserve – Reserves and surplus not benefit or perquisite of business – Capital in nature.[S.4]**
The assessee has shown difference between combined share capital of companies prior to amalgamation and equity share capital after amalgamation transferred to general reserve. The AO assessed the said amount as benefit or perquisite by applying the provision of section 28(iv) of the Act. But the Commissioner (Appeals) set aside the order of the Assessing Officer and the Tribunal confirmed this. On appeal:
Held, dismissing the appeal, that the provisions of section 28(iv) make it clear that the amount reflected in the balance-sheet of the assessee under the head "reserves and surplus" cannot be treated as a benefit or perquisite arising from business or exercise of profession. The difference amount post-amalgamation was the amalgamation reserve and it could not be said that it was out of normal transaction of the business. The amount was capital in nature and arose on account of amalgamation of four companies. Hence, the amount could not be treated as falling within section 28(iv).(AY.2003-04)
CIT v. STADS Ltd. (2015) 373 ITR 313 (Mad.)(HC)

460 **S.28(iv) : Business income – Value of any benefit or perquisites – Converted into money or not – Share forfeiture amount – Amount of forfeited share application money transferred to 'warrant forfeiture account' is a capital receipt and it cannot be taxed as income of assessee, either under section 28(iv) or under section 41(1).[S. 4, 41(1)]**
It is held that the amount of forfeited share application money transferred to "warrant, forfeiture account" in the capital reserve, was a capital receipt only and could not be taxed as income of the assessee, either under section 28(iv) or under section 41(1). Accordingly, ground raised by the assessee is allowed. (AY. 2009-10)
Graviss Hospitality Ltd. v. DCIT (2015) 67 SOT 184 (URO)(Mum.)(Trib.)

461 **S.28(iv) : Business income – Value of any benefit or perquisites – Converted into money or not – For assigning development rights of a land and received certain sum as advance – Cannot be assessed as income.**
Assessee-company executed Memorandum of Understanding (MOU) with one HR for assigning development rights of a land and received certain sum as advance. As transaction did not complete, assessee did not show that amount as income. AO treated

said amount as income by applying section 28(iv). On appeal, CIT(A) as well as Tribunal deleted addition by recording finding that MOU was neither withdrawn nor cancelled and it was a liability towards HR which assessee was obliged to return - Whether finding of fact recorded by CIT(A) and Tribunal was based on material on record and, therefore, could not be interfered with.
CIT v. Arvind Securities (P.) Ltd. (2015) 228 Taxman 301 (Mag.)(Bom.)(HC)

S.28(va) : Business income – Non-compete fee – Capital receipt – Prior to amendment. 462
High Court by impugned order held that prior to insertion of clause (va) of section 28, compensation amount received towards loss of source of income and non-competition fee could only be treated as capital receipt and was not liable to tax. Special leave petition filed against impugned order was to be dismissed.(AY. 1999-2000)
CIT v. Sapthagiri Distilleries Ltd. (2015) 229 Taxman 487 (SC)

S.28(va) : Business income – Non-compete consideration received prior to insertion of S. 28(va) in the Act w.e.f. 1.4.2003 is not taxable.[S. 55(2)(a)] 463
On appeal by revenue, The High Court had to consider :
"Whether non-compete consideration received by the assessee is not liable to tax as capital gains even after the amendment to Section 55(2)(a) of the Act w.e.f. 1.4.1998 which introduced the words 'or a right to manufacture, produce or process any article or thing'?"
Dismissing the appeal the Court held that The Supreme Court held in *Guffic Chem Pvt. Ltd. v. CIT (2011) 332 ITR 602 (SC)* that the restraint of right to carry on business would be taxable only with effect from Assessment Year 2003-04 consequent to the introduction of Section 28(va) into the Act. It was held that there is a dichotomy between receipt of compensation by an Assessee for the loss of agency and receipt of compensation attributable to the negative/restrictive covenant. The compensation received for the loss of agency is a revenue receipt whereas the compensation attributable to a negative/ restrictive covenant is a capital receipt. It was also held payment received as non-competition fee under a negative covenant was always treated as a capital receipt till the assessment year 2003-04. It is only vide Finance Act, 2002 with effect from 1.4.2003 that the said capital receipt is now made taxable. Section 55(2)(a) of the Act would have no application in the present circumstances, as it deals with the cost of acquisition in relation to a capital asset which includes a right to manufacture or carrying on business. In the present case, the Agreement prohibits the assessee in as much as it amounts to giving up its right to carry on business i.e. a restrictive covenant. (AY.1999-00)
CIT v. Bisleri Sales Ltd. (2015) 377 ITR 144 (Bom.)(HC)

S.28(va) : Business income – Benefit or perquisite – Non-compete fee – Received by assessees directors of a company Chemito Technologies from another company to which one of the divisions of Chemito Technologies was sold was assessable as business income.[28(i)] 464
Assessees directors of a company Chemito Technologies (P) Ltd sold one of its divisions to a company Thermo Electron LLS India (P) Ltd. on 27th May, 2008 and *vide* an agreement dt 2-6-2008 the said Thermo Electron LLS India (P.) Ltd entered into

agreements and non compete and non-solicitation under which the assessee agreed and under took not to engage in any business directly or indirectly otherwise be involved in activity which was similar to that of the division sold to Thermo Electron LLS India (P) Ltd. In consideration of the said undertaking Thermo Electron LLS India (P) Ltd. paid to the assessee a sum of ₹ 5 crores and ₹ 2 crores respectively. Tribunal held that amount received was taxable under section 28(va). On appeal dismissing the appeal the Court held that, had the assessee not entered into an agreement of non-compete they would have earned the amount from the business carried on out of the division which was sold to Thermo Electron LLS India (P) Ltd. It is the sale consideration itself, they were required to execute an agreement of non-compete and the compensation received under the said agreement was relatable on a consideration for sale of the business of the division and therefore the amount is taxable under section 28(va). (AY. 2009-10)
Arun Toshniwal v. Dy. CIT (2015) 375 ITR 270 / 278 CTR 43 / 119 DTR 44 (Bom.)(HC)
Anurag A. Toshiniwal v. Dy. CIT (2015) 375 ITR 270 / 278 CTR 43 / 119 DTR 44 (Bom.) (HC)
Editorial : Order in Anurag Toshniwal v. Dy.CIT (2013) 23 ITR 112 (Mum.)(Trib.) is affirmed.

Section 30 : Rent, rates, taxes, repairs and insurance for buildings.

465 **S.30 : Rent rates, taxes, repairs – Deletion of part of maintenance expenses – Held to be justified.**
Tribunal held that it could not be presumed that expenditure of Rs. 1.29 crore pertained to one property and no expenditure was incurred in relation to lease properties from which rent of over Rs. 1.05 crore was earned. Tribunal, therefore, deleted a part of disallowance made by Assessing Officer. On appeal by revenue , the Court held that view taken by Tribunal was evidently a possible view and not perverse; same was to be upheld. (AY. 1998-99, 1999-2000)
CIT v. Williamson Magor & Co. Ltd. (2015) 232 Taxman 533 (Cal.)(HC)

466 **S.30 : Rent rates, taxes, repairs – Capital or revenue – Damage by fire – Repair expenditure is held to be revenue expenditure. [S.37(1)]**
The assessee-company had an office at Kolkata and laboratory at Goa. The office at Kolkata was damaged by fire and Goa laboratory was damaged by flood/cyclone. The assessee incurred certain expenditure in respect of its office and laboratory and claimed said expenditure under section 30. The Assessing Officer disallowed said expenditure holding that same was to be treated as an expenditure of a capital nature. On appeal, the Commissioner (Appeals) held that the entire expenditure was of a revenue nature and therefore, deductible. On appeal, the Tribunal upheld the order of the Commissioner (Appeals). On appeal by revenue, dismissing the appeal the Court held that; expenditure incurred by assessee did not enhance value of its capital assets and it was necessary to repair damage caused by fire/flood, same was to be treated as revenue expenditure, therefore the said expenditure was to be allowable.
CIT v. Norinco (P.) Ltd. (2015) 231 Taxman 84 (Cal.)(HC)

Section 31 : Repairs and insurance of machinery, plant and furniture.

S.31 : Repairs – Leases premises – Capital or revenue – Repair and renovation of leased premises is capital in nature. [S. 30] 467

Expenditure towards false ceiling, fixing tiles/flooring, replacing glasses, wooden partitions, replacement of electrical wiring, earthing, replacement of G.I. pipes, plumbing and sanitation lines, plaster and painting of walls of leased premises cannot be regarded as 'current repairs'. 'Repairs', though a term of wider scope, yet cannot extend beyond that of the term itself. A repair, by definition, is toward the maintenance and preservation of an 'existing' asset. Surely, the advantage or asset, in terms of its functional utility and capacity for the business, needs to be maintained, so that expenditure for retaining the same is essentially revenue expenditure, which, again, by definition, does not lead to or result in an enhancement or improvement. The premises in the instant case was admittedly not in use for a long time and, thus, in a dysfunctional, if not dilapidated, state prior to it being acquired by the assessee. The expenditure stands thus incurred on refurbishment and renovation of an old premises, in an inoperable state, so as to make it fit for use. It is therefore wrong to classify or describe it as 'repairs'. The expenditure was incurred to render it in a functional state and, therefore, is clearly in the capital field. Could, one may ask by way of a test, the answer be any different if the same was acquired on own account? The ingredients and prerequisites of a capital expenditure would remain the same, and not undergo any change depending on the object matter of the expenditure, i.e., whether an owned or leased premises, and which itself is the premise of Explanation 1 to section 32(1)(ii), invoked by the Revenue On the termination or expiry of the lease or rent arrangement, leading to the vacation of the premises, the assessee would continue to be entitled to claim deduction on the written down value (WDV) of the relevant block of assets, subject to the adjustment in respect of 'moneys payable', if any, as explained by the Tribunal in Metro Exporters Pvt. Ltd. (in ITA No. 7315/Mum/2012 dated 30-9-2014, as modified by its' further order dated 30-1-2015). Reliance by the assessee on the decision in the case of *CIT v. Hi Line Pens (P.) Ltd. [2008] 306 ITR 182 (Del.)* is misplaced. (AY. 2009-10)

Vardhman Development Ltd. v. ITO (2015) 38 ITR 512 / 68 SOT 107 (URO)(Mum.)(Trib.)

Section 32 : Depreciation.

S.32 : Depreciation – Intangible assets – Commercial agreements even prior to the insertion of "intangible assets" in s. 32, intellectual property rights such as trademarks, copyrights and know-how constitute "plant" for purposes of depreciation. The department is not entitled to rewrite the terms of a commercial agreement. [S. 35A, 35AB, 43(3)] 468

The Supreme Court had to consider whether in AY 1995-96, when s. 32 did not make any distinction between tangible and intangible assets, the assessee was entitled to any benefit under Section 32 of the Act read with Section 43(3) thereof for the expenditure incurred on the acquisition of trademarks, copyrights and know-how. HELD by the Supreme Court upholding the claim:

(i) The definition of 'plant' in Section 43(3) of the Act is inclusive. A similar definition occurring in Section 10(5) of the Income-tax Act, 1922 was considered in *Commissioner of Income Tax v. Taj Mahal Hotel (1971) 3 SCC 550* wherein it was held that the word 'plant' must be given a wide meaning. The question is, would intellectual property such as trademarks, copyrights and know-how come within the definition of 'plant' in the 'sense which people conversant with the subject-matter with which the statute is dealing, would attribute to it'? In our opinion, this must be answered in the affirmative for the reason that there can be no doubt that for the purposes of a large business, control over intellectual property rights such as brand name, trademark etc. are absolutely necessary. Moreover, the acquisition of such rights and know-how is acquisition of a capital nature, more particularly in the case of the assessee. Therefore, it cannot be doubted that so far as the assessee is concerned, the trademarks, copyrights and know-how acquired by it would come within the definition of 'plant' being commercially necessary and essential as understood by those dealing with direct taxes.

(ii) Section 32 of the Act as it stood at the relevant time did not make any distinction between tangible and intangible assets for the purposes of depreciation. The distinction came in by way of an amendment after the assessment year that we are concerned with. That being the position, the Assessee is entitled to the benefit of depreciation on plant (that is on trademarks, copyrights and know-how) in terms of Section 32 of the Act as it was at the relevant time. We are, therefore, in agreement with the view taken by the Tribunal in this regard that the Assessee would be entitled to the benefit of Section 32 of the Act read with Section 43(3) thereof;

(iii) The Act does not clothe the taxing authorities with any power or jurisdiction to rewrite the terms of the agreement arrived at between the parties with each other at arm's length and with no allegation of any collusion between them. 'The commercial expediency of the contract is to be adjudged by the contracting parties as to its terms.

(iv) There is a clear finding of fact by the Tribunal that the legal expenses incurred by the Assessee were for protecting its business and that the expenses were incurred after 18th November, 1994. There is no reason to reverse this finding of fact particularly since nothing has been shown to us to conclude that the finding of fact was perverse in any manner whatsoever. That apart, if the finding of fact arrived at by the Tribunal were to be set aside, a specific question regarding a perverse finding of fact ought to have been framed by the High Court. The Revenue did not seek the framing of any such question. The High Court was not justified in upsetting a finding of fact arrived at by the Tribunal, particularly in the absence of a substantial question of law being framed in this regard.(AY.1995-96)

Mangalore Ganesh Beedi Works v. CIT (2015) 378 ITR 640 / 280 CTR 521 / 126 DTR 233 (SC)

469 **S.32 : Depreciation – Plant – Prawn ponds – The "functional" test has to be applied to determine whether an asset is "plant". Even a pond designed for rearing prawns can be "plant".**

(i) Applying the 'functional test', since the ponds were specially designed for rearing/ breeding of the prawns, they have to be treated as tools of the business of the assessee and the depreciation was admissible on these ponds.

(ii) In *Commissioner of Income Tax v. Anand Theatres 224 ITR 192* it was held that except in exceptional cases, the building in which the plant is situated must be distinguished from the plant and that, therefore, the assessee's generating station building was not to be treated as a plant for the purposes of investment allowance. It is difficult to read the judgment in the case of Anand Theatres so broadly. The question before the court was whether a building that was used as a hotel or a cinema theatre could be given depreciation on the basis that it was a "plant" and it was in relation to that question that the court considered a host of authorities of this country and England and came to the conclusion that a building which was used as a hotel or cinema theatre could not be given depreciation on the basis that it was a plant. We must add that the Court said, "To differentiate a building for grant of additional depreciation by holding it to be a plant in one case where a building is specially designed and constructed with some special features to attract the customers and the building not so constructed but used for the same purpose, namely, as a hotel or theatre would be unreasonable." This observation is, in our view, limited to buildings that are used for the purposes of hotels or cinema theatres and will not always apply otherwise. The question, basically, is a question of fact, and where it is found as a fact that a building has been so planned and constructed as to serve an assessee's special technical requirements, it will qualify to be treated as a plant for the purposes of investment allowance

ACIT v. Victory Aqua Farm Ltd. (2015) 379 ITR 335 / 280 CTR 32 / 125 DTR 117 / 234 Taxman 593 (SC)

Editorial: From the judgment, CIT v. Victory Acqa Farm Ltd. (2003) 182 CTR 193 (Ker.)(HC) / CIT v. Victory Aqua Farm Ltd. (2004) 192 CTR 593 (Ker.)(HC)

S.32 : Depreciation – Sale and lease back – Sham transaction – On facts the depreciation was held to be not allowable – No question of law. 470

Assessee is said to have purchased a machinery from APSEB and leased the same to the latter itself. All the authorities below have found as a fact that there was no such purchase of machinery and the transaction in question is a sham and hence disallowed the depreciation. On appeal dismissing the appeal of assessee the Court held that finding recorded by the authorities being pure finding of fact no question of law arises.(AY. 1996-97)

Avasarala Technologies Ltd. v. JCIT (2015) 373 ITR 34 / 278 CTR 111 / 120 DTR 309(SC)

Editorial: Refer, Avasarala Technologies Ltd v. JCIT (2003) 185 CTR 402 / (2004) 266 ITR 178 (Karn.)(HC)

S.32 : Depreciation – Gas Cylinders – Manufacturing business – Lease – Lease income is assessed as business income – Entitle to depreciation. 471

The assessee purchased the Cylinders, since the manufacturing unit had not started function, assessee leased out the gas cylinders to two parties to enable some income. The income was assessed as business income. The Assessing Officer disallowed the depreciation on the ground that the gas cylinders were not purchased for leasing business. Disallowance was confirmed by High Court. On appeal allowing the depreciation the Court held that the assessee has proved ownership of gas cylinders

and use of gas cylinders for business purposes. Once these ingredients are proved, the assessee was entitled to depreciation. (AY. 1986-87)

K. M. Sugar Mills Ltd. v. CIT (2015) 373 ITR 42 / 231 Taxman 245 / 278 CTR 100 (SC)

Editorial: Decision in K. M. Sugar Mills Ltd v. CIT (2003) 262 ITR 70 / 184 CTR 100 (All)(HC) is reversed.

472 **S.32 : Depreciation – Unaborbed depreciation and unabsorbed investment allowance – Carry forward and set off – Priorities in matter of set off – The assessee has the right to disclaim depreciation in its entirety – However, it cannot claim depreciation for the current year and disclaim unabsorbed depreciation – Situation distinguished from case where no depreciation claimed at all. [S. 32(2), 34, 72, 73]**

The assessee claimed the depreciation allowance insofar as it pertained to the current year. At the same time, it did not want to claim the set off of the unabsorbed depreciation allowance of the previous years. The Supreme Court had to consider whether it is open to the assessee to invoke the provisions of Section 32 of the Act by claiming depreciation of the current year, but at the same time choose not to make a claim of set off of unabsorbed depreciation allowance of the previous years. HELD by the Supreme Court rejecting the plea. Where the assessee has not claimed depreciation, the position mentioned in *CIT v. Mahendra Mills (2000) 243 ITR 56 (SC)* would follow. (AY. 1991-92, 1992-93)

Seshasayee Paper & Boards Ltd. v. CIT (2015) 374 ITR 619 / 119 DTR 361 / 277 CTR 448 / 232 Taxman 168 (SC)

Madras Oxygen and Acetylene Co. Ltd v. CIT (2015) 374 ITR 619 (SC)

Editorial : Decision in Seshasayee Paper & Boards Ltd. v. Dy. CIT (2005) 272 ITR 165 / 193 CTR 641 / 144 Taxman 812 (Mad.)(HC) is affirmed on different grounds.

473 **S.32 : Depreciation – Additional depreciation – Report of accountant was not filed along with return but was filed during assessment proceedings – Entitled to additional depreciation. [S.32(1)(iia), Rule 5A, Form 3AA]**

Dismissing the appeal of revenue, the Court held that though the report of accountant to be filed in Form 3AA was not filed with return but during assessment proceedings before order was passed was held to be sufficient compliance and the assessee was held to be entitled to additional depreciation. (AY.2005-06)

CIT v. G.M. Knitting Industries (P) Ltd. (2015) 376 ITR 456 / 279 CTR 534 (SC)

CIT v. AKS Alloys (P) Ltd. (2015) 376 ITR 456 (SC)

Editorial : Decision of Bombay High Court in CIT v. Shivanand Electronics (1994) 2009 ITR 63 / 279 CTR 534 (Bom.)(HC) was affirmed.

474 **S.32 : Depreciation – Manufacture – Embroidery work on synthetic fabrics – Entitle to additional depreciation. [S.2(29BA)]**

Dismissing the appeal of revenue the Court held that, the assessee carries on embroidery work on synthetic fabrics. When the assessee carries on embroidery work on the synthetic fabric, such synthetic fabric is converted into a new article, viz. embroidered synthetic fabric which is commercially known as another article. The nature of the article produced would depend upon the kind of embroidery carried out

on the synthetic cloth. The ultimate article produced may be an embroidered saree or an embroidered dress material or some other article. Therefore, there would be a transformation in the basic synthetic fabric on which embroidery has been carried out resulting into a new article which is commercially known as another article. Under the circumstances, the work of embroidery carried on by the assessee would fall within the ambit of definition of manufacture as envisaged under section 2(29BA). Therefore, the assessee was entitled to avail of the additional depreciation in relation to the machinery installed. (AY. 2008-09)
PCIT v. Vijay Pataka Synthetics (2015) 235 Taxman 323 (Guj.)(HC)

S.32 : Depreciation – Accrued liability – Gratuity and leave salary payable to workers – Not eligible depreciation. 475
Assessee acquired fixed assets like land, building and also plant and machinery by paying price partly in cash and partly by way of taking over accrued liability in respect of gratuity and leave salary payable to workers. It claimed depreciation on such assets by adding value of taken over accrued liabilities in cost of acquisition. Assessing Officer disallowed the depreciation. On appeal, the Tribunal directed the Assessing Officer to allow the claim of the assessee towards depreciation on the fixed assets acquired by it by considering the present day value of the gratuity as well as the leave salary liability as forming part of the cost of these assets. On appeal by revenue; allowing the appeal the Court held that accrued liability is neither a building, machinery, plant or furniture nor is it an intangible asset of kind mentioned in section 32(1)(ii) and, therefore, no depreciation could be claimed in respect of such accrued liability.
CIT v. Hooghly Mills Ltd. (2015) 234 Taxman 625 (Cal.)(HC)

S.32 : Depreciation – Commercial right – Though termed as goodwill, what was actually parted with by company 'S' was a commercial rights – Depreciation was allowed. 476
Assessee-company acquired shares of company 'S'. Apart from paying consideration, as per terms of agreement, assessee had also to pay specific amount to transferor to get commercial right for marketing, customer support, distribution and associate set ups; otherwise such market/customer network would not have been transferred to assessee-company by company 'S'. Tribunal allowed the claim of depreciation on commercial right. Dismissing the appeal of revenue the Court held that in present case, though termed as goodwill, what was actually parted with by company 'S' was a commercial rights, i.e., exclusivity to market/customer network; depreciation was to be allowed on same. (AY. 2006-07)
CIT v. Bharti Teletech Ltd. (2015) 233 Taxman 238 / 278 CTR 339 (Delhi)(HC)

S.32 : Depreciation – Block of assets – Even assets installed in a discontinued business are eligible for depreciation as part of 'block of assets' [S. 2(11) 43(6)] 477
On appeal by the department to the High Court HELD dismissing the appeal; Once the concept of block of assets was brought into effect from assessment year 1989-90 onwards then the aggregate of written down value of all the assets in the block at the beginning of the previous year along with additions made to the assets in the subject Assessment Year depreciation is allowable. The individual asset loses its identity for

purposes of depreciation and the user test is to be satisfied at the time the purchased Machinery becomes a part of the block of assets for the first time (ITA No. 2088 of 2013. Dt. 17.11.2015) (AY.2005-06)
CIT v. Sonic Biochem Extraction Pvt. Ltd. (Bom.)(HC); www.itatonline.org

478 **S.32 : Depreciation – Wind mills – Cost of wind mill – Disallowance of depreciation on alleged inflation of cost is held to be not justified.**
The assessee had claimed 100 per cent depreciation on 12 wind mills. Assessing Officer disallowed said claim holding that cost of wind mills were inflated by ₹ 1 crore per windmill. Tribunal, allowed assessee's claim. Dismissing the appeal of revenue, the Court held that the Tribunal had considered statement of comparable cases produced by assessee and concluded that payment made by assessee was certainly not inflated. It was also found that Assessing Officer had merely proceeded on basis of a presumption that cost of each wind mill was inflated but it had not been proved by documentary evidence, in view of aforesaid, Tribunal was justified in allowing assessee's claim. (AY. 2002-03 to 2006-07)
CIT v. Karma Energy Ltd. (2015) 375 ITR 264 / 232 Taxman 496 (Bom.)(HC.)

479 **S.32 : Depreciation – Functional test – Centering /Shuttering material – 100% depreciation is not eligible.**
Allowing the appeal of revenue the Court held that shuttering /Centering is undoubtedly a plant, but its components which cannot be put to use in the business independently cannot be treated as plant; hence the assessee was not entitled to claim 100 per cent depreciation under section 32(1), proviso, on centering/shuttering material. (AY.1991-92)
CIT v. S. Vijay Kumar (2015) 376 ITR 226 / 278 CTR 265 / 233 Taxman 132 / 122 DTR 81 (FB)(AP&T)(HC)

480 **S.32 : Depreciation – Consideration paid and accounted for as goodwill – Entitle to claim depreciation.**
Assessee is entitled to claim depreciation on consideration paid for acquisition of good will. (AY. 2006-07 to 2009-10)
CIT v. RFCL Ltd. (2015) 119 DTR 65 / 277 CTR 272 / 57 taxmann.com 17 (HP)(HC)

481 **S.32 : Depreciation – Building – Const of construction – Amount paid to State Government to prevent acquisition of land – Not entitled to depreciation. [Maharashtra Housing and Area Development Act, 1976, S. 20, 41]**
Amount paid to State Government to prevent acquisition of land is not part of construction hence the assessee was not entitled to depreciation. The amount was paid under Maharashtra Housing and Area Development Act, 1976, to grant exemption. (AY.1990-91)
Sandvik Asia Limited v. DCIT (2015) 378 ITR 114 / 281 CTR 61 / 124 DTR 97 (Bom.)(HC)

S.32 : Depreciation – Optional – Chapter VIA – Prior to insertion of Explanation 5 to section 32(1) – Depreciation being optional, cannot be allowed by Assessing Officer while computing income where it is not claimed by assessee.[S.29] 482

The assessee had filed its return for the assessment year. The return was processed and the Assessing Officer allowed full depreciation which was not claimed by the assessee while computing the income. On appeal, the Commissioner (Appeals) allowed the appeal of the assessee. On Second Appeal, the revenue's stand was partly allowed. On appeal by assessee allowing the appeal the Court held that in *Dy. CIT (Asst.) v. Sun Pharmaceuticals Ind. Ltd. [Tax Appeal No. 93 of 2000]* it was observed Gujarat High Court in the case of *CIT v. Arun Textiles [1991] 192 ITR 700*, stated that nothing in the provisions of section 32(1), read with section 29 indicated that even when no claim is made for allowing deduction in respect of the depreciation, the Income-tax Officer is bound to allow a deduction. Under the scheme of the Act, income is to be charged regardless of depreciation on the value of the assets and it is only by way on an exception that section 32(1) grants an allowance in respect of depreciation on the value of the capital assets enumerated therein. Therefore, the assessee could clearly state that it does not want to compute depreciation on the assets and wants no benefit of claiming any depreciation in respect thereof. Hence, depreciation is optional to the assessee and once he chooses not to claim it, the Assessing Officer cannot allow it while computing the income. Further, once the depreciation is optional, block of assets would also be optional. The Tribunal was not right in holding that depreciation, whether claimed or not, has to be foisted upon the assessee even prior to insertion of Explanation 5 to section 32(1) of the Act while calculating deduction under Chapter VI-A of the Act.
Sakun Polymers Ltd. v. Jt. CIT (2015) 231 Taxman 532 (Guj.)(HC)

S.32 : Depreciation – Actual cost – Written down value – Customs duty paid in a later year can be capitalized in the year the obligation to pay the duty arose – Question whether it can be capitalized in year of import of the goods left open. 483

The assessee imported hospital equipment valued at ₹ 2,75,11,988 during the years 1988-89 and 1992-93, without payment of custom duty, on the basis of a customs duty exemption certificate ('CDEC') issued by the Director General of Health Services ('DGHS'). The equipment thus imported was capitalized by the Assessee on the actual value of the equipment paid by it. Depreciation was being claimed on the said equipment from year to year at the prescribed rate as per the Act. Subsequently, the DGHS noted that the assessee had failed to fulfil the essential condition stipulated in the relevant notification of the Customs Department dated 1st March, 1968 for retaining CDECs for import of hospital equipments. Accordingly, the CDEC granted to the Assessee stood withdrawn. In AY 2005-06, upon such withdrawal, the Customs authorities raised a demand of ₹ 1,10,04,795 (reduced from ₹ 3,78,66,864) as custom duty on the Assessee for the import of equipment in the aforementioned years. In AY 2009-10, the assessee treated the said payment as 'new' plant and machinery and claimed 100% depreciation on it. The Tribunal allowed the claim. On appeal by the department to the High Court HELD dismissing the appeal:
The central question is whether the obligation to pay customs duty related back to the actual date of payment of customs duty or the date of import of the equipment

and whether the said customs duty paid in the previous year relevant to the AY in question can be capitalized with reference to an earlier year. In Funskool (India) Limited (2007) 294 ITR 642 (Mad.) the question was whether depreciation could be claimed on the additional customs duty paid in the previous year relevant to the AY in question although such customs duty was in respect of machinery that was imported and installed in an earlier year. That question was answered in the affirmative by the Madras High Court by following the judgment of the Gujarat High Court in *Atlas Radio and Electronics P. Limited v. Commissioner of Income Tax (1994) 207 ITR 329 (Guj.)* in which it was held that even though the sales tax was paid in a subsequent year, the liability to pay sales tax arose in the accounting period relevant to the assessment year in which the machinery was purchased. It was held on the facts of that case that the development rebate had to be claimed in the AY in which the machinery was purchased. Following the above decision of the Madras High Court in Funskool (India) Limited (supra), we are of the view that in the instant case, the AO erred in disallowing the capitalization of the additional customs duty in the manner claimed by the assessee and adding the entire customs duty paid in the relevant AY to the income of the assessee. The impugned order of the ITAT affirming the decision of the CIT(A) that the enhanced cost of equipment should be taken into consideration from AY 2005-06 onwards and that the WDV should be reworked for the AY in question does not call for interference. However, as the assessee has not preferred an appeal against the rejection of its cross-objection by the ITAT, the question whether the assessee would be entitled to claim deprecation on the customs duty paid from the year of actual import of equipment is not considered but left open for decision in an appropriate case.(AY. 2009-10)
CIT v. Noida Medicare Centre Ltd. (2015) 378 ITR 65 (Delhi)(HC)

484 **S.32 : Depreciation – Tubewell – Plant and machinery – Entitled to depreciation.**
In assessee's own case the court had allowed depreciation on tubewell treating it as plant and machinery. Therefore, the assessee was entitled to depreciation on tubewell. (AY. 1991-92)
CIT v. Dhampur Sugar Mills P. Ltd. (2015) 375 ITR 296 (All.)(HC)

485 **S.32 : Depreciation Manufacturing – Entitled to depreciation – Question of fact.**
Dismissing the appeal of revenue that in view of the concurrent findings of the Commissioner (Appeals) and the Tribunal that in fact the N unit actually functioned during the relevant year, the depreciation was correctly allowed. (AY. 1994-95, 1995-96)
CIT v. Tony Electronics Ltd. (2015) 375 ITR 431 / 128 DTR 281 (Delhi)(HC)

486 **S.32 : Depreciation – Wind mill – Additional depreciation is eligible. [S. 32(1)(iiA)]**
Core business of manufacture and export of textile goods. Assessee entering into business of generation of power and installing wind mill. Assessee maintaining separate books of account for export division and wind mill division. Production of textiles and export nothing to do with generation of power. Assessee entitled to additional depreciation on wind mill. (AY 2005-06, 2006-07)
CIT v. Atlas Exports Enterprise (2015) 373 ITR 414 / 231 Taxman 804 (Mad.)(HC)

S.32 : Depreciation – Intangible assets – Goodwill – Depreciation is admissible. 487
Goodwill as also list of stockist agreements, distribution agreements, lease agreements and also distribution and marketing agreements along with list of licences and permissions and list of various products, the name licence and also manufacturing know-how etc along with list of employees are eligible assets, entitled to depreciation. (AY. 2006-07 to 2009-10)
CIT v. RFCL Ltd. (2015) 119 DTR 65 / 277 CTR 272 (HP)(HC)

S.32 : Depreciation – Licensee – A licensee who is in full control of the building and can exercise the rights of the owner in his own right is entitled to depreciation including depreciation on the plumbing and sanitaryware installed therein. 488
Dismissing the appeal of revenue the Court held that (i) Explanation (1) to Section 32 of the Act also acknowledges that depreciation would be claimed by assessee who carries on business "in a building not owned by him but in respect of which the assessee holds a lease or other right of occupancy and any capital expenditure is incurred by the assessee for the purposes of the business or profession on the construction of any structure or doing of any work or in relation to……. the building." In such event, Section 32 (1) would apply "as if the said structure or work is a building owned by the assessee".
(ii) In any event even for the period earlier than 1st April, 1988, in view of the decision in Supreme Court in *Commissioner of Income Tax v. Podar Cement Private Limited (1997) 226 ITR 625* and *Mysore Minerals v. CIT 106 Taxman 166* the legal position is no longer *res integra*. In Podar Cement Private Limited the Supreme Court was called upon to consider whether the income derived by the assessee on the flat or the building were income from other sources and not income from the house property. The Court in that context considered the words "owner" and accepted that this would include "that person who can exercise the rights of the owner, and not on behalf of the owner but in his own right." In Mysore Minerals (supra), the Supreme Court explained that "the very concept of depreciation suggests that the tax benefit on account of depreciation legitimately belongs to one who has invested in the capital asset, is utilizing the capital asset and thereby losing gradually investment caused by wear and tear, and would need to replace the same by having lost its value fully over a period of time." On the facts of the case, although the appellant-assessee had only paid part of the price of the buildings in question to the Housing Board, and although the document of title had not yet been executed in its favour, the Court was of the view that the assessee would be entitled to depreciation.
(iii) The Court is satisfied that the during the AYs in question assessee was indeed in full control of the three buildings, viz., the hotel building, the WTT and WTC and that in any event, notwithstanding the clarificatory amendment inserted as Explanation No. 1 in Section 32 with effect from 1st April 1988, the assessee would be entitled to claim depreciation in respect thereof, including depreciation on the plumbing and sanitary ware installed therein. (AY. 1989-90 to 1993-94)
CIT v. Bharat Hotels (2016) 380 ITR 552 / (2015) 123 DTR 281 (Delhi)(HC)

489 **S.32 : Depreciation – Shuttering material – Each item of shuttering material costing less than five thousand rupees – Entitled to 100 per cent depreciation.**
Held, dismissing the appeal, that the "irreducible minimum" for the shuttering material were the individual plates, for providing support to the reinforced concrete and cement or the poles and bars that are used at the time of formation. The assessee was entitled to 100 per cent depreciation.(AY. 1995-96)
CIT v. Live Well Home Finance P. Ltd. (2015) 373 ITR 188 (T&AP)(HC)

490 **S.32 : Depreciation – Unabsorbed depreciation – Set-off – Tribunal to decide whether capital gains arising out of sale of depreciable assets could be set off against business profits for AY 1999-2000 – Matter remanded.[S. 32(2), 50]**
The assessee set off unabsorbed depreciation loss against capital gain arising out of sale of depreciable assets. The Tribunal constituted special bench which observed that the unabsorbed depreciation relates to A.Y. 1997-98 and the business is still continuing. The Special bench of Tribunal held that unabsorbed depreciation cannot be set off against capital gains in A.Y. 1999-2000 and the assessee can only claim carry forward of unabsorbed depreciation for six more assessment years to be adjusted against the profits and gains from the same business from which the depreciation claim arose as per the provisions of section 32(2)(iii). On appeal, the HC held that the Tribunal had not considered section 32(2)(iii)(a) while passing its order, and hence remanded back the order to the Tribunal to decide afresh. (AY. 1999-2000)
Southern Travels v. ACIT (2015) 117 DTR 335 / 232 Taxman 689 (Mad.)(HC)

491 **S.32 : Depreciation – Additional – Generation of power – Entitled to additional depreciation.[S. 32(1)(iia)]**
Assessee is using plant and machinery for purpose of generation of power necessary for its business of manufacture and production of sponge iron ingots and billets. Assessee claimed additional depreciation, which was allowed by the Tribunal. On appeal by revenue dismissing the appeal the Court held that there was no dispute on facts regarding the assessee acquired the plant and machinery for the purpose of power necessary for the production of the items it manufactures. The assessee having satisfied those conditions was entitled to claim the additional depreciation as provided by clause (iia) irrespective of its original claim for depreciation having made under clause (i) of section 32(1). (AY. 2008-09)
CIT v. Ankit Metal and Power Ltd. (2015) 372 ITR 660 (Cal.)(HC)

492 **S.32 : Depreciation – Gas cylinder – 100% depreciation – Block of asset – Each Cylinder is Less than 5000 – Less than 180 days – Depreciation is allowable at 100%. [S. 2(11)]**
The assessee-agency was involved in the supply of gas cylinders and allied activity. The assessee filed its return claiming 100 per cent depreciation on value of cylinders. The assessee claimed that the value of each cylinder was less than ₹ 5000 and in terms of first proviso to section 32 it was entitled to claim depreciation. The revenue authorities however, applied third proviso to section 32 and finding that the cylinders were kept to use for less than 180 days, only 50 per cent depreciation was allowed. The Tribunal,

however, allowed the assessee's claim. On revenue's appeal, the Court held that once an asset is covered by first proviso to section 32, it cannot be subject to any other test including one stipulated under third proviso to section 32, therefore, where an article i.e. gas cylinder, whose cost was less than ₹ 5000, it could not form part of block of assets and depreciation thereon could not be subject to any test as to extent of use as specified in third proviso to section 32. The appeals are dismissed. (AY. 1993-94, 1994-95)
CIT v. PKL Ltd. (2015) 230 Taxman 80 (AP)(HC)

S.32 : Depreciation – Hotel and restaurant – Electrical installations and sanitary fittings should be regarded as plant – Entitled to depreciation at 25%. 493
The assessee firm was engaged in the business of hotel and restaurant. The Assessing Officer noticed that the assessee had claimed expenditure spent on electrical installations such as glow signboard and hoardings as capital expenditure and claimed depreciation. The Assessing Officer treated the installations of glow signboard and hoardings as electric fittings and allowed depreciation at the rate of 15 per cent. On appeal, the Commissioner (Appeals) held said installations as part of plant and allowed depreciation at the rate of 25 per cent. On Revenue's appeal, the Tribunal upheld the order of the Commissioner (Appeals). On appeal by Revenue dismissing the appeal of Revenue the Court held that Electrical installations and sanitary fittings should be regarded as plant for purpose of depreciation in scheme of section 32; merely because they were installed in a building used as a hotel would not render those fittings depreciable in same manner as building itself. These items were entitled to depreciation at rate of 25 per cent. (AY. 2002-03)
CIT v. Express Resorts & Hotels Ltd. (2015) 230 Taxman 424 (Guj.)(HC)

S.32 : Depreciation – Trial run – 'used' – Entitled depreciation. 494
Section 32 does not contemplate that manufacturing or production should have actually commenced nor does it contemplate that assets should be used for whole of assessment year. Depreciation on machinery would be allowed where machinery was installed before end of financial year and used only for trial run, though not for production.(AY. 1987-88)
CIT v. Escorts Tractors Ltd. (2015) 230 Taxman 584 (Delhi)(HC)

S.32 : Depreciation – Hundred per cent – Energy saving equipment – No substantial question of law.[S.260A] 495
Assessee claiming certain items as energy saving equipment. Commissioner allowing two items. Tribunal finding Commissioner (Appeals) view correct on facts. Finding of fact. No substantial question of law.
Autolec Industries Ltd. v. JCIT (2015) 231 Taxman 81 / 373 ITR 501 (Mad.)(HC)

S.32 : Depreciation – Charitable institution – Capital asset – Depreciation has to be deducted.[S. 11] 496
The assessee, a charitable institution claimed depreciation on capital assets for which capital expenditure had already been allowed in relevant assessment year. The AO however, disallowed said claim made by the AO.

On appeal, the CIT(A) affirmed the order of the AO. On further appeal, the Tribunal allowed the appeal made by the assessee. On appeal High Court affirmed the order of Tribunal.
CIT v. Krishi Upaj Mandi Samiti (2015) 229 Taxman 524 (Raj.)(HC)

497 **S.32 : Depreciation – Estimate of net profit rate – Depreciation is allowable.[S.145]**
Depreciation is allowable from net profits even if total income is calculated by applying net profit rate.(AY. 1990-91)
Lali Construction Co. v. ACIT (2015) 229 Taxman 286 (P&H) (HC)

498 **S.32 : Depreciation – Block of assets – Assessee purchasing assets for its employees' benefit – Assessee as part of its emolument policy reimbursing expenses incurred by employees – Reimbursement only to extent of employees' entitlement – Individual identity of asset lost in block – Expenses not personal to assessee's employees –Entitled to depreciation. [S.2(11)]**
Dismissing the appeal of revenue the Court held that the Revenue did not dispute the Tribunal's finding that as part of its emolument policy, the assessee reimbursed the expenses incurred by its employees on purchase of furnishings. Such reimbursements were made by the assessee to the employees only to the extent of their entitlement (determined on the basis of their grade or level in terms of their appointment letters). These expenses could not be, therefore, termed as personal to the assessee's employees but were for its business purposes. The assessee was entitled to depreciation.(AY. 2002-03 to 2008-09)
CIT v. Yum Restaurants (I) Pvt. Ltd. (2015) 371 ITR 139 / 115 DTR 129 / 231 Taxman 691 (Delhi)(HC)

499 **S.32 : Depreciation – Capital asset – Depreciation on capital assets would be allowed as deduction-Position prior to 1-4-2015. [S.11]**
Depreciation on capital assets would be allowed as deduction in computing income under section 11.
CIT v. Lilavati Kirtilal Mehta Medical Trust (2015) 229 Taxman 276 (Bom.)(HC)

500 **S.32 : Depreciation – Remission or cessation of trading liability – Depreciation granted earlier could not be withdrawn and taxed as income under section 41(1) [S.41(1)]**
Following order passed by Supreme Court in case of *Nector Beverages (P.) Ltd. v. Dy. CIT [2009] 314 ITR 314 (SC)*, Tribunal was not justified in holding that depreciation granted earlier could be withdrawn and taxed as in-come under section 41(1) (AY. 1993-94)
Gujarat Narmada Vally Fertilisers Ltd. v. DY. CIT (2015) 229 Taxman 270 (Guj.)(HC)

501 **S.32 : Depreciation – Amortisation of preliminary expenses – Share issue expenses – Expenditure allowable u/s. 35D cannot be capitalized to asset for claim of depreciation.[S.35D]**
The assessee issued 6,25,000 equity shares of ₹10/- each. The increase in the share capital was for setting up an unit for the manufacture of computer and OEM peripheral manufacturing project. For the issue of shares, the assessee had incurred expenses of

₹14,21,276 under different heads like financial consultancy, managerial fees, legal fees, underwriting commission, advertisement, issue house expenses, printing charges etc. Out of total expenditure of ₹14,21,276/-, the assessee capitalised a sum of ₹ 29,668/- on plant & machinery and factory equipment and ₹ 9,79,438/- on the work-in-progress. The balance sum of ₹4,12,170 was treated as preliminary expenses and on these expenses had claimed relief under Section 35D of the Act. On the capitalised amount of ₹ 29,668/-, the assessee claimed depreciation of ₹ 4,203/- in the said Assessment Year. The applicant justified the claim for depreciation on the ground that these amounts which were capitalised represented expenditure incurred in raising finance for the acquisition of and/or for brining into existence capital assets and thus formed part of the cost of fixed assets. In support of its claim for depreciation under Section 32 of the Act, the applicant relied upon the decision of the Supreme Court in the case of *Chellapalli Sugars Ltd. v. CIT (1975) 98 ITR 167(SC).* The AO, CIT(A) and Tribunal rejected the claim. On appeal by the assessee to the High Court HELD dismissing the reference:
A plain reading of section 35D indicates that the Legislature has thought it appropriate to give a special benefit to the assessee in respect of expenditure specified in sub-section (2) incurred before commencement of business or after the commencement of business, in connection with the extension of industrial undertaking or in connection with setting up a new industrial unit. This provision allows amortisation of the specific category of expenditures incurred by the assessee, by way of deduction of an amount equal to one-tenth of such expenditure for each of the ten successive previous years as provided therein. The legislature, therefore, having specifically provided for amortisation of the preliminary expenditure which includes expenditure incurred for issuance of shares by the assessee in connection with the issue of shares, the said expenditure on issue of shares is not eligible for depreciation. The decision of the Supreme Court in "*Chellapalli Sugars Ltd. v. CIT* is not applicable in the facts of the present case because the Supreme Court was not dealing with an issue in regard to expenditure incurred by the Assessee in issuing shares and also provisions of Section 35D of the Act was not on the Statute book. In the present case, the assessee having issued shares and incurred expenses on issuance of shares which were sought to be capitalised by the assessee cannot be said to be expenditure incurred for installation of plant and machinery so as to apply the ratio of the decision in "Chellapalli Sugars Ltd." (supra) to the facts of the present case. Moreover, as regards the category of expenditure capitalised by the assessee, the provisions of Section 35D(2)(c)(iii) of the Act were held to be attracted.(AY. 1980-81, 1981-82)
International Computers Indian Manufacture v. CIT (2015) 374 ITR 243 / 276 CTR 57 / 117 DTR 24 / 230 Taxman 428 (Bom.)(HC)

S.32 : Depreciation – Machinery was not put to use – Depreciation was not allowable. 502
Where assessee having purchased machinery from abroad, could not put it to use for business purpose during relevant year, its claim for depreciation in respect of same was rightly rejected. (AY. 1989-90)
CIT v. R.S. Builders & Engineers (P.) Ltd. (2015) 228 Taxman 305 (Mag.)(P&H)(HC)

503 **S.32 : Depreciation – Carry forward of unabsorbed depreciation concerning impugned assessment years could be set off in subsequent years without any set time limit**
Considering judgment given in *General Motors India (P.) Ltd. v. Dy. CIT [2012] 210 Taxman 20 (Mag.)(Guj.)(HC)*, Tribunal held that carry forward of unabsorbed depreciation concerning impugned assessment years could be set off in subsequent years without any set time limit. (AY. 1997-98 to 2001-02)
CIT v. Gujarat Themis Biosyn Ltd. (2015) 228 Taxman 359 (Mag.)(Guj.)(HC)

504 **S.32 : Depreciation – Guest house – Depreciation is not allowable.**
In view of order passed by Supreme Court in case of *Britannia Industries Ltd. v. CIT [2005] 278 ITR 546 (SC)* AO was justified in rejecting assessee's claim for depreciation on guest house. (AY. 1988-89)
CIT v. Arvind Mills Ltd. (2015) 228 Taxman 358 (Mag.)(Guj.)(HC)

505 **S.32 : Depreciation – SEBI registration fee – Intangible asset – Rule of consistency – Depreciation was allowed.**
Assessee had been approved by SEBI to act as Investment Manager of Mutual Funds. Assessee filed its return claiming depreciation in respect of SEBI registration fee. AO rejected assessee's claim. Tribunal held that fees paid to SEBI for registration of Mutual Funds had already been treated as intangible assets and formed part of block of assets of assessee as on 1-4-2004. Tribunal thus, concluded that consistency should have been maintained by granting claim. Revenue filed instant appeal contending that since in a subsequent decision of High Court such claim of depreciation on expenses incurred for securing registration could not be allowed under section 32(1)(ii), a substantial question of law arose from Tribunal's order. Court held that since Tribunal had allowed assessee's claim emphasizing rule of consistency, reliance placed on subsequent judgment of High Court could not carry case of revenue any further. Therefore, revenue's appeal was to be dismissed. (AY. 2004-05)
DIT v. HSBC Asset Management (I) (P.) Ltd. (2015) 228 Taxman 365 (Mag.)(Bom.)

506 **S.32 : Depreciation – Moulds – Machinery was installed in third party premises – Entitled depreciation.**
Assessee was engaged in business of manufacture and trading of pharmaceutical products. Assessee had entered into a contract with a company to manufacture moulds for eye drops manufactured by assessee. For purpose, it had purchased machinery and installed it at premise of said company. Machinery was used by assessee in its business and, thus, it was entitled to depreciation. (AY. 1996-97, 2003-04 to 2005-06)
CIT v. Allergan India (P.) Ltd. (2015) 371 ITR 38 / 228 Taxman 362 (Mag.)(Karn.)(HC)

507 **S.32 : Depreciation – Rate of depreciation – Option exercised in terms of second proviso to rule 5(1A) in return filed under section 139(1) – No separate procedure necessary – Assessee entitled to depreciation on wind mills at 80%.[S.139(1), R.5(IA)]**
If the assessee exercised the option in terms of the second proviso to rule 5(1A) of the Income-tax Rules, 1962, at the time of furnishing of return of income, it will suffice and no separate letter or request or intimation with regard to of exercise of option is

required. Since the returns were filed in accordance with section 139(1), and the form prescribed therein makes a provision for exercising an option in respect of the claim of depreciation, no separate procedure is required. Held, that the assessee was entitled to depreciation at the rate of 80% on wind mills.(AY. 2005-06, 2006-07)
CIT v. ABT Ltd (2015) 370 ITR 159 (Mad.)(HC)

S.32 : Depreciation – Actual cost – Acquisition of entire business including assets and liabilities for a lump sum amount – Valuation of buildings, boundary wall and other plant and machinery as on date of sale done by surveyor relied on by assessee and seller – Determination of actual cost of depreciable assets on basis of valuation report justified. [S.43(1)] 508
The assessee purchased a running undertaking with all assets and liabilities for lumpsum ₹ 6,03,21,910. Relying upon the assessee's surveyor's report, the value of the assets was taken as ₹ 3,50,37,238. Held, there was evidence that the assessee and the seller had evaluated the plant and machinery on the date of the sale. Therefore, the authorities and the Tribunal deemed it appropriate to rely upon the surveyor's report for computing actual cost for the purpose of allowing depreciation. (AY. 1990-91, 1991-92)
DE NORA India Ltd. v. CIT (2015) 370 ITR 391 / 114 DTR 89 / 274 CTR 34 / 57 taxmann.com 32 (Delhi)(HC)

S.32 : Depreciation – Charitable trust – Capital asset – Application of income – Entitled depreciation.[S.11] 509
A charitable institution, which has purchased capital assets and treated amount spent on purchase of capital asset as application of income, is entitled to claim depreciation on same capital asset utilised for business.
DIT(E) v. Indraprastha Cancer Society (2015) 229 Taxman 93 (Delhi)(HC)

S.32 : Depreciation – Semi-conductor – Entitled 40% depreciation. [Income-tax Rules, 1962, Appendix 1, Part A, Item No III(3)(xi)] 510
The assessee is engaged in business of manufacturing of Electronic Circuit Boards (ECB's). Assessee claimed 40% depreciation on semi-conductor as integrated circuits and mounted piezo-electronic crystals which are fixed on the board and they are interconnected to produce the end products. i.e. Electronics Circuit Boards, which are used in watches and therefore can be said to be engaged in semi conductor industry entitled to higher rate of depreciation at 40 per cent. AO restricted the depreciation to 25% only. In appeal CIT(A) and Tribunal allowed the claim of assessee. On appeal by revenue, dismissing the appeal the Court held that the assessee is entitled to depreciation at 40% as claimed by assessee.
CIT v. Titan Time Products Ltd. (2015) 113 DTR 307 273 CTR 479 (Bom.)(HC)

S.32 : Depreciation – User of asset – UPS and computer peripherals – Absence of factual determination by revenue – Plea of the revenue was rejected. 511
In appellate proceedings revenue raised the ground that unless the assessee was able to show that UPS and computer peripherals had been used for more than 180 days in previous year it could have claimed higher depreciation. Dismissing the ground the

Court held that ground raised by revenue based on factual determination, in the absence of any evidence shown by the revenue appeal of revenue was dismissed.(AY. 2008-09 to 2010-11)
CIT v. SMCC Construction India Ltd.(2015) 234 Taxman 14 (Delhi)(HC)

512 **S.32 : Depreciation – Leasing of commercial vehicles – Entitled higher rate of depreciation.**
Where assessee – NBFC was in business of leasing of commercial vehicles and same were given on lease and was treated as given on 'hire' assessee was entitled to higher rate of depreciation. (AY. 2006-07, 2007-08)
SREI Infrastructure of Income-tax v. Addl. CIT (2015) 230 Taxman 1 / 116 DTR 359 / 281 CTR 532 (Delhi)(HC)

513 **S.32 : Depreciation – Vehicles purchased in the names of directors – used for purpose of business – Held assessee to be owner for all practical purposes – Depreciation is allowable.**
The assessee was in the business of providing educational consultancy and assisting the students in overseas education. The AO and CIT(A), disallowed the depreciation on the ground that assessee was not the legal owner of the vehicles. On appeal to Tribunal, following the decision o*f CIT v. Aravali Fin-Lease Ltd. [2012] 341 ITR 282 (Guj.)*, held that assessee should be treated as owner of vehicles for all practical purposes considering the fact that the funds for purchase of vehicles were provided by assessee and they were shown as assets in the books of the assessee. (AY. 2008-09 to 2010-11)
Edwise Consultants P Ltd. v. DCIT (2015) 44 ITR 236 (Mum.)(Trib.)

514 **S.32 : Depreciation – Rate of depreciation – Depreciation on computer peripheral items and software – Depreciation allowable at 60 per cent.**
For the assessment year 2009-10, the assessee claimed depreciation at 60 per cent on computer including printer, scanner and electronic token display system and 60 per cent depreciation on software. The Assessing Officer held that the peripheral item would not fall under the definition of computer and allowed depreciation only at 15 per cent and for the software, he allowed the depreciation at 25 per cent. The Dispute Resolution Panel confirmed this. On appeal the Tribunal held that the depreciation at 60 per cent on printer, scanner and electronic token display system was allowable and also on software 60 per cent depreciation was allowable.(AY.2008-09, 2009-10)
Hapag Lloyd India P. Ltd. v. Dy. CIT (2015) 40 ITR 375 / 169 TTJ 419 / 117 DTR 113 (Mum.)(Trib.)

515 **S.32 : Depreciation – Crane – Held to be allowable.**
In absence of any material to doubt purchase of crane by assessee, depreciation claimed would not be disallowed merely because assessee did not produce any evidence of ownership as well as usage for business purpose. (AY. 2008-09)
Shiv Kumar v. ACIT (2015) 41 ITR 124 / (2016) 156 ITD 660 (Chd.)(Trib.)

S.32 : Depreciation – User of asset – Ready to use – Eligible depreciation. 516
Where machines in multi metal project were not actually used but same were ready to use, depreciation was allowable on said machineries. (AY. 2003-04, 2004-05)
Dy. CIT v. Gujarat Mineral Development Corporation Ltd. (2015) 68 SOT 283 (URO)(Ahd.) (Trib.)

S.32 : Depreciation – Printers, switches net working equipments UPS and pen drives are integral part of computer system – Eligible depreciation at 60%. 517
Tribunal held that Printers, switches, networking equipments, UPS and pen drives are integral part of computer system and, hence, eligible for depreciation at higher rate of 60 per cent (AY. 2007-08, 2008-09)
GE Capital Business Process Management Services (P.) Ltd. v. ACIT (2015) 174 TTJ 834 / (2016) 156 ITD 239 (Delhi)(Trib.)

S.32 : Depreciation – Lease rent – Only interest component was assessed as business income – Not eligible depreciation. [S.28(i)] 518
Where assessee gave buses on lease to State Road Transport Corporation and same was financial transaction, assessee was not entitled to depreciation on said assets and only interest component of lease rent was to be treated as income.(AY. 2003-04, 2004-05)
Dy. CIT v. Gujarat Mineral Development Corporation Ltd. (2015) 68 SOT 283 (URO)(Ahd.) (Trib.)

S.32 : Depreciation – Unabsorbed scientific research expenditure – Matter remanded. [S.35, 79] 519
In order to claim carry forward and set off of unabsorbed scientific research as unabsorbed depreciation it is necessary that scientific research expenditure should have been capitalised and deduction claimed under section 35(1)(iv). Matter remanded.(AY. 2008-09)
Dy. CIT v. Tejas Networks Ltd. (2015) 68 SOT 477 (Bang.)(Trib.)

S.32 : Depreciation – Unabsorbed depreciation has not only to be set off against other heads of income in relevant previous year but where it is carried forward, it stands on exactly same footing as current depreciation.[S. 71] 520
Allowing the appeal of assessee the Tribunal held that Unabsorbed depreciation has not only to be set off against other heads of income in relevant previous year but where it is carried forward, it stands on exactly same footing as current depreciation. (AY. 2007-08)
Sunshield Chemicals Pvt. Ltd. v. ITO (2015) 129 DTR 113 / (2016) 156 ITD 452 / 175 TTJ 129 (Mum.)(Trib.)

S.32 : Depreciation – Personal computers not restricted to number of employees – Restricting the depreciation to extent of number of employees working was held to be not logical. 521
Allowing the claim the Tribunal held that Keeping extra computers for meeting emergent situation of non-functional computer or under repair computer usual practice and software installed on existing computer cannot be treated as excess, therefore restricting

depreciation of software licence to extent of number of employees working not logical. (AY. 2008-09, 2009-10)
Hapag Lloyd India P. Ltd. v. Dy. CIT (2015) 40 ITR 375 / 169 TTJ 419 / 117 DTR 113 (Mum.)(Trib.)

522 **S.32 : Depreciation – Rate of depreciation – Computer peripherals – Depreciation allowable at 60 per cent.**
The assessee claimed depreciation on computer peripherals at 60 per cent which was restricted by the Assessing Officer to 15 per cent. The Commissioner (Appeals), following the decision of the Delhi High Court in *CIT v. BSES Yamuna Powers Ltd. (2013) 358 ITR 47 (Delhi)(HC)* accepted the claim. On appeal by the Department Held, that the assessee was eligible for depreciation at 60 per cent on computer peripherals. (AY. 2006-07 to 2008-09)
ACIT v. HT Media Ltd. (2015) 40 ITR 185 (Delhi)(Trib.)

523 **S.32 : Depreciation – Rate of depreciation – Computer to plate – Eligible depreciation at 60%.**
The assessee claimed depreciation on computer to plate at 60 per cent. The Department rejected this. On appeal: Held, that the computer to plate performs the functions of receiving and processing data ready for printing process. It was nothing but part of machinery used by the assessee in its business of printing press in the factory itself. Computer to plate was otherwise an item of plant and machinery, but, fell under the broader head of "Computers including computer software," which was the subject-matter of item (5) under the broader heading III of Appendix I to the Income-tax Rules, 1962. The assessee was entitled to depreciation on computer to plate at the higher rate, in line with other computer peripherals. (AY. 2006-07 to 2008-09)
ACIT v. HT Media Ltd. (2015) 40 ITR 185 (Delhi)(Trib.)

524 **S.32 : Depreciation – Actual cost – Loss or gain on account of foreign exchange rate fluctuations can be adjusted towards cost of asset only after making payment. [S.43(1)]**
During the previous year, the assessee imported plant and machinery and computers. The assessee capitalised the liability arising on account of fluctuation in rates of foreign exchange as dues payable and claimed depreciation on that amount. The Assessing Officer held that the assessee failed to produce supporting evidence to establish the foreign exchange loss due to fluctuation and the foreign exchange fluctuation was only a notional loss which the assessee had added to the value of the machinery and disallowed the depreciation. The Commissioner (Appeals) confirmed this. On appeal: Held, that no addition or deduction could be made to the cost of the asset on account of notional loss or gain on account of foreign exchange rate fluctuations as the assessee did not make payment during the year. Only when the assessee made payment, could the loss or gain on account of foreign exchange rate fluctuations be adjusted towards cost of the asset. (AY. 2009-10)
K. L. Hitech Secure Print Ltd. v. Jt. CIT (2015) 40 ITR 287 (Hyd.)(Trib.)

S.32 : Depreciation – Proportionate disallowance of depreciation on software licence on the basis of number of employees was held to be not justified. [S.32(1)(i)] 525

The Tribunal held that there is no logic or substance in the directions of the DRP in restricting the depreciation on software licence in proportion to the number of employees working with the assessee, accordingly claim of depreciation is allowable in full. (AY. 2008-09, 2009-10)

Hapag Lloyd India (P) Ltd. v. DCIT (2015) 40 ITR 375 / 169 TTJ 419 / 117 DTR 113 (Mum.)(Trib.)

S.32 : Depreciation – Intangible assets – Acquiring of business – Depreciation is held to be allowable. [S.2(11)] 526

Allowing the appeal the Tribunal held that where assessee acquired a business which included intangible assets such as customer base, list of material suppliers, process know-how, technical manpower for purpose of its two wheeler braking business, section 32(1)(ii) deduction was to be allowed on same. (AY. 2007-08)

Brembo Brake India (P.) Ltd. v. Dy. CIT (2015) 68 SOT 263 (URO)(Pune)(Trib.)

S.32 : Depreciation – Installing machinery for which it required clean rooms, since payment were made by assessee for installation and commissioning of clean rooms, same were in nature of building and not plant. [S. 43(3)] 527

Assessee was engaged in business of manufacturing of pharmaceutical and surgical items. Assessee had installed BFS machinery for which it required clean rooms, expenses regarding clean rooms etc. incurred by assessee were included in value of plant and machinery on which depreciation had been claimed as prescribed for plant and machinery. Assessing Officer allowed the depreciation treating the said room as building. Dismissing the appeal of assessee the Tribunal held that since payments were made by assessee for installation and commissioning of clean rooms, same was to be included within ambit of building and not to be included in ambit of plant. (AY. 2009-10)

Vifor Pharma (P.) Ltd. v. ACIT (2015) 155 ITD 941 (Mum.)(Trib.)

S.32 : Depreciation – Any device used along with computer whose functions are integrated with computer, would come within ambit of expression 'computer', and depreciation is to be allowed at 60 per cent. 528

Assessee-company was engaged in business of publishing of newspapers and satellite television broadcasting. Assessing Officer restricted rate of depreciation at 25 per cent as against 60 per cent claimed by assessee on computers, software and peripherals. Assessee contended that printers, scanners, modems and routers were integral parts of computer systems and without computers, these assets could not function in business of satellite television broadcasting. Tribunal held that any device when used along with computer and whose functions were integrated with computer, would come within ambit of expression 'computer', depreciation was to be allowed at 60 per cent. (AY. 2005-06, 2006-07)

Ushodaya Enterprises Ltd. v. Dy. CIT (2015) 155 ITD 701 / 38 ITR 148 (Hyd.)(Trib.)

529 **S.32 : Depreciation – Goodwill – Eligible depreciation.**
It was held by the Hon'ble Appellate Tribunal that "Goodwill" is an asset under Explanation 3(b) to Section 32(1) of the Act eligible for deprecation. (AY. 2002-03 to 2007-08, 2008-09)
St. Angelo's Computers Ltd. v. ITO (2015) 44 ITR 112 (Mum.)(Trib.)

530 **S.32 : Depreciation – Motor car purchased in director's name for business activities – Entitled to depreciation.**
The assessee purchased a car in the name of its director and claimed depreciation. The ITAT held that depreciation having been allowed in the assessee's own case for the earlier years on the basis of the order of the Tribunal, there was no reason to disallow the depreciation claimed by the assessee.
Dy. CIT v. Kisan Ratilal Choksey Shares and Securities P. Ltd. (2015) 41 ITR 114 (Mum.) (Trib.)

531 **S.32 : Depreciation – Commercial rights – Network support – Entitled to depreciation.**
Payments to transferor who owned commercial rights towards the network and facilities constitute payment for business or commercial right hence entitled to depreciation.(AY. 2006-07)
ACIT v. Bharti Teletech Ltd. (2015) 150 ITD 185 / 163 TTJ 36 / 119 DTR 139 (Delhi)(Trib.)

532 **S.32 : Depreciation – Goodwill – On acquisition of going concern – Depreciation is allowable.**
Assessee would be allowed depreciation on goodwill acquired on acquisition of other concern on going concern basis.(A.Y 2003-04, 2005-06)
Aditya Birla Nuvo Ltd. v. ACIT (2015) 68 SOT 403 (Mum.)(Trib.)

533 **S.32 : Depreciation – Goodwill – One time licence fee – Eligible for depreciation.**
The assessee incurred certain expenditure being one time licence fee paid to the owner for granting to the user and it claimed said expenditure as revenue expenditure. The A.O. disallowed 50 per cent of the same holding that income was obtained for a period of 2 years. CIT(A) disallowed the entire expenditure on the ground that the same was for acquiring of goodwill for 2 years and on which no depreciation could be allowed. The Hon'ble ITAT held that, There is no dispute to the fact that the assessee has incurred expenditure being one time licence fee paid to the owner for granting to the user, the licence to continue to use the trademark as per the name licence agreement. The assessee treated the same as revenue expenditure in the books. The entire amount should be allowed as revenue expenditure. The depreciation should be allowed as it is held to be acquisition of goodwill. It has been held that goodwill under Explanation 3(b) of section 31(2) is eligible for depreciation.(AY. 2003-04)
ACIT v. GKN Sinter Metal (P.) Ltd. (2015) 153 ITD 311 (Pune)(Trib.)

534 **S.32 : Depreciation – Investments held as stock-in-trade – Depreciation on account of valuation of securities allowable.**
The assessee classified its investments under categories as (i) available for sale, (ii) held for trading, and (iii) held to maturity. The assessee claimed depreciation towards

diminution in the value of investment under the "available for sale" and "held for trading" categories. The Assessing Officer held that only the net depreciation was allowable on the securities aggregated scrip-wise and he added back the amount of appreciation. The Commissioner (Appeals) deleted the addition. On appeal:
Held, that all investments held by a bank were to be regarded as stock-in-trade and the depreciation on account of valuation of those securities was an allowable deduction. (AY. 2005-06)
ING Vysya Bank Ltd. v. ACIT (2015) 39 ITR 250 (Bang.)(Trib.)

S.32 : Depreciation – Additional depreciation – Food and beverage business – Manufacture – Entitled additional depreciation.[S.29BA] 535
Assessee engaged in activities of production or manufacture of article or thing and entitled to additional depreciation. (AY. 2009-10)
ACIT v. Gamma Pizzakraft P. Ltd (2015) 39 ITR 567 / 70 SOT 768 (Delhi)(Trib.)

S.32 : Depreciation – Rate – Software and licences – Use of assets for less than 180 days – Depreciation is restricted to 50 per cent. 536
Failure by assessee to bring evidence to show installation of software and payment before September 30, depreciation is restricted to 50 per cent. (AY. 2006-07, 2008-09)
Dy. CIT v. GAC Shipping (India) P. Ltd. (2015) 39 ITR 183 (Cochin)(Trib.)

S.32 : Depreciation – Goodwill – AO was not justified in apportioning certain amount towards acquisition of goodwill and denying depreciation on said amount.[S.43(1)] 537
Assessee company acquired business of magazine and event division of BCCL as an on-going concern on a slum sale basis. On basis of valuation obtained from professionals, certain amount was paid for acquiring intangible assets like trademark and copyright. Assessee claimed depreciation on said amount. AO apportioned the certain amount towards acquisition of goodwill and denied the depreciation on said amount. CIT(A) granted partial relief to assessee. On cross appeals allowing the appeal the Tribunal held that; since depreciation was allowable on goodwill like any other intangible asset, it would not make any difference to segregate various intangible assets for purpose of making disallowance on account of depreciation. Disallowance made by the AO was deleted. (AY. 2005-06 to 2007-08)
Dy. CIT v. Worldwide Media (P.) Ltd. (2015) 30 ITR 181 / 153 ITD 162 (Mum.)(Trib.)

S.32 : Depreciation – Hoardings used for less than 180 days – Tribunal granting 100 per cent depreciation in assessee's own case – Doctrine of *stare decisis* to be followed – Entitled to 100 per cent depreciation. 538
Held, dismissing the appeal, that the issue was decided in favour of the assessee by the Tribunal in the assessee's own case. It was not the case of the assessee that the decision was set aside by the High Court. Adhering to the doctrine of *stare decisis*, the depreciation of 100 per cent was to be allowed.(AY. 2004-05 to 2009-10)
Dy. CIT v. Vantage Advertising P. Ltd. (2015) 39 ITR 240 / 70 SOT 610 (Kol.)(Trib.)

539 **S.32 : Depreciation – Higher rate of depreciation @ 30 per cent – Vehicles – Financial statements showing assessee received income from hiring out vehicles – Higher rate of depreciation to be allowed.**

The assessee undertook contract work for road construction and traded in products of a company I. The assessee claimed depreciation on vehicles at the rate of 30 per cent. The Assessing Officer observed that the assessee having used the vehicles in the business of road construction and trading which were the main business activities of the assessee, it was not entitled to depreciation at the higher rate. The Commissioner (Appeals) confirmed this. On appeal by the assessee :

Held, that the financial statements proved that the assessee had received rental receipts by hiring out its vehicles. Therefore, the assessee was entitled to depreciation at the higher rate of 30 per cent. (AY. 2006-07)

Urmila Enterprises P. Ltd. v. ACIT (2015) 38 ITR 533 (Chennai)(Trib.)

540 **S.32 : Depreciation – Rate of depreciation – Computers – Printers, scanners, modems and routers come within ambit of expression "computer" when used along with computer – Entitled to higher rate of depreciation.**

The assessee was engaged in the business of publishing of newspapers and satellite television broadcasting. The Assessing Officer restricted the rate of depreciation at 25 per cent on computers, software and peripherals. The Commissioner (Appeals) confirmed the order of the Assessing Officer. On appeal, the assessee contended that since the printers, scanners, modems and routers were integral parts of computer systems and without computers, these assets could not function in the business of satellite television broadcasting, depreciation was to be allowed at 60 per cent :

Held, allowing the appeal, that any device, when used along with computer and whose functions were integrated with the computer, would come within the ambit of the expression "computer". The depreciation was to be allowed at 60 per cent. (AY. 2005-06, 2006-07)

Ushodaya Enterprises Ltd. v. Dy. CIT (2015) 155 ITD 701 / 38 ITR 148 (Hyd.)(Trib.)

541 **S.32 : Depreciation – Higher rate of depreciation @ 30 per cent – Using vehicles for transporting goods on hire – Entitled for depreciation at rate of 30 per cent according to CBDT Circular No. 609 dated 29-7-1991.**

Assessee is engaged in the business of transportation of municipal waste. During the impugned assessment year Assessee claimed depreciation at rate of 30 per cent on Vehicles used for commercial purposes. The Assessing Officer allowed depreciation at 15 per cent as against 30 per cent claimed by the Assessee. The Hon'ble Appellate Tribunal held that when there is commercial exploitation of vehicles for transporting goods on hire, the nature of assessee's business fall under ambit of Circular No. 609 dated 29-7-1991. Thus the Assessee is entitled for depreciation at rate of 30 per cent. (A.Y.-2009-10)

C.V. Bhanumurthy Reddy v. DCIT (2015) 67 SOT 154 (URO) / 53 taxmann.com 110 (Bang.)(Trib.)

S.32 : Depreciation – Wind electric generators – Integral part of windmill unit – Entitled to higher rate of depreciation. 542

Dismissing the appeal of the revenue, the Tribunal held that the wind electric generator was an integral part of the wind mill and therefore higher rate of depreciation was allowable. (AY. 2008-09)

Dy. CIT v. Lanco Infratech Ltd. (2015) 37 ITR 95 (Hyd.)(Trib.)

S.32 : Depreciation – Building – Owner of property – Land – No registered sale deed executed in favour of assessee – Assessee in possession of property in his own title – Entitled depreciation – Land – On cost of land no depreciation is allowable. 543

Held, that anyone in possession of property in his own title exercising dominion over the property excluding others therefrom and having the right to use and to occupy the property in his own right would be the owner of building entitled to depreciation for the purpose of section 32(1) of the Act, though a formal deed of title is not executed and registered in favour of the assessee. The Assessing Officer had not denied that the assessee had exercised dominion over the property, and had the right to occupy and to use it. Denial of depreciation allowance for non-execution of the registered sale deed was not sustainable. The assessee was to be treated as the owner of the properties and entitled to depreciation. However, the cost of land included in the amount on which depreciation had been claimed was to be determined and depreciation thereon not allowed. (AY. 1998-99 to 2009-10)

Indian Renewable Energy Development Agency Ltd. v. JCIT (2015) 37 ITR 250 (Delhi) (Trib.)

S.32 : Depreciation – Higher rate – Routers and switches – Entitled higher rate of depreciation. 544

Routers and switches integrated with computers to be treated as computer system which is entitled to higher rate of depreciation. (AY. 2008-09)

Cisco Systems Capital (India) P. Ltd. v. Add. CIT (2015) 37 ITR 343 (Bang.)(Trib.)

S.32 : Depreciation – ITG networking equipment – Included in block of computers – Entitled to higher rate of depreciation. 545

Held, that ITG networking equipment was to be included in the block of computers entitled to depreciation at the rate of 60 per cent. (AY. 2006-07)

Microsoft Corporation India P. Ltd. v. Add. CIT (2015) 37 ITR 290 / 67 SOT 340 / 168 TTJ 314 (Delhi)(Trib.)

S.32 : Depreciation – Company – Personal use – Vehicles used by employees for personal purpose – Depreciation allowable. 546

The assessee claimed depreciation on vehicles which were owned by it but used by its employees. The AO disallowed depreciation on the ground that the vehicles were being used by the employees for their personal purposes. On appeal :

Held, that there was no rationale in treating the amount of depreciation on cars as that for personal use, when admittedly these had been provided to employees. A company was a separate legal entity distinct from its directors or employees. There could be no

occasion to treat the use of vehicles by the directors or employees as amounting to personal use by the company. Therefore, the addition of depreciation on vehicles was to be deleted. (AY. 2006-07)
Microsoft Corporation India P. Ltd. v. Addl. CIT (2015) 37 ITR 290 / 67 SOT 340 / 168 TTJ 314 (Delhi)(Trib.)

547 **S.32 : Depreciation – LED video display boards – Are temporary structures – Assessee entitled to 100 per cent depreciation**
Held, dismissing the appeal, that the LED video display boards were temporary structures and they could not be equated with plant and machinery for the reason that these structures were displayed outside in temporary locations and on land taken on lease for a temporary period. Once these temporary structures were dismantled, their value would be reduced to almost nil and they could not be used second time or third time. The life span of LED video display boards was also not more than 6 months to 1 year. The land was neither owned by the assessee nor was it held by the assessee on lease basis. The structures put on such land, whatever in nature, were purely temporary structures. Even these structures were not taken by the assessee for re-use. When such structures were put on land not belonging to the assessee, the expenditure was held to be the nature of revenue. Therefore, the depreciation was allowed. (AY. 2006-07 to 2010-11)
Dy. CIT v. Selvel Advertising P. Ltd. (2015) 37 ITR 611 (Kol.)(Trib.)

548 **S.32 : Depreciation – Assessee acquiring commercial rights to display on bridges for business purposes – Entitled to depreciation.**
Held, dismissing the appeal, that on the facts it was clear that the assessee had acquired commercial rights and used them during the relevant year for the purposes of its business. Therefore, the assessee was entitled to depreciation at 12.5 per cent. (AY. 2006-07 to 2010-11)
Dy. CIT v. Selvel Advertising P. Ltd. (2015) 37 ITR 611 (Kol.)(Trib.)

549 **S.32 : Depreciation – Additional depreciation – Allowed in immediately preceding year – Denial of remaining fifty percent depreciation was held to be not justified. [S.32(1)(iia)]**
The assessee was engaged in the business of manufacture of polyester fibres and yarns. For the assessment year 2005-06, the assessee had purchased plant and machinery for its captive power plant and was allowed fifty per cent of additional depreciation thereon under section 32(1)(iia) of the Act on assets procured since the machinery was put to use for less than 180 days in the previous year. For the following assessment year 2006-07, the assessee claimed the balance fifty per cent of the additional depreciation but the AO rejected the claim on the ground that the assessee was not eligible to claim additional depreciation on the assets purchased for the power plant. The Commissioner (Appeals) confirmed the order of the Assessing Officer. On appeal.
Held, allowing the appeal, that the assessee had claimed additional depreciation under section 32(1)(iia) of the Act in immediately preceding assessment year 2005-06 and the claim was allowed by the Assessing Officer. Once the conditions regarding the claim of

depreciation were examined by the Assessing Officer in the very first year, subsequently he could not go back and hold that the additional depreciation was not allowable on business of generation or generation and distribution of power. Hence, the assessee was entitled to remaining unutilised fifty per cent of additional depreciation under section 32(1)(iia) of the Act, for the next assessment year. (AY. 2006-07)
Century Enka Ltd. v. Dy. CIT (2015) 154 ITD 426 / 37 ITR 644 (Kol.)(Trib.)

S.32 : Depreciation – Unabsorbed depreciation can be treated as current depreciation and set off against non-business income and be available to carry forward indefinitely – Judgment of a non-jurisdictional High Court has to be preferred over the judgment of a Special Bench of the ITAT.[S. 32(2)] 550
There is a conflict of opinion between the judgment of the ITAT Special Bench in *DCIT v. Times Guaranty Limited (2010) 4 ITR (Trib.) 210 (Mum.) (SB)* and that of the Gujarat High Court in *General Motors India Pvt. Ltd. v. DCIT [(2013) 354 ITR 244 (Guj.)* on the question whether unabsorbed depreciation for the assessment years prior to the amendment made to s. 32(2) w.e.f. AY 2002-03 can be treated as "current depreciation" and set-off against non-business income and be available for carry forward indefinitely. A judgment of the non-jurisdictional High Court binds the Tribunal benches as held in *CIT v. Godavaridevi Saraf (1978) 113 ITR 589 (Bom.)* and has to be followed over a judgment of the Special Bench. Unabsorbed depreciation can be treated as current depreciation and set-off against non-business income and is available to carry forward indefinitely. (AY. 2009-10)
Minda Sai Limited v. ITO (2015) 167 TTJ 689 / 114 DTR 50 (Delhi)(Trib.)

Section 32A : Investment allowance

S.32A : Investment allowance – Purchase – Continuation of original contract – Deduction is allowable. 551
Assessee entered into initial contract for purchase of plant and machinery on 2-5-1986, however, contract was finally concluded on 18-8-1986 due to revision of price. Assessee claimed deduction under section 32A in respect of aforesaid purchase. Assessing Officer rejected assessee's claim holding that purchase was made after cut off date given in section 32A(8B), i.e., 12-6-1986. On appeal allowing the appeal the Court held that since subsequent contract, i.e., 18-8-1986, was in continuation of original contract, i.e., 2-5-1986, it was to be presumed that purchase was made prior to cut off date and, therefore, assessee's claim was to be allowed. (AY. 1989-90)
Shaily Eng. Plastics (P.) Ltd. v. Dy. CIT (2015) 231 Taxman 253 (Guj.)(HC)

S.32A : Investment allowance – Deduction u/s. 80HHC – Special deduction to be computed after setting off unabsorbed investment allowance.[S 32A, 80AB, 80HHC] 552
Allowing the appeal of Revenue the Court held that in section 32A(3) as well as section 80HHC(3) of the Act, reference is made to the profits computed under the business head. Perusal of section 80HHC(3) makes it further clear that the deduction under section 80HHC(1) is to be allowed on the profits and gains as computed under the head "Profits and gains of business or profession". Section 32A(3) is placed in

Chapter IV-D and, therefore, it is clear that unabsorbed investment allowance is to be considered under the head "Profits and gains of business or profession". In view of that the deduction under section 80HHC(3) is required to be computed after setting off the unabsorbed investment allowance under section 32A(3) from profits of the business. The Supreme Court in *IPCA Laboratory Ltd. v. Deputy CIT [2004] 266 ITR 521 (SC)* in terms held that section 80HHC would be governed by section 80AB. Hence, for the purpose of computing the benefits under section 80HHC, unabsorbed investment allowance is required to be set off while computing the income chargeable under the head "Profits and gains of business or profession". The question of law was answered in favour of Revenue.(AY. 1991-92)
CIT v. V.M. Salgaonkar and Bros. P. Ltd. (2015) 372 ITR 248 (Bom.)(HC)

553 **S.32A : Investment allowance – Tribunal allowing in respect of ten items – Reference thereagainst dismissed – Assessee entitled to investment allowance.**
Tribunal has followed the earlier years orders and reference to said orders were dismissed. Following the same appeal of Revenue was dismissed. *Associated Bearing Co. Ltd. v. CIT [2006] 286 ITR 341 (Bom.)*, followed.(AY. 1986-87, 1987-88)
CIT v. Dharamsi Morarji Chemicals Co. Ltd. (2015) 373 ITR 545 (Bom.)(HC)

554 **S.32A : Investment allowance – Higher rate of allowance – Installation of machinery for manufacturing sulphuric acid – Assessee entitled to investment allowance.**
Court held that the Tribunal was right in law in confirming the order of the Commissioner (Appeals) allowing the higher rate of investment allowance of 35 per cent on machinery installed for the purpose of manufacturing sulphuric acid. (AY. 1986-87, 1987-88)
CIT v. Dharamsi Morarji Chemicals Co. Ltd. (2015) 373 ITR 545 (Bom.)(HC)

555 **S.32A : Investment allowance – Amalgamation – Withdrawal of benefit of investment allowance – Matter remanded. [Companies Act. 1956. S. 391 to 394]**
Assessee company was granted benefit of investment allowance or carried forward of investment allowance under section 32A. Under a scheme of arrangement under sections 391 to 394 of Companies Act, 1956, 9 out of 13 industrial units held by respondent company were transferred to three newly formed companies. Assessing Officer, passed an order under section 32A(5) withdrawing benefit of investment allowance or carried forward of investment allowance. Tribunal held that the scheme of arrangement did not result in 'transfer' under section 32A(5) and hence Assessing Officer erred in withdrawing investment allowance granted earlier. On further appeal, the High Court held sub-section (5) uses two expressions "sold or is otherwise transferred". Scheme of amalgamation or reconstruction under Sections 391 and 394 of the Act whereby assets or units/undertakings were transferred would be covered by the expression 'otherwise transferred' in sub-section (5). On the alternate argument, the Court held that, sub-section (6) to Section 32A is broad enough and would include any scheme of merger provided the legislative stipulations in sub-section (6) are met. It is not necessary and required under the sub-section (6) to Section 32A that the amalgamating company should have been dissolved or fully merged. The expression "amalgamation"

as understood in law and in common parlance is a very broad and a wide expression. It would include any type of corporate restructuring or reorganisation and is not restricted to only cases where the amalgamating company/companies get merged into another entity and cease to thereafter exist. It is not necessary that the scheme of amalgamation must postulate a complete merger of the company with assets and liabilities. Part or partial merger would equally be cases of amalgamation. Thus the Court further held that scheme of arrangement/ reconstruction could be regarded as amalgamation and protected under sub-section (6) to section 32A if conditions specified in said sub-section as well as clauses (ii) and (iii) of section 2(1B) were satisfied and hence matter was to be remanded to examine this aspect. (AY. 1983-84 to 1990-91)
CIT v. D.C.M. Ltd. (2015) 114 DTR 1 / 275 CTR 475 / 230 Taxman 426 (Delhi)(HC)

S.32A : Investment allowance – Withdrawal of investment allowance – Held to be not justified. [S.155 (4A)] 556
Allowing the appeal of assessee the Court held that where conditions enumerated in clause (4A) of section 155 were not fulfilled by revenue, Tribunal was not justified in holding that investment allowance granted in assessment year 1983-84 and adjusted in Assessment year 1990-91 could not be withdrawn in year under consideration. (AY. 1993-94)
Gujarat Narmada Valley Fertilisers Ltd. v. Dy. CIT (2015) 229 Taxman 270 (Guj.)(HC)

Section 32AB : Investment deposit account

S.32AB : Investment deposit account – Investment allowance – Option to claim deduction either under section 32A or section 32AB for assessment year 1989-90 – Assessee allowed deduction under section 32AB for assessment years 1987-88 and 1988-89 – Assessee entitled to deduction under section 32AB for assessment year 1989-90 [S. 32A] 557
Answering the reference in favour of assessee the Court held that sub-section (8B) of section 32A of the Act clearly envisages allowance of investment allowance under section 32AB of the Act in respect of plant and machinery installed from April 1, 1987, to March 31, 1988, in the assessment year 1989-90. Therefore, the view of the AO that since the assessee had been allowed deduction under the scheme of investment deposit account under section 32AB of the Act for the assessment year 1988-89, it was not entitled to claim deduction under section 32A(8B) for the same assets was not correct and the order of the Tribunal allowing investment allowance under section 32A of the Act in respect of plant and machinery installed from April 1, 1987, to March 31, 1988, was valid. CBDT Circular No.559, dated 4-5-1990 (1990) 184 ITR 91(St) is considered. (AY. 1989-90)
CIT v. Indian Petrochemicals Corporation Ltd. (2015) 372 ITR 568 / 125 DTR 67 / 281 CTR 223 (Guj.)(HC)

S.32AB : Investment deposit account – Amount withdrawn for repayment of loan and security deposit – Addition cannot be made. 558
Out of balance in Investment Deposit Account, some amount was withdrawn by assessee and used for making repayment of loan against trucks and tankers. Remaining amount

was used by the assessee for repaying loans taken by it against security of plant and machinery. Machinery was purchased with term loan that was contracted for more than three years from scheduled bank/financial corporation. Dismissing the appeal of revenue the Court held that no addition could be made under section 32AB. (AY. 1990-91 to 1994-95)
CIT v. Harsiddh Specific Family Trust (2015) 230 Taxman 613 (Guj.)(HC)

559 **S.32AB : Investment deposit account – Audit report – Directory**
Filing of audit report along with return is only directory and not mandatory; deduction claimed by assessee could not be disallowed only on ground that assessee had not filed audit report along with return. (AY. 2005-06)
CIT v. Ramani Realtors (P.) Ltd. (2015) 229 Taxman 283 (Mad.)(HC)

560 **S.32AB : Investment deposit account – Set off and aggregation of losses and profits respectively of other eligible businesses cannot be made.**
Assessee computed deduction u/s. 32AB only after considering profits of eligible businesses and ignored the losses of other eligible businesses. The AO aggregated the losses suffered in the eligible businesses as well as non-eligible businesses and reduced the same from the profits earned in the eligible businesses for the purpose of computing the deduction u/s. 32AB. The Commissioner (Appeals) accepted the contention of the assessee which was affirmed by the Tribunal. The court held that section 32AB(3) clearly postulates that profits of eligible business should be separately computed. It was observed that in the present case separate accounts were maintained for each eligible business. If all the parts of section 32AB are read harmoniously, then it becomes clear that deduction under the said clause has to be computed with reference to the profits of eligible business only without aggregation of profits or losses of other eligible businesses. Further, the amendment in the said section w.e.f. 1.4.1999 negating the concept of eligible business, would not have any effect in so far as concerned year is in question. (AY. 1989-90, 1990-91)
CIT v. Kelvinator of India Ltd. (2015) 371 ITR 51 / 275 CTR 1 / 114 DTR 297 (Delhi)(HC)

561 **S.32AB : Investment deposit account – Eligible profits – Interest on debenture, fixed deposit, loan and inter corporate deposit and dividend income constitute income from business for the purpose computing deduction. [S.263]**
The AO excluded the income shown under the head 'other income' viz. interest on debentures, fixed deposit, loan and inter-corporate deposit and dividend income for the purpose of computing deduction u/s. 32AB. The said finding was affirmed by the Commissioner (Appeals). The Tribunal held that income from the eligible business are not to be computed in accordance with the provision of IT Act but in accordance with Schedule VI of the Companies Act and therefore, the other income should also be included for computing deduction. On appeal, the court held that other income viz. interest on debentures, fixed deposit, loan and inter-corporate deposit and dividend income were income from business, and was accordingly shown in Part II and Part III of the Schedule VI of the Companies Act, and deduction would be available on the business income as computed in the above manner. (AY 1989-90, 1990-91)
CIT v. Kelvinator of India Ltd. (2015) 371 ITR 51 / 275 CTR 1 / 114 DTR 297 (Delhi)(HC)

S.32AB : Investment deposit account – Eligible profits – Assessee having several units some eligible for deduction and others not – Deduction is on profits and not on aggregate of profits of all units. 562

Held that the concept of eligible business referred to in section 32AB was negated by the Finance Act, 1989, with effect from April 1, 1991. The provisions of section 32AB would have to be read and interpreted in the light of the amendments. However, for the assessment years 1989-90 and 1990-91 under the applicable provisions, only the profits of the eligible business could be taken into consideration for computing the deduction under section 32AB and aggregation would not be permissible. Therefore, the deduction under section 32AB was available on the profits of the eligible industrial undertaking and not on the aggregate profits of the assessee. (AY. 1989-90, 1990-91)

CIT v. Kelvinator of India Ltd. (2015) 371 ITR 51 / 275 CTR 1 / 114 DTR 297 (Delhi)(HC)

S.32AB : Investment deposit account – Business of civil and labour construction – Not eligible deduction. 563

Assessee, engaged in business of civil and labour construction, was not entitled to deduction under section 32AB. (AY. 1989-90)

CIT v. R.S. Builders & Engineers (P.) Ltd. (2015) 228 Taxman 305 (Mag.)(P&H)(HC)

S.32AB : Investment deposit account – Assessing Officer has power only to examine whether books of account are certified by authorities under Companies Act – Principles for determination of income under the Income-tax Act – Not applicable. [Companies Act, 1956] 564

Section 32AB provides an incentive to an assessee who is carrying on business or profession. If the amount is deposited with the Development Bank or utilised for the purchase of any new machinery or plant without depositing any amount in an account under clause (a), how the profits of business or profession are to be calculated for the purpose of section 32AB of the Act is found under sub-section (3). According to which they are to be arrived at on the basis of the profits computed in accordance with the requirements of Part II of the Sixth Schedule to the Companies Act, 1956 and not in accordance with the provisions of the 1961 Act. Therefore, while deciding the benefit to which the assessee is entitled under section 32AB of the 1961 Act, the Assessing Officer has only power to examine whether the books of account are certified by the authorities under the 1956 Act as having been properly maintained in accordance with the 1956 Act. He cannot apply the principles under the 1961 Act for the purpose of determining the profits of the assessee from business or profession for the purpose of section 32AB. (AY. 1990-91)

Jindal Aluminium Ltd. v. Dy. CIT (2015) 370 ITR 235 / 118 DTR 351 (Karn.)(HC)

Section 33AB : Tea development account, coffee development account and rubber development account.

S.33AB : Development account – Only 11 percentage of tea was purchased from outside manufacturers – Eligible deduction. 565

Allowing the appeal of assessee the Court held that where assessee had utilized entire tea grown by it in its garden and by blending same with tea purchased from outside

manufacturers, it had manufactured final product, entire profit arising out of such manufacture would get benefit of section 33AB as only for purpose of blending 11 per cent tea was purchased from outside manufacturers. (AY. 1998-99)
Stewart Holl (India) Ltd. v. CIT (2015) 232 Taxman 130 (Cal.)(HC)

566 **S.33AB : Development account – Investment of surplus funds in short-term deposits – Interest – Business income – To be taken into account for purposes of benefit.**
Held, allowing the appeal, that the surplus commercial funds available with the assessee were kept in short-term fixed deposits. The assessee had borrowed funds for the purpose of carrying on its business. The funds may not always be necessary or may not always be blocked. Therefore, the funds which were surplus at any point of time were fruitfully invested in short-term fixed deposits and the assessee thus earned interest which in a way had reduced its burden on account of interest. It was, therefore, not possible to hold that the interest earned was not business income. When the assessee had paid interest of ₹ 2.66 crores and had earned interest of ₹ 1.88 crores, the effective debit on that side was less than ₹ 1 crore. Therefore, the interest earned by the assessee should be treated as the business income for the purpose of the benefit under section 33AB.
Warren Tea Ltd. v. CIT (2015) 374 ITR 6 / 233 Taxman 337 (Cal.)(HC)

Section 35 : Expenditure on scientific research

567 **S.35 : Expenditure on scientific research – Assessing Officer cannot disallow the weighted deduction in respect of scientific expenditure pursuant to certificate issued by prescribed authority, i.e., Department of Scientific and Industrial Research (DSIR): Availability of alternate remedy would be a good ground to refuse the relief under article 226 of the Constitution of India. [S. 35(2AB), Constitution of India, Article 226]**
Allowing the petition the Court held that where assessee claimed deduction under section 35(2AB), pursuant to certificate issued by prescribed authority, i.e., Department of Scientific and Industrial Research (DSIR), approving such claim, Assessing Officer could not have denied weighted deduction under section 35(2AB) in respect of scientific expenditure. Court also held that the Assessing Officer cannot sit in judgment over report submitted by prescribed authority, however, where Assessing Officer does not accept claim of assessee made under section 35(2AB), he should refer matter to Board, which will then refer question to prescribed authority, since issue of jurisdiction of Assessing Officer was under consideration, petition could not have been dismissed on ground of availability of alternate remedy. (AY. 2009-10)
Tejas Networks Ltd. v. Dy. CIT (2015) 233 Taxman 426 (Karn.)(HC)

568 **S.35 : Expenditure on scientific research – Denial of deduction by Assessing Officer on ground machinery required to be installed and commissioned before expiry of relevant previous year is not proper.**
The assessee was engaged in the business of manufacture of enzymes and pharmaceutical ingredients. During the assessment year 2003-04, the assessee had incurred certain expenditure on capital towards cost of machinery for a sum of ₹ 7,82,25,431. The Assessing Officer noticed that the amount included a sum of

₹ 2,72,59,589 incurred towards three items of machinery. The three items of machinery had not been installed and commissioned and since such expenditure did not amount to expenditure incurred during that period, he held that the assessee was not entitled to weighted deduction under section 35(2AB). The appellate authorities held that the Assessing Officer was not justified in not allowing the weighted deduction under section 35(2AB). On appeal:

Held, the provision nowhere suggests or implies that the machinery is required to be installed and commissioned before the expiry of the relevant previous year. The provision postulates approval of a research and development facility, which implies that a development facility shall be in existence, which in turn, presupposes that the assessee must have incurred expenditure in this behalf. The Tribunal had rightly concluded that if the interpretation of the Assessing Officer were accepted, it would create absurdity in the provision inasmuch as words not provided in the statute were to be read into it, which is against the settled proposition of law with regard to the plain and simple meaning of the provision. The plain and homogeneous reading of the provisions would suggest that the entire expenditure incurred in respect of research and development has to be considered for weighted deduction under section 35(2AB). (AY. 2003-04)

CIT v. Biocon Ltd. (2015) 375 ITR 306 / 234 Taxman 602 / 127 DTR 127 (Karn.)(HC)

Editorial: Order in DCIT v. Biocon Ltd. (2014) 3 ITR 680 (Bang.)(Trib) is affirmed.

S.35 : Expenditure on scientific research – Business expenditure – Pouch development expenses were in nature of scientific research or acquisition of patent rights or copyright therefore, said expenses was not allowable under section. [S. 35A, 37(i)] 569

Assessee was engaged in manufacturing plastic pouches. Under an agreement, one HGF produced certain sample of pouches on its behalf, thereafter, assessee made payment to HGF. The Assessing Officer held that said pouch development expenses were in the nature of scientific research or acquisition of the patent rights or copy rights and came under the purview of section 35 or 35A. As none of the conditions mentioned in those sections were fulfilled, the expenditure so debited was disallowed.

On appeal, the Commissioner (Appeals) held that said expenditure was revenue expenditure, therefore, allowed deduction under section 37.

On revenue's appeal, the Tribunal confirmed the order of the Assessing Officer. On appeal Court held that, pouch development expenses were in nature of scientific research or acquisition of patent rights or copyright and came under purview of section 35 or 35A, therefore, said expenses was not allowable under section 37(1).

Standipack (P.) Ltd. v. CIT (2015) 230 Taxman 307 (Cal.)(HC)

S.35 : Expenditure on scientific research – Deferred revenue expenditure – Not allowable. 570

Dismissing the appeal of assessee the Court held that, deferred revenue expenditure could not be allowed by way of carry forward. There is no provision under the Act which provides for such a method of claiming deferred research and development expenditure. Moreover, the Assessing Officer had allowed the expenses relatable to the year under consideration and disallowed only the expenditure not relatable to the

relevant assessment year. It was not the case of the assessee that the expenditure was relatable to the year 2002-03. Therefore, the authorities were justified in disallowing such a claim made by the assessee. (AY.2002-03)
Banyan Networks P. Ltd. v. ACIT (2015) 373 ITR 566 / 233 Taxman 245 (Mad.)(HC)

571 **S.35 : Expenditure on scientific research – Board – Reference ought to have been made to CBDT – Disallowance was not justified. [S.43]**
Where assessee raised claim for deduction under section 35(1), in view of order passed by Court in another case involving identical issue, it was to be concluded that reference ought to have been sought by revenue before Board to prescribed authority and not having done so, Tribunal was justified in reversing orders of revenue authorities rejecting assessee's claim for deduction. Court also held that Tribunal itself should not have decided the question in favour of assessee without seeking opinion of prescribed authority and without fully discussing material on record. (AY. 1995-96)
CIT v. Mastek Ltd. (2015) 228 Taxman 377 (Mag.)(Guj.)(HC)

572 **S.35 : Expenditure on scientific research – Acquisition of patent rights – Expenditure incurred was held to be allowable. [S. 43(4)]**
Assessee filed its return claiming deduction of research and development expenses. Assessing Officer held that the said expenditure was not on scientific research but gave rise to patents, which were intellectual property rights and, therefore, came under exclusion clause in definition of scientific research as mentioned in section 43(4)(ii), he thus disallowed entire expenditure being capital in nature. On appeal CIT(A) allowed the claim of assessee. On appeal by revenue the Tribunal held that expenditure that is sought to be excluded under section 43(4)(ii) is an expenditure which assessee incurs in acquiring rights in or arising out of scientific research already done by somebody else. Since, in instant case, assessee itself was engaged in research and development activities, impugned order passed by Assessing Officer was to be set aside. (AY. 2008-09)
Dy. CIT v. Tejas Networks Ltd. (2015) 68 SOT 477 (Bang.)(Trib.)

573 **S.35 : Expenditure on scientific research – Registered under section 12AA and approved under section 35(1)(ii) – Entitled to exemption under sections 11 and 10(21) – Not required to furnish declaration in Form 10 in respect of part of income accumulated. [S.11, 10(21), 12AA]**
Dismissing the appeal the Tribunal held that the assessee was given approval under section 35 of the Act and there was nothing on record to suggest that it violated conditions for exemption under section 10(21) of the Act, other than delay in filing Form 10. The assessee was eligible for exemption under section 11 of the Act for the income accruing after April 7, 2006, since the registration under section 12AA was effected. Thus, the assessee was eligible for exemption in respect of its income under sections 10(21) and 11 of the Act and was not required to furnish the declaration in Form 10 in respect of part of the income accumulated by it. The Commissioner (Appeals) granted relief to the assessee as requested by it and passed a well-reasoned order. The order did not call for interference. (AY. 2007-08)
Wadia Institute of Himalayan Geology v. Add. CIT (2015) 155 ITD 676 / 40 ITR 459 (Delhi) (Trib.)

S.35 : Scientific research expenditure – Developing prototypes of its products – Held to be allowable as revenue expenditure. [S.37(1)] 574

Assessee company was engaged in manufacturing of musical instrument. During year assessee incurred expenditure on R & D for developing prototypes of its products and claimed deduction under section 35(1)(i). Assessee contended that on receiving samples, company developed products in-house to satisfaction of buyer. AO held that the said expenses incurred were only to conform to specifications of customers so as to get supply orders in regular course of business, Further such prototypes were of limited use meant only for manufacturing products for a specific customer, he treated the said expenditure as capital in nature. CIT(A) decided the issue in favour of assessee. On appeal by revenue the Tribunal held that after perusing details of R & D expenses, all expenses were in nature of revenue expenses hence the assessee would be entitled for said deduction. (AY.2004-05)

ACIT v. Besson Musical Instrument (P.) Ltd. (2015) 68 SOT 102 (URO)(Delhi)(Trib.)

S.35 : Scientific research expenditure – Receipts credited to profit and loss account is part of normal sales – Weighted deduction is available.[S. 352AB] 575

Receipts credited to profit and loss account is part of normal sales. Weighted deduction is allowable.(AY. 2009-10)

Dy. CIT (LTU) v. Microlabs Ltd. (2015) 39 ITR 585 / 70 SOT 774 (Bang.)(Trib.)

S.35 : Scientific research expenditure – Approval was granted from the assessment year 2010-11, hence deduction is not available for the Asst. year 2009-10. 576

Since approval under section 35(2AB) had been accorded to R & D unit of assessee-company from 1-4-2009 to 31-3-2012, assessee was entitled to claim weighted deduction under section 35(2AB) from assessment years 2010-11 and not 2009-10 as claimed by the assessee.(AY. 2009-10)

Advik Hi tech (P.) Ltd. v. ACIT (2015) 67 SOT 158 (URO)(Pune)(Trib.)

S.35 : Expenditure on scientific research – Contribution to IIT and International Advanced Research Centre allowable in terms of sub-section (2AA) of section 35. [S.43(4)] 577

It was held that where assessee claimed deduction of contributions made to IIT and International Advanced Research Centre for power metallurgy and new materials, since both institutions to which assessee made contribution were approved for purposes mentioned in sections 35(2AA) and 35(1)(ii), assessee's claim was to be allowed. (AY. 2009-10, 2010-11)

Resil Chemicals (P.) Ltd. v. Dy. CIT (2015) 67 SOT 189 (URO)(Bang.)(Trib.)

S.35 : Scientific research expenditure – Salary, consultancy fees etc allowed under Sub-section (2AB) of section 35. [S.43(4)] 578

It was held that where assessee claimed deduction of expenditure incurred on scientific research, in view of fact that major part of expenses were towards salary, equipments, materials consumed, consultancy fees and other routine expenses, deduction so claimed was to be allowed under section 35(2AB).(AY. 2009-10, 2010-11)

Resil Chemicals (P.) Ltd. v. Dy. CIT (2015) 67 SOT 189 (URO)(Bang.)(Trib.)

579 **S.35 : Expenditure on scientific research – Any material is purchased for research & development, same should be allowed as deduction and it is immaterial whether material is consumed or held as closing stock.**

When a material is purchased for research and development purpose, it is immaterial whether the material is consumed during the year or held as closing stock and the entire expenditure incurred on raw material for the purpose of research and development qualifies for deduction u/s. 35 irrespective of the accounting treatment of the same in the books of account. (AY. 2007-08 to 2009-10)

Balaji Amines Ltd. v. Addl. CIT (2015) 153 ITD 20 (Pune)(Trib.)

580 **S.35 : Expenditure on scientific research – Research and development for production of new drugs – Mistake apparent – Non-consideration or improper consideration of issue – Matter remanded.[S. 254(2)]**

The assessee was engaged in the business of research and development towards production of new drugs through biotechnology. The assessee claimed deduction under section 35(1) of the Act, for the expenditure incurred for the development in respect of three products with reference to scientific research activity. The AO treated the expenditure as capital in nature, on the ground that, when the molecules were successfully developed, the assessee would yield patent rights resulting in enduring benefit to the assessee. The CIT(A) held that section 35(1)(iv) read with section 35(2)(ia) specifically allowed the claim of deduction on any expenditure of a capital nature on scientific research carried on by the assessee. On appeal by the Department :

Held, that, the AO had failed to follow the correct procedure prescribed under section 35(3) of the Act to determine whether the assessee's activity constituted scientific research. The Tribunal could not decide the claim against the assessee or in its favour without following the procedure laid down in the Act. [Matter remanded to the AO with the direction to refer the claim of deduction under section 35, according to the procedure laid down under section 35(3) of the Act. (AY. 2006-07, 2007-08, 2008-09)

Dy. CIT v. Bharat Biotech International Ltd. (2015) 37 ITR 750 / 169 TTJ 148 / 63 SOT 13 (URO)(Hyd.)(Trib.)

581 **S.35 : Expenditure on scientific research – In-house division – Weighted deduction cannot be denied on the ground that prescribed authority did not submit Form No 3CL in time to Income-tax department.[S.35(2AB]**

Assessee-company claimed research and development expenditure under section 35(2AB), relating to its in-house division. It claimed weighted deduction under section 35(2AB) at the rate of 150 per cent of the capital expenses and revenue expenses. The AO disallowed the claimed deduction holding that the assessee did not submit the approval from the prescribed authority. On appeal, the CIT(A) allowed the deduction. On appeal by revenue the Tribunal held that assessee could not be denied deduction under section 35(2AB) merely on ground that prescribed authority did not submit Form No. 3CL for granting approval under section 35(2AB) in time to income-tax department. (AY. 2009-10)

Dy. CIT v. Famy Care Ltd. (2014) 52 taxmann.com 461 / (2015) 67 SOT 85 (Mum.)(Trib.)

S.35 : Expenditure on scientific research – In-house research and development facility – Clinical tests were conducted in assessee's laboratory duly approved by Directorate General of Health Services, its claim for weighted deduction was to be allowed. [S.35(2AB), 43(4)] 582

The assessee-company was a manufacturer and trader of pharmaceutical goods, diagnostic kits, medical instruments etc. During relevant year, the assessee incurred expenditure on 'research and development'. The assessee claimed 150 per cent deduction as prescribed under section 35(2AB). The AO held that the clinical trials were conducted outside the approved facilities. He held that the clinical trial expenses and bioequivalence study was allowable under section 35(1)(i) only up to 100 per cent and, hence, the excess claim of deduction was not allowed. The DRP confirmed the order of the AO. On Second Appeal the Tribunal held that language of section 35(2AB) does not suggest that research has to be conducted within four walls of an undertaking, since assessee collected data from several resources both within and outside premises and thereupon clinical tests were conducted in assessee's laboratory duly approved by Directorate General of Health Services, its claim for weighted deduction was to be allowed. (AY. 2006-07)

Cadila Healthcare Ltd. v. Addl. CIT (2012) 21 taxmann.com 483 / (2015) 67 SOT 110 (URO)(Ahd.)(Trib.)

Section 35AB : Expenditure on know-how

S.35AB : Know-how – Mercantile method of accounting – Provision is made – Allowable as deduction though the payment was made in instalments. [S.43(2), 145] 583

Liability to pay technical know-how arise as soon as the said know-how was delivered to the assessee as per the agreement. Hence provision made in respect of the said know-how was held to be allowable though the payment was made in installment. Appeals of revenue was dismissed.(AY. 1999-2000 to 2003-04)

CIT v. AMCO Power Systems Ltd. (2015) 379 ITR 375 / 127 CTR 193 / 281 CTR 332 / 235 Taxman 521 (Karn.)(HC)

Section 35C : Agricultural development allowance.

S.35C : Agricultural development allowance – Salary, verterinary medicines, verterinary transport, artificial insemination expenses, advertisement & publicity and fodder development expenses – Eligible deduction. 584

Assessee was a co-operative society carrying on business of dairy. It claimed deduction in respect of salary, verterinary medicines, verterinary transport, artificial insemination expenses, advertisement & publicity and fodder development expenses. Following the ratio in case of *Kaira Dist. Co-op Milk Producers Union Ltd. v. CIT [2002] 253 ITR 766 (Guj.)* entire expenses were eligible for deduction under section 35C.(AY. 1980-81)

Kaira District Co-op. Milk Producers' Union Ltd. v. CIT (2015) 229 Taxman 266 (Guj.)(HC)

Section 35D : Amortisation of certain preliminary expenses

585 **S.35D : Amortisation of preliminary expenses – GDR issue – Held to be allowable.**
On appeal the Court held that the Tribunal was not justified in disallowing deduction claimed under section 35D being 1/10th of expenditure incurred on GDR issue by merely relying upon a High Court decision; it should have adverted to relevant material. (AY. 1998-99)
Crompton Greaves Ltd. v. ACIT (2015) 230 Taxman 509 (Bom.)(HC)

586 **S.35D : Amortisation of preliminary expenses – Expenditure on raising share capital – One-tenth of expenditure was held to be allowable.**
The Assessing Officer made a disallowance of ₹ 2,97,924 claimed under section 35D of the Income-tax Act, 1961, in respect of capital raising expenses being one-tenth of ₹ 29,79,237 on the ground that these were not covered under section 35D of the Act. On appeal, the Commissioner (Appeals) deleted the additions and this was confirmed by the Tribunal. Court held that, the expenditure incurred by way of fees paid to the Registrar of Companies for enhancement of authorised capital was deductible over a period of ten years under section 35D(2)(c)(iv).(AY.1994-95 to 1999-2000)
CIT v. Nuchem Ltd. (2015) 371 ITR 164 (P&H)(HC)

587 **S.35D : Amortisation of preliminary expenses – Infrastructure projects on Build, Operate and Transfer (BOT) – Entitled to benefit of amortization.**
Assessee-company was engaged in business of execution of infrastructure projects on Build, Operate and Transfer (BOT) basis. It incurred all expenditure and then recovered toll for specified period from users of that facility. Assessee amortized expenses under section 35D. Assessing Officer held that these expenses were not specified under section 35D therefore not allowable. Commissioner (Appeals) allowed the amortization. On appeal by revenue : dismissing the appeal of revenue the Tribunal held that; expenses incurred by assessee on infrastructure were revenue expenditure but same could not be claimed in one year because assessee was to recover its investment as well as profits from toll tax up to toll period of respective projects, therefore, assessee was entitled to benefit of amortization under section 35D. (AY. 2007-08)
ACIT v. TCI Infrastructure Finance Ltd. (2014) 34 ITR 628 / (2015) 68 SOT 125 (Jaipur) (Trib.)

588 **S.35D : Amortisation of preliminary expenses – Deduction of 1/5th expenses amortised in A.Y. 2002-03 was allowed, same could not be disallowed in AY. 2006-07.**
The assessee worked out certain amount, which was spent prior to the enhancement of the business. These expenses were amortized u/s. 35D and 1/5th of the expenses were claimed by the assessee starting from the A.Y. 2002-03. The revenue authorities had confirmed the disallowance on the ground that the assessee had failed to establish that the said amounts were claimed to have been spent before the A.Y. 2002-03. The Hon'ble ITAT held that when in the first year no disallowance was made, and thereafter, in subsequent two years this 1/5th has been allowed, Assessing Officer was not justified

to ask the assessee to establish its genuineness. Therefore, the disallowance is deleted. (AY. 2006-07)
Marwar Hotel Ltd. v. ACIT (2015) 155 ITD 655 / (2016) 131 DTR 340 / 176 TTJ 655 (Ahd.) (Trib.)

S.35D : Amortisation of preliminary expenses – Expenditure on acquisition of stock exchange card – Failure to demonstrate how amortised amount was allowable, disallowance was upheld. 589
The assessee had amortised one-tenth Bombay Stock Exchange card and claimed deduction. The AO disallowed the amortisation expenditure holding that depreciation on Bombay Stock Exchange card was not allowable. The CIT(A) upheld the order of AO. Tribunal held that, the assessee had made a similar amortisation claim in earlier years and the year under consideration was the last year of claim. However, it was not shown by parties that the claim was allowed or disallowed in earlier years. The assessee failed to demonstrate that how the amortisation was allowable as deduction under the Act. Therefore the amortisation of expenses was disallowed.(AY.2007-08)
Kisan Ratilal Choksey Shares and Securities P. Ltd. v. Dy. CIT (2015) 41 ITR 114 (Mum.) (Trib.)

S.35D : Amortisation of preliminary expenses – Rule of consistency – Appellate Tribunal Order of Commissioner (Appeals) allowing expenditure for earlier assessment year not appealed against – Department estopped from filing appeal on same issue in subsequent assessment year.[S.253] 590
Order of Commissioner (Appeals) allowing expenditure for earlier assessment year not appealed against. Following the rule of consistency, department is estopped from filing appeal on same issue in subsequent assessment year.(AY. 2007-08, to 2009-10)
Dy. CIT v. Deccan Chronicle Holdings Ltd. (2015) 39 ITR 295 / 70 SOT 600 (Hyd.)(Trib.)

S.35D : Amortisation of preliminary expenses – Qualified institutional buyers – Revenue expenditure – Eligible deduction. 591
Held that the qualified institutional buyers were a class of investors as a part of the large investor community. The assessee sought for qualified institutional buyers issues to raise funds within a short span of time. Since the buyers were a class of investors, the issue of shares to qualified institutional buyers could be considered as public issue. The expenses in connection with public issue of shares were allowable and therefore, the expenditure incurred on qualified institutional buyers could be treated as revenue expenditure and eligible for deduction under section 35D of the Income-tax Act, 1961. (AY. 2007-08, to 2009-10)
Dy. CIT v. Deccan Chronicle Holdings Ltd. (2015) 39 ITR 295 / 70 SOT 600 (Hyd.)(Trib.)

S.35D : Amortisation of preliminary expenses – Investments – Appeal is pending in preceding year – Matter remanded. 592
Assessee claiming deduction on amortization. Appeal pending against adjustments on amortisation in preceding assessment years. Assessing Officer to examine issue afresh in light of decision in pending appeals. Assessee not entitled to deduction in year in

which securities sold if amortisation allowed as deduction in preceding assessment years. Matter remanded. (AY.2005-06)
ING Vysya Bank Ltd. v. ACIT (2015) 39 ITR 250 (Bang.)(Trib.)

Section 36 : Other deductions

593 **S.36(1)(ii) : Bonus – Bonus paid to employee shareholders/Directors is deductible.**
The bonus paid to employee shareholders/Directors is held to be deductible. (AY. 2008-09)
Chryscapital Investment Advisors (India) (P.) Ltd. v. DCIT (2015) 376 ITR 183 / 119 DTR 1 / 232 Taxman 20 / 277 CTR 137 (Delhi)(HC)

594 **S.36(1)(iii) : Interest on borrowed capital – Loans to subsidiary and directors – Businessman's point of view – Loans diverted to sister concern for the purpose of business can be allowed as business expenditure – Loans to directors from own funds, hence allowable.**
Interest paid on borrowed capital used for the purposes advancing to subsidiary is held to be allowable as business expenditure. Loans advanced to the directors were out of own funds hence disallowance of interest was held to be not justified.(AY.1988-89)
Hero Cycles (P) Ltd. v. CIT (2015) 379 ITR 347 / 128 DTR 1 / 281 CTR 481 / 236 Taxman 447 (SC)

595 **S.36(1)(iii) : Interest on borrowed capital – Upfront fee – Interest on debenture holder – Allowable in the first year or to be spread over a period of five years – Method of accounting – Matching concept.[S. 35D, 37(1), 43, 145]**
The assessee issued debentures in which two options as regards payment of interest were given to the subscribers/debenture holders. They could either receive interest periodically, that is every half yearly @ 18% per annum over a period of five years, or else, the debenture holders could opt for one time upfront payment of ₹ 55 per debenture. In the second alternative, 55 per debenture was to be immediately paid as upfront on account of interest. At the end of five years period, the debentures were to be redeemed at the face value of ₹ 100. The assessee paid to the debenture holder the upfront interest payment and claimed the same as a deduction. In the accounts, the interest expenditure was shown as deferred expenditure. However, the AO, CIT(A), ITAT and High Court rejected the assessee's claim and held that though the amount was paid, the same was only allowable as a deduction over the tenure of the debentures. On appeal by the assessee to the Supreme Court HELD allowing the appeal:
Held that normally revenue expenditure incurred in a particular year has to be allowed in that year and if the assessee claims that expenditure in that year, the Department cannot deny the same. Fact that assessee has deferred the expenditure in the books of account is irrelevant. However, if the assessee himself wants to spread the expenditure over a period of ensuing years, it can be allowed only if the principle of 'Matching Concept' is satisfied. Once a return in that manner was filed, the AO was bound to carry out the assessment by applying the provisions of that Act and not to go beyond the said return. There is no estoppel against the Statute and the Act enables and entitles the assessee to claim the entire expenditure in the manner it is claimed. (AY. 1996-97, 1997-98, 1998-99)
Taparia Tools Ltd. v. JCIT (2015) 372 ITR 605 / 276 CTR 1 / 231 Taxman 5 (SC)

S.36(1)(iii) : Interest on borrowed capital – Mixed funds are diverted towards interest free advances – Entitle to deduction. 596

Dismissing the appeal of revenue the Court held that; where mixed funds are diverted towards interest-free advances, disallowance should be made up to level of average cost of debt to assessee and there is no justification in taking into consideration rate of interest in respect of any particular transaction whereunder an assessee avails advances on interest. (AY.2009-10)

CIT v. Kudu Industries (2016) 381 ITR 107 / (2015) 234 Taxman 668 (P&H)(HC)

S.36(1)(iii) : Interest on borrowed capital – Advance to sister concern – For the purpose of business – Disallowance was held to be not justified. 597

Assessee-company advanced an interest-free sum to its sister concern. Assessing Officer held that advance to sister concern did not appear to be for business purposes as assessee had no business dealing with sister concern, accordingly disallowed interest paid by assessee on loans taken from banks. Tribunal has confirmed the disallowance. On appeal allowing the appeal the court held that where assessee and sister company were in hotel business and amount was advanced on account of commercial expediency and advance was used by its sister concern for purpose of business, disallowance was not justified. (AY. 2005-06)

Bright Enterprises (P.) Ltd. v. CIT (2015) 234 Taxman 509 / (2016) 381 ITR 107 (P&H)(HC)

S.36(1)(iii) : Interest on borrowed capital – Interest bearing funds diverted as interest – Free advances to sister concerns – Trading transaction – No disallowance of interest. 598

Court held that the Tribunal had concurred with the finding of the Commissioner (Appeals) which turned on the facts. The decision was not perverse nor did it suffer from any legal infirmity. Therefore, there could be no disallowance of interest.(AY. 1995-96 to 1999-2000)

Jet Lite (India) Ltd. v. CIT (2015) 379 ITR 185 / (2016) 236 Taxman 453 / 282 CTR 113 (Delhi)(HC)

S.36(1)(iii) : Interest on borrowed capital – Advance to sister concern – Amount was not utilsed for the purposes of business – Held to be not deductible. 599

Assessee engaged in construction of residential and commercial buildings. Amount borrowed advanced to sister concern and the said amount was not utilised by sister concern in construction work. Interest was held to be not deductible. (AY. 2000-01, 2001-02, 2002-03)

Embassy Development Corpn. v. ACIT (2015) 378 ITR 677 / 62 taxmann.com 234 (Karn.) (HC)

S.36(1)(iii) : Interest on borrowed capital – Strategic investment – Matter remanded. [S.57] 600

Allowing the Court held that if the expenditure is incurred for the purpose of promotion of business to retain control or as part of a strategic investment of the assessee, such expenses by way of interest outgo would have to be treated under section 36(1)(iii) and not under section 57. The matter was, therefore, remitted to the Assessing Officer for

full appraisal of the fact situation and findings in the light of conclusions of the court. If, as a result of the Assessing Officer's determination, it is found that such expenditure is incurred, the net expenditure is obviously to be taken into consideration under section 80M.(AY. 1994-95)
Eicher Goodearth Ltd. v. CIT (2015) 378 ITR 28 / 233 Taxman 285 (Karn.)(HC)

601 **S.36(1)(iii) : Interest on borrowed capital – Interest free funds – Deletion of disallowance was held to be justified.**
When the advance was made from interest free funds. Deletion of disallowance was held to be justified. (AY. 1999-2000)
CIT v. Gujarat Foils Ltd. (2015) 377 ITR 324 (Guj.)(HC)

602 **S.36(1)(iii) : Interest on borrowed capital – Borrowed funds and own funds – Loans advanced interest free to sister concerns – Presumption is loan was advanced from own funds – Disallowance was held to be not justified. [S. 260A]**
Dismissing the appeal of revenue the Court held that A sum of ₹ 2 crores was advanced to the assessee's sister concern on account of commercial expediency as that company was declared sick. No interest was accrued on the loan. The Tribunal found that the financial statements of the assessee showed that it had a mixed pool of funds comprising own funds and loan funds and that in such a situation where the one to one nexus between the borrowed funds and the loan advanced to the sister concern could not be established, the loan had to be held as having come out of its own funds. (AY. 2001-02)
CIT v. Modi Rubber Ltd. (2015) 378 ITR 128 (Delhi)(HC)

603 **S.36(1)(iii) : Interest on borrowed capital – Subscribing rights issue of another company to retain control on it – Matter remanded. [S. 57]**
Allowing the appeal of revenue the Court held that if the expenditure is incurred for the purpose of promotion of business-more specifically as in the facts of the instant case to retain control or as part of a strategic investment of the assessee/company, such expenses by way of interest outgo would have to be treated under section 36(1)(iii) and not under section 57. The matter is, therefore, remitted to the Assessing Officer for full appraisal of the fact situation and findings in the light of our conclusions. If, as a result of the Assessing Officer's determination, it is found that such expenditure is incurred, the net expenditure is obviously to be taken into consideration under section 80M in the facts of the instant case. (AY. 1993-94, 1994-95)
Eicher Goodearth Ltd. v. CIT (2015) 378 ITR 28 / 233 Taxman 285 (Delhi)(HC)

604 **S.36(1)(iii) : Interest on borrowed capital – In a case where advances for non-business purposes are made from mixed funds, neither the AO nor the assessee can claim that the funds have come from a particular source and so the disallowance should be worked out on the basis of the average interest rate.**
The Assessing Officer held that in respect of the advances given for non-business purposes, interest is to be disallowed on a proportionate basis since all the funds of the assessee are placed in a common kitty and it is not possible to separate the borrowed funds from the assessee's own funds. The Assessing Officer accordingly computed the

interest at 11.5% in respect of the advances to the two parties and added the same back to the income of the respondent/assessee. The CIT (Appeals) upheld this order. The Tribunal set aside the order of the CIT (Appeals) in this regard. On appeal by the department to the High Court HELD dismissing the appeal:
The judgment of this Court in *Commissioner of Income Tax-I, Ludhiana v. M/s. Abhishek Industries, Ludhiana [2006] 286 ITR 1 (P&H)* does not deal with the question of the rate of interest to be applied in cases where the assessee has mixed funds available with it. We also agree with the Tribunal's view that where mixed funds are diverted towards interest free advances the disallowance should be made up to the level of the average cost of debt to the assessee. There is no justification in taking into consideration the rate of interest in respect of any particular transaction where under an assessee avails advances on interest. An assessee may avail several advances from the same lender or from different lenders and at varying rates of interest. In the absence of anything to indicate that the interest free advance was made only from a particular corresponding advance received by the assessee, the advance made by the assessee would obviously be from the common pool of money. Money lying in a common pool has no identity. The various amounts advanced to the assessee get merged into a common pool. There is no justification then either for the assessee or for the department to take into consideration the rate of interest in respect of a particular advance or advances to the assessee. The only logical approach is to take into consideration the average interest rate at which the assessee has availed of the advances. (AY.2009-10)
CIT v. Kudu Industries (2015) 234 Taxman 668 (P&H)(HC)

S.36(1)(iii) : Interest on borrowed capital – Purchase and installation of 'plant and machinery' was allowable. 605
Interest paid on money borrowed for purchase and installation of 'plant and machinery' was allowable as deduction.
CIT v. Avery Cycle Inds Ltd. (2015) 231 Taxman 814 (P&H)(HC)

S.36(1)(iii) : Interest on borrowed capital – Interest on interest free advance to directors was not allowable – Matter remanded 606
Interest on interest free advance to directors was not allowable – Matter remanded.
CIT v. Avery Cycle Inds Ltd. (2015) 231 Taxman 814 (P&H)(HC)

S.36(1)(iii) : Interest on borrowed capital – Amounts was utilized for settling the accounts of retiring partner – Interest was not allowable. 607
Assessee-firm borrowed funds from bank for settling account of retiring partners and claimed deduction of interest under section 36(1)(iii). Facts revealed that amount sanctioned by bank was directly made over to retiring partners as full payment of consideration agreed to be paid by continuing partners to retiring partners for relinquishment of their share. On appeal dismissing the appeal of assessee the Court held that the said amount did not represent amount borrowed for purpose of business and, therefore, interest paid thereon could not be allowed as deduction. (AY. 2002-03)
Hotel Roopa v. CIT (2015) 231 Taxman 425 (Karn.)(HC)

608 **S.36(1)(iii) : Interest on borrowed capital – Actual cost – Interest expenditure incurred after the asset is put to use was allowable as revenue expenditure. [S. 43(1)]**
Assessee borrowed money to purchase assets and paid interest thereon - Whether while interest attributable till asset was put to use for first time was required to be included in actual cost as per section 43(1) while interest expenditure incurred thereafter was allowable as revenue expenditure.(AY. 1995-96, 2002-03, 2003-04)
Jt. CIT v. Bell Ceramics Ltd. (2015) 231 Taxman 82 (Guj.)(HC)

609 **S.36(1)(iii) : Interest on borrowed capital – Interest free security deposit – Sufficient surplus funds – Commercial decision – Deletion of interest was held to be justified.**
Assessee was engaged in dealership business of vehicles. Assessee filed its return claiming deduction of interest paid on borrowed capital. Assessing Officer finding that borrowed funds had been used for booking of a property which was to be used as a showroom of company in future years, held that money borrowed was not utilised for business purpose. He thus rejected assessee's claim for deduction. Tribunal deleted said disallowance. It was noted from records that assessee had sufficient surplus funds for making payment of interest free security deposit to acquire asset in question. Even otherwise, it was a commercial decision which could not have been gone into unless Assessing Officer had concrete material to contend that transaction was a sham or illusory in view of aforesaid, impugned order passed by Tribunal did not require any interference. (AY. 2007-08)
CIT v. DD Industries Ltd. (2015) 231 Taxman 784 (Delhi)(HC)

610 **S.36(1)(iii) : Interest on borrowed capital – There was clear nexus of utilization of borrowed fund for earning income in form of interest, rent, and business income of construction – Interest was held to be allowable.**
Assessee, a civil engineer was engaged in business of construction activities. Assessee filed his return claiming deduction of interest on loan taken against capital bonds. Assessing Officer rejected assessee's claim holding that payment of interest was a bogus expenditure. Tribunal however noted that there was clear nexus of utilization of borrowed fund for earning income in form of interest, rent, and business income of construction. It was further found that assessee had deducted tax at source on interest payment wherever applicable. Tribunal thus deleted disallowance made by TPO. Finding recorded by Tribunal being a finding of fact, it did not require any interference. (AY. 2009-10)
PCIT v. Ashwin Kantilal Raval (2015) 231 Taxman 615 (Guj.)(HC)

611 **S.36(1)(iii) : Interest on borrowed capital – Stock-in-trade – Allowable as deduction.**
Where payment of advance was not for acquisition of fixed assets but only for acquiring stock-in-trade, assessee was entitled for deduction in respect of interest on borrowed capital.(AY. 2008-09)
CIT v. Cellice Developers (P.) Ltd. (2015) 231 Taxman 255 (Cal.)(HC)

S.36(1)(iii) : Interest on borrowed capital – Civil contractor – Entitled to depreciation and interest on estimated profits.[S.32, 44AD, 144, 145] 612

Dismissing the appeal of Revenue the Court held that if an assessee is entitled to claim deduction of interest, be it under section 36(1)(iii) or any other relevant provision and of depreciation in the ordinary course of assessment, there is no reason why the same facilities should not be extended to him, merely because the profits are determined on the basis of estimation. Depreciation and interest which are otherwise deductible in the ordinary course of assessment retain the same legal character, even where the profits of the assessee are determined on percentage basis. This view gets support from the circular dated August 31, 1965, issued by the Central Board of Direct Taxes. Though the circular was with reference to the Indian Income-tax Act, 1922, it holds good for the analogous provisions under the 1961 Act.

Held, that, on the facts and in the circumstances of the case, the Tribunal was correct in law in directing the Assessing Officer to allow the assessee, a civil contractor, depreciation and interest payments from the estimate of profit made at 12 per cent. (AY. 1994-95)

CIT v. Ramachandra Reddy (2014) 226 Taxman 206 (Mag.) / (2015) 372 ITR 77 (T & AP) (HC)

S.36(1)(iii) : Interest on borrowed capital – AO cannot disallow interest without concrete material to contend that a transaction is a sham. 613

The assessee was engaged in manufacturing and trading of auto components and dealership business vehicles and filed its return claiming deduction of interest paid on borrowed capital. The AO found that borrowed funds had been used for booking of a property which was to be used as a show room of the assessee company in future years and hence he took a view that money borrowed was not utilised for business purpose. The Tribunal however deleted the disallowance holding that the assessee had made the advance from his own surplus funds.

The High Court dismissed the department's appeal observed various findings such as the assessee needed the premises, it had a consistent and long standing arrangement with the seller, the security deposit had not been increased for a long time, etc. and held that singling out a factor to hold against the assessee in the absence of any other material establishing dubiousness in the transaction was incorrect. (AY. 2007-08)

CIT v. DD Industries Ltd. (2015) 117 DTR 355 / 231 Taxman 784 (Delhi)(HC)

S.36(1)(iii) : Interest on borrowed capital – Sufficient capital and reserve – Advance to sister concern on low rate – No disallowance can be made. 614

When there was sufficient capital and reserve and surplus at the Assessee's disposal, advance to sister concern on a low interest or without interest having business connection does not prove that Assessee has diverted borrowed funds as interest free loan. (AY.1992-93)

CIT v. Vijay Solvex Ltd. (2015) 274 CTR 384 / 113 DTR 382 (Raj.)(HC)

615 **S.36(1)(iii) : Interest on borrowed capital – Diversion of borrowed funds to associated concern – Disallowance was held to be justified.**
Assessee invested certain sum of money out of borrowed funds in a group concern for the purpose of generation and supply of electricity. The group concern further advanced the said sum as unsecured loan to another group concern which in turn invested the said sum in the shares of the assessee company. Because of the inter connection between the concerns, having common directors, the AO held the transaction as sham transaction and disallowed the interest on borrowed funds. Held:
There being no evidence that the advance made by the assessee was from the funds which the assessee had raised from the shareholders therefore, the interest was rightly disallowed. (AY. 1997-98 to 1999-2000)
CIT v. Bellary Steel & Alloys Ltd. (2014) 223 Taxman 491 / (2015) 370 ITR 226 / 114 DTR 287 (Karn.)(HC)

616 **S.36(1)(iii) : Interest on borrowed capital – Estimate of net profit rate – Interest on borrowed capital is not allowable.**
Deduction on account of interest on borrowed capital is not allowable where income is estimated by applying net profit rate. (AY. 1990-91)
Lali Construction Co. v. ACIT (2015) 229 Taxman 286 (P&H)(HC)

617 **S.36(1)(iii) : Interest on borrowed capital – Shares and debentures for the purpose of business – Interest was held to be allowable. [S.56]**
The assessee firm was engaged in the business of advancing loans and earning income from hire purchase financing, besides investment in shares and debentures. It borrowed funds and invested the same in shares and debentures. It treated the interest arising out of such investments as income from business and claimed interest on borrowed capital under section 36(1)(iii). The AO held that the interest income had to be assessed under the head "other sources" and not under the head "business income" and therefore disallowed the interest on borrowed capital under section 36(1)(iii). On appeal the disallowance was deleted by CIT(A) and Tribunal. On appeal by revenue dismissing the appeal the Court held that where borrowed capital was invested in shares and debentures for purpose of business, interest paid thereupon would be allowed as deduction. (AY. 1992-93 to 1994-95)
CIT v. Shriram Investments (Firm) (2015) 229 Taxman 179 (Mad.)(HC)

618 **S.36(1)(iii) : Interest on borrowed capital – Mixed funds – No diversion of funds as interest free advances – Disallowance was not justified.**
Where assessee, engaged in sarafi business, obtained loan from bank, in view of fact that said funds got merged with funds of assessee's other business, but there was no material on record indicating that there was diversion of interest bearing funds as interest free advances, assessee's claim for deduction under section 36(1)(iii) was to be allowed.
CIT v. Rajendra Brothers (2015) 228 Taxman 348 (Mag.)(Guj.)(HC)

S.36(1)(iii) : Interest on borrowed capital – Not utilized for the purpose of business – Kept idle – Not entitled to deduction. 619

Assessee borrowed unsecured loan from friends and relatives and paid interest thereupon. It was found that such borrowed funds were lying idle in an almirah and were never utilised for business purpose. Assessee was not entitled to deduction of interest paid on said loan. (AY. 2001-02)

Tulsi Ram Bhagwan Das Mandi Ghanshyamganj v. CIT (2015) 228 Taxman 308 (Mag.) (All.)(HC)

S.36(1)(iii) : Interest on borrowed capital – No finding by Assessing Officer that assessee borrowed amount on interest and straightaway passed it on to its sister concern – No disallowance of interest can be made. 620

Held, dismissing the appeal of revenue, that since the Assessing Officer could not demonstrate that what was advanced by the assessee to its sister concern was nothing but the amount borrowed from the financial institution, disallowance of interest could not be made.(AY.1992-93)

CIT v. Seven Hills Hospitals P. Ltd. (2015) 370 ITR 69 / 229 Taxman 462 (T&AP)(HC)

S.36(1)(iii) : Interest on borrowed capital – No loan from any bank had been raised by assessee for advancing loans to its sister concerns as funds so advanced were generated from assessee's own revenues, interest could not be disallowed. 621

Assessee had advanced various interest-free advances to its sister concern. Assessing Officer disallowed interest by holding that assessee had failed to prove commercial expediency for advancing these loans to its sister concerns. CIT(A) upheld the action of the AO. On appeal Tribunal held that no loan from any bank had been raised by assessee for advancing loans to its sister concerns as funds so advanced were generated from assessee's own revenues, therefore, interest could not be disallowed. (AY. 2009-10)

Dy. CIT v. International Institute of Planning & Management (P.) Ltd. (2015) 41 ITR 733 (2016) 157 ITD 579 (Delhi)(Trib.)

S.36(1)(iii) : Interest on borrowed capital – New project – Held not allowable. 622

Where assessee was never in business of generation of power, interest expenditure incurred on new power project was not allowable. (AY. 2003-04, 2004-05)

Dy. CIT v. Gujarat Mineral Development Corporation Ltd. (2015) 68 SOT 283 (URO)(Ahd.) (Trib)

S.36(1)(iii) : Interest on borrowed capital – Advance to subsidiary – No disallowance can be made. 623

Where subsidiary company was also in same line of business as that of assessee and there was interdependence between two entities for obtaining network and fulfil requirement of funds and assessee advanced borrowed funds to its subsidiary company as strategic advance during course of business, no disallowance could be made under section 36(1)(iii).(AY. 2009-10, 2010-11]

Vodafone East Ltd v. Addl. CIT (2015) 43 ITR 551 / (2016) 156 ITD 337 (Kol.)(Trib.)

624 **S.36(1)(iii) : Interest on borrowed capital – Advance to group concerns – Matter was set aside.**
Assessee making interest-free advances and investments to group concerns. Tribunal held that, no disallowance can be made if amount advanced to group concerns for business expediency. Matter was set aside. (AY. 2009-10)
DD Township Ltd. v. Dy. CIT (2015) 40 ITR 642 / 70 SOT 792 (Delhi)(Trib.)

625 **S.36(1)(iii) : Interest on borrowed capital – Advance to sister concern – Interest free fund was utilised – Department could not dictate the assessee to conduct its business affairs in a particular manner – Disallowance of interest was held to be not proper.**
Dismissing the appeal of revenue the Tribunal held that the assessee had given details of the borrowings and the utilisation of the entire secured loan for business purposes. The Assessing Officer had failed to establish that the loan amount advanced to sister concerns was out of interest-bearing funds only. The details of interest-free funds and utilisation of entire borrowed funds for business of the assessee had not been controverted by the Department and the Department could not dictate the assessee to conduct its business affairs in a particular manner. As long as the assessee was conducting its business affairs within the legal framework, it was at liberty to manage and utilise its resources according to its own prudence and skill. There was no infirmity in the order of the Commissioner (Appeals). (AY. 2009-10)
Dy. CIT v. Alliance Retreat P. Ltd. (2015) 40 ITR 661 (Chennai)(Trib.)

626 **S.36(1)(iii) : Interest on borrowed capital – Selling the goods in regular course of business – Disallowance of interest was held to be not justified.**
Dismissing the appeal of revenue the Tribunal held that the assessee sold goods to those parties and those transactions represented a transaction in the regular course of business and not a case of interest-free advance. Once it was a case of sales, then even if the amount was not received, it could not be construed as a case of diversion of funds. The Commissioner (Appeals) was justified in deleting the addition. (AY. 2008-09)
ITO v. Triple V. Timber Sales Corpn. (2015) 40 ITR 204 / 70 SOT 811 (Chd)(Trib.)

627 **S.36(1)(iii) : Interest on borrowed capital – Books of account interlinked – Interest was held to be allowable.**
Assessee's personal books of account as well as books of account of his proprietary concern were interlinked and connected with business activity interest paid from personal books of account on funds borrowed for business purpose was allowable. (AY. 2008-09)
Brijgopal Madhusudan Bhattad v. ITO (2015) 155 ITD 90 (Nag.)(Trib.)

628 **S.36(1)(iii) : Interest on borrowed capital – Repayment of subsequent loan – Borrowed funds for repaying old borrowings which had been duly used for purpose of business, interest paid on subsequent borrowings was to be allowed as deduction.**
The assessee borrowed loan to repay his earlier loan borrowed by him during the course of his business. The interest paid on the new loan was claimed as deduction by the assessee which was disallowed by the Assessing Officer on the ground that the interest was paid on borrowed funds which was utilized for earning dividend. The

CIT(A) confirmed the Assessing Officer the ITAT held that the borrowed fund have been used for repaying the old borrowings which has been duly used for the purpose of business. It is not in dispute that the original borrowings were used by the assessee for the purpose of his business. Hence, the interest paid by the assessee on borrowings which were utilized by repaying the old business borrowings is squarely allowable as deduction.(AY. 2006-07)
Kamal Bhandari v. ITO (2015) 155 ITD 680 / 2016) 136 DTR 271 / 176 TTJ 764 (Kol.) (Trib.)

S.36(1)(iii) : Interest on borrowed capital – Advance to sister concerns – Had sufficient funds to provide interest-free loan – Disallowance of interest was not justified. 629
Interest-free loans advanced to sister concerns by assessee. Assessee had sufficient funds to provide interest free loan. Interest bearing advances used for business purposes. Disallowance of interest was not justified. (AY. 2010-11, 2011-12)
ACIT v. Sharma East India Hospitals and Medical Research Ltd. (2015) 41 ITR 604 (Jaipur)(Trib.)

S.36(1)(iii) : Interest on borrowed capital – Interest-free loan from own funds – Interest could not be disallowed. 630
No loan from any bank had been raised by assessee for advancing loans to its sister concerns, as funds so advanced were generated from assessee's own revenues. Interest could not be disallowed. (AY.2009-10)
Dy. CIT v. International Institute of Planning and Management P. Ltd. (2015) 41 ITR 733 / (2016) 157 ITD 579 (Delhi)(Trib.)
Central for Vocational and Entrepreneurship Studies v. Dy. CIT (2015) 41 ITR 733 / (2016) 157 ITD 579 (Delhi)(Trib.)

S.36(1)(iii) : Interest on borrowed capital – Purchase of immovable property – Interest is held to be allowable. 631
Where assessee, engaged in business of running pre-schools, took term loan utilised it for acquiring property used for purpose of pre-schooling business, assessee's claim for deduction of interest on said loan was to be allowed. (AY. 2006-07)
ACIT v. Geeta Bhatia (Ms.) (2015) 68 SOT 50 (URO)(Mum.)(Trib.)

S.36(1)(iii) : Interest on borrowed capital – Assessee advancing interest-free funds to sister concern from cash credit account – Advance given out of assessee's own funds to be determined – No addition required if assessee substantiates its claim – Matter remanded. 632
The assessee had advanced interest-free loans to his sister concern from his cash credit account, against which repayment was received on different dates resulting in outstanding loan. The AO computed the interest at 12 per cent as applicable for cash credit loans and made disallowance on the ground that there was no business nexus between the two business concerns. The CIT(A) confirmed the addition observing that there was no commercial expediency in respect of such interest-free advance. On appeal: Held, that, if the assessee was able to substantiate its claim that the advance was

given out of its own funds, no addition was called for. Matter remanded to the AO. (AY. 2008-09)
Radha Shyam Panda v. ITO (2015) 37 ITR 386 (Cuttack)(Trib.)

633 **S.36(1)(iii) : Interest on borrowed capital – Assessee diverting interest bearing funds to sister concern – Disallowance of proportionate interest was held to be proper.**
The assessee advanced interest free loans to its sister concern from borrowed capital. The Assessing Officer calculated the proportionate disallowance under the Act, and restricted the disallowance based on the claim of interest. The Commissioner (Appeals) confirmed the order of the Assessing Officer. On appeal:
Held, dismissing the appeal, that admittedly, the assessee had diverted the interest bearing funds to its sister concern. Hence proportionate interest was to be disallowed and the Assessing Officer had fairly restricted the disallowance based on the amount of interest claimed by the assessee. There was no infirmity in the orders of the authorities. (AY. 2010-11)
Hi Tech Land Developers and Builders v. Add. CIT (2015) 38 ITR 355 / 69 SOT 245 (Chd.) (Trib.)

634 **S.36(1)(iii) : Interest on borrowed capital – Broker not confirmed – Disallowance was held to be justified.**
Assessee claimed interest paid on loan borrowed from its broker. The said interest was disallowed by the AO. On appeal Tribunal held that in accounts of broker there was no mention of any interest income and since broker had never confirmed of receiving any interest from assessee, disallowance made was justified.(AY. 1987-88 to 1990-91)
Dhanraj Mills (P.) Ltd. v. ACIT (2015) 152 ITD 253 (Mum.)(Trib.)

635 **S.36(1)(va) : Any sum received from employees – Belated contribution cannot be allowed as deduction.[S.43B]**
Deduction would be available only if remittance to provident fund is made within due date fixed for making such remittance, therefore belated payment of employee's contribution to provident fund cannot be allowed as deduction in view of provisions of Explanation to clause (va) of section 36(1) and section 43B. (AY. 1992-93, 1993-94)
CIT v. South India Corporation Ltd. (2015) 232 Taxman 241 (Ker.)(HC)

636 **S.36(1)(va) : Any sum received from employees – Delay in deposit of employees' contribution to PF and ESI – Finding that there was no delay – Disallowance held to be not justified. [S.37(1)]**
An addition of ₹ 47,32,919 was made by the Assessing Officer on account of late deposit of employees' contribution to PF and ESI. The Tribunal while upholding the finding recorded by the Commissioner (Appeals) observed that the amounts had been paid before the due date of filing the return and, therefore, the amounts was allowable. Court held that in view of the finding that there had been no delay in depositing the employees' contribution to PF and ESI no addition could be made on that account. (AY.1994-95 to 1999-2000)
CIT v. Nuchem Ltd. (2015) 371 ITR 164 (P&H)(HC)

S.36(1)(vii) : Bad debt – Tribunal remanding matter to Assessing Officer was held to be justified. [S.139(5)] 637

Dismissing the appeal of revenue the Court held that the Tribunal was right in holding that while there was a bar on the Assessing Officer entertaining such claim without a revised return being filed by the assessee, there was no such restraint on the Commissioner (Appeals) during the appellate proceedings. However, while permitting such a claim he ought to have examined whether in fact the bad debts were written off by the assessee in the first instance in the accounts and then taken into consideration while computing the income. The remand of the matter to the Assessing Officer for that purpose was, therefore, justified. (AY. 2006-07)

PCIT v. Western India Shipyard Ltd. (2015) 379 ITR 289 (Delhi)(HC)

S.36(1)(vii) : Bad debt – Warranty expenses – Credited in earlier year and write off in the current year – Held to be allowable as bad debt. 638

Assessee credited the provision for warranty expenses in earlier year and paid taxes on the said amount. As the assessee has not got any portion of the warranty provision during the year the same was written off. Debt was held to be allowable as bad debt. (AY. 2003-04)

Amco Batteries Ltd. v. ACIT (2015) 232 Taxman 351 (Karn.)(HC)

S.36(1)(vii) : Bad debt – Foreign buyer failed to honour bills – Amount was written off as per the permission of RBI – Bad debt was held to be allowable. 639

Assessee-company had been exporting jute to 'W' Inc. of USA for a long time, however, in respect of a particular shipments made, foreign company failed to honour bills on presentation even after extending due dates at their request. Foreign buyer was subsequently declared insolvent and amount was actually written off during relevant assessment year. Deduction on account of bad debt, however, was not allowed on ground that assessee had failed to establish that debt had become irrecoverable. On reference allowing the claim of assessee the Court held that since assessee had written off amount in question in accordance with permission granted by RBI, claim raised for bad debts was to be allowed. (AY. 1980-81)

Duncan International Ltd. v. CIT (2015) 232 Taxman 570 (Cal.)(HC)

S.36(1)(vii) : Bad debt – The principal part of the Inter-corporate Debt (ICD) can be claimed as a bad debt if the interest thereon has been offered to tax in some year. [S.36(2)] 640

Even if a part of debt is offered to tax, Section 36(2)(i) of the Act, stands satisfied. The test under the first part of Section 36(2)(i) of the Act is that where the debt or a part thereof has been taken into account for computing the profits for earlier Assessment Year, it would satisfy a claim to deduction under Section 36(1)(vii) read with Section 36(2)(i) of the Act. Therefore the principal part of the Inter-corporate Debt (ICD) can be claimed as a bad debt if the interest thereon has been offered to tax in some year. (AY.2004-05)

CIT v. Pudumjee Pulp & Paper Mills Ltd. (2015) 235 Taxman 451 (Bom.)(HC)

641 **S.36(1)(vii) : Bad debt – Debit balances written off – Appellate Tribunal – Claim was not pressed before the Tribunal because of erroneous understanding of its authorized representative – Matter was set aside. [S. 254(1)]**
Allowing the appeal the Court held that, where claim of deduction under section 36(1)(vii) being small debit balances written off as bad debts was not pressed before Tribunal because of erroneous understanding of its authorised representative, assessee could be allowed an opportunity to establish and prove this claim. Matter remanded. (AY. 1998-99)
Crompton Greaves Ltd. v. ACIT (2015) 230 Taxman 509 (Bom.)(HC)

642 **S.36(1)(vii) : Bad debt – For claiming bad debt it was not necessary for assessee to close individual account of each of its debtors in its books.**
Assessee was a co-operative Bank and claimed deduction in respect of bad debt. Assessing Officer denied deduction on ground that assessee was trying to recover amount treated as bad debts. Where assessee had written off bad debt in its books of account and simultaneously reduced corresponding amount from loans and advances to debtors, assessee would be entitled to deduction under section 36(1)(vii); it was not necessary for assessee to close individual account of each of its debtors in its books. (AY. 2007-08)
CIT v. Newanagar Co-operative Bank Ltd. (2015) 229 Taxman 201 (Guj.)(HC)

643 **S.36(1)(vii) : Bad debt – Irrecoverable debt – Allowable as bad debt.**
Assessee company was engaged in business of hire purchase, leasing and providing consumer durable loans. Assessee claimed bad debts on account of irrecoverable debts. It is not necessary for assessee to establish that debt has become irrecoverable as it is enough if bad debt is irrecoverable in accounts of assessee, therefore, debts claimed by assessee would be allowed.(AY. 2002-03 to 2005-06)
Citi Financial Retail Services India Ltd. v. ACIT (2015) 228 Taxman 258 (Mag.)(Mad.)(HC)

644 **S.36(1)(vii) : Bad debt – It is not necessary that same has been offered as income liable to tax in earlier years or that same has become bad.**
In order to claim a particular debt as bad, all that assessee is required to show is that said amount is written off in books of account; and it is not necessary that same has been offered as income liable to tax in earlier years or that same has become bad.
CIT v. Essar Teleholdings Ltd. (2015) 228 Taxman 309 (Mag.)(Bom.)(HC)

645 **S.36(1)(vii) : Bad debt – Advance to sister concern – Genuine of transaction was not proved – Claim as bad debt was held to be not allowable.**
Assessee's sister concern was acting as sub-broker. Said sister concern failed to pay amount of debt. Assessee company claimed that amount as a bad debt, however, Tribunal found that a book entry was made to claim bad debts as a means to reduce taxable profits. On appeal the Court held that since entire process was a mere eye-wash, this was not a fit case where substantial questions of law arose for determination in Appeal. (AY. 2004-05)
Sovereign Securities (P.) Ltd. v. ITO (2015) 228 Taxman 309 (Mag.)(Bom.)(HC)

S.36(1)(vii) : Bad debts – Law after 1989 – Assessee writing off debts in its books of account – Sufficient – Not necessary for assessee to establish debt became irrecoverable. 646

Allowing the appeal of assessee the Tribunal held that it was an admitted fact that the assessee had written off the debts in its books of account and it was not the case of the Assessing Officer that the debts written off were not related to the business of the assessee. After April 1, 1989, it was not necessary for the assessee to establish that the debt had become irrecoverable. It was enough if the bad debt was written off as irrecoverable in the accounts of the assessee. The Commissioner was justified in deleting the disallowance. Followed *T. R. F. Ltd. v. CIT [2010] 323 ITR 397 (SC)*(AY. 2008-09)
Living Media India Ltd. v. ACIT (2015) 40 ITR 610 / 70 SOT 536 (Delhi)(Trib.)

S.36(1)(vii) : Bad debt – Provision for doubtful debt – Allowed as deduction in the year of write off. 647

The Assessee claimed bad debts of ₹ 34,03,407/- during the impugned assessment year. As the assessee disallowed a sum of ₹ 31,02,151/- in the earlier year while making the provision for doubtful debts, it reduced this sum from income of the impugned assessment year to avoid double taxation. The Assessing officer disallowed a sum of ₹ 3,01,256/- on the ground that the bad debts written off in the sum of ₹ 34,03,407/- was more than the provision made in the earlier years amounting to ₹ 31,02,151/. On appeal, the learned CIT(A) upheld the action of the Assessing officer. On appeal, the Appellate Tribunal held that the assessee made provision for bad and doubtful debts in the earlier year amounting to ₹ 31,02,151/- and the same were duly disallowed. This sum was written back to the income and expenditure account during A.Y.2008-09 by the assessee but since the same was already offered to tax by way of voluntary disallowance in the earlier year, it was reduced in the statement of total income for AY.2008-09 to avoid double taxation. The assessee also correspondingly sought to write off the doubtful debts in its books of account as irrecoverable in accordance with section 36(1)(vii) of the Act amounting to ₹ 34,03,407/- and claimed the same as deduction in AY.2008-09. Thus, the treatment given in the books as well as return of the assessee is correct. (AY. 2008-09)
Woodlands Medical v. DCIT (2015) 44 ITR 312 (Kol.)(Trib.)

S.36(1)(vii) : Bad debt – Written off in the books – Held to be allowable. [S. 36(2)] 648

Once the bad debt being written off in the books of account is sufficient compliance hence allowable as deduction.
Kisan Ratilal Choksey Shares and Securities P. Ltd. v. Dy. CIT (2015) 41 ITR 114 (Mum.) (Trib.)

S.36(1)(vii) : Bad debt – Simple write off in books of account sufficient for claiming bad debts – Debt need not be proved as bad. 649

The Assessing Officer disallowed debts due from the Ministry of Defence and loss on account of irrecoverable advances which was made for development of moulds on the ground that they represented capital loss. The Commissioner (Appeals) confirmed this. On appeal :

Held, that bad debts written off in the books of account were to be allowed as deduction as a simple write off in the books of account was sufficient for claiming deduction and the debt need not be proved as bad. (AY. 2004-05, 2008-09)
Devendra Exports P. Ltd. v. ACIT (2015) 38 ITR 744 (Chennai)(Trib.)

650 **S.36(1)(vii) : Bad debt – Not allowable if debt not taken into account while computing income of assessee in any previous year – Allowable as business expenditure. Matter remanded.[S.28(i), 36(2), 37(1)]**
Bad debt is not allowable if debt not taken into account while computing income of assessee in any previous year. Whether can be allowable as business expenditure. Matter remanded. (AY. 2006-07, 2008-09)
Dy. CIT v. GAC Shipping (India) P. Ltd. (2015) 39 ITR 183 (Cochin)(Trib.)

651 **S.36(1)(viia) : Provision for bad and doubtful debts – Schedule bank – Rural branch – Even provisional figures of census data available on first day of relevant financial year can be taken into consideration – Not entitled deduction.**
The assessee was a scheduled bank of the Government of India. It, relying upon census of 1991, declared it as a 'rural bank' and claimed deduction under section 36(1)(viia). The revenue authorities, relying upon provisional data of census of 2001, concluded that the assessee was not a rural branch. Accordingly, the assessee's claim for deduction under section 36(1)(viia) was disallowed.
The Tribunal confirmed order passed by authorities below. On appeal, the assessee contended that since census data of 2001 was finally published after first day of previous year, it could not be taken into consideration while disposing of aforesaid claim. Dismissing the appeal of assessee the Court held that in order to determine status of a bank as a 'rural branch' for allowing benefit of deduction under section 36(1)(viia) even provisional figures of census data available on first day of relevant financial year can be taken into consideration and if figure shown in provisional population total in a village exceeds 10,000, then bank would not satisfy requirement of rural branch and, consequently, would not be entitled to benefit granted to rural branch.(AY. 2003-04, 2004-05)
State Bank of Mysore v. ACIT (2015) 231 Taxman 319 (Karn.)(HC)

Section 37 : General.

652 **S.37(1) : Business expenditure – Legal expenses incurred for protecting the business of the firm – Held to be allowable business expenditure**
Tribunal held that the legal expenses incurred for defending the business of the going concern and for protecting its interest could not be said to be personal in nature nor could it could be said that the expenses were unreasonable or not *bona fide*. High Court reversed the finding of Tribunal. On appeal allowing the claim the Court held that the High Court was not justified in upsetting a finding of fact arrived by the Tribunal particularly in the absence of a substantial question of law being framed in this regard. Accordingly the order of Tribunal was restored. (AY.1995-96)
Mangalore Ganesh Beedi Works v. CIT (2015) 378 ITR 640 / 280 CTR 521 / 126 DTR 233 (SC)

S.37(1) : Business expenditure – Commission – Agreement – AO has to consider relevant facts and determine according to law – On facts the disallowance of commission was held to be justified, mere existence of agreement was not sufficient. 653

The question that was posed by the High Court was whether acceptance of the agreements, affidavits and proof of payment would debar the assessing authority to go into the question whether the expenses claimed would still be allowable under Section 37 of the Act. This is a question which the High Court held was required to be answered in the facts of each case in the light of the decision of this Court in *Swadeshi Cotton Mills Co. Ltd. v. CIT (1967) 63 ITR 57 (SC)* and *Lachminarayan Madan Lal vs. CITl (1972) 86 ITR 439 (SC)*. In Lachminarayan it was held that "The mere existence of an agreement between the assessee and its selling agents or payment of certain amounts as commission, assuming there was such payment, does not bind the Income Tax Officer to hold that the payment was made exclusively and wholly for the purpose of the assessee's business. Although there might be such an agreement in existence and the payments might have been made. It is still open to the Income tax Officer to consider the relevant facts and determine for himself whether the commission said to have been paid to the selling agents or any part thereof is properly deductible under Section 37 of the Act." There were certain Government Circulars which regulated, if not prohibited, liaisoning with the Government corporations by the manufacturers for the purpose of obtaining supply orders. The true effect of the Government Circulars along with the agreements between the assessee and the commission agents and the details of payments made by the assessee to the commission agents as well as the affidavits filed by the husbands of the partners of M/s. R. J. Associates were considered by the High Court. In performing the said exercise the High Court did not disturb or reverse the primary facts as found by the learned Tribunal. Rather, the exercise performed is one of the correct legal inferences that should be drawn on the facts already recorded by the learned Tribunal. The questions reframed were to the said effect. The legal inference that should be drawn from the primary facts, as consistently held by this Court, is eminently a question of law. No question of perversity was required to be framed or gone into to answer the issues arising. In fact, as already held by us, the questions relatable to perversity were consciously discarded by the High Court. We, therefore, cannot find any fault with the questions reframed by the High Court or the answers provided. Civil appeal of assessee was dismissed.

Premier Breweries Ltd. v. CIT (2015) 372 ITR 180 / 230 Taxman 575 / 116 DTR 233 (SC)
McDowell & Co. Ltd. v. Dy. CIT (2015) 372 ITR 180 / 230 Taxman 575 / 116 DTR 233 (SC)

S.37(1) : Business expenditure – Commission – Selling to statutory corporation – Matter remanded 654

Questions raised in Departmental appeals was whether the assessee was eligible for deduction of commission paid to agents for sale of liquor to KSBC. The Department's contention that there was no scope for paying any commission for the sale of liquor to a Government company had force because collection of commission or incentive if any by a Government company or its employees would amount to a corrupt practice. There is prohibition against advertisements of liquor for sales promotion. Therefore, it is essentially a matter of selection of manufacturers and brands which should not involve

any payment of commission. Court remanded the matter before the Assessing Officer for further verification. (AY. 1991-92 to 1996-97, 2002-03)
CIT v. South Travancore Distilleries and Allied Products (2015) 379 ITR 56 / (2016) 285 CTR 70 (Ker.)(HC)

655 **S.37(1) : Business expenditure – Accounting – Mercantile system of accounting – Advertisement and publicity expenses – Bills pertaining to previous year and continued during year booked only when liability crystallized – Deductible. [S. 145]**
Court held that according to the mercantile system of accounting, bills received by the assessee in respect of advertisement services pertaining to the previous year and continued during the year were booked only when the liability crystallised. Merely because the expenditure related to an earlier year, it did not become a liability payable in the earlier year unless the liability was determined and crystallised in the year in question on the basis of maintaining accounts on the mercantile basis. Therefore, the disallowance of ₹ 10,37,367 on account of advertisement and publicity expenses on the ground that the expenses did not relate to assessment year 1996-97 was not justified. (AY. 1995-96 to 1999-2000)
CIT v. Jet Lite (India) Ltd. (2015) 379 ITR 185 / 128 DTR 91 / (2016) 236 Taxman 453 / 282 CTR 113 (Delhi)(HC)

656 **S.37(1) : Business expenditure – Airlines – Foreign travel expenses – Expenses for purpose of training of pilots abroad – Expenses incurred after obtaining approval from Reserve Bank of India – Training imparted by technical experts for business purposes – Deduction allowable.**
Court held that there was to be no interference with the decision of the Tribunal on the issue of foreign travel expenses. (AY. 1995-96 to 1999-2000)
CIT v. Jet Lite (India) Ltd. (2015) 379 ITR 185 / 128 DTR 91 / (2016) 236 Taxman 453 / 282 CTR 113 (Delhi)(HC)

657 **S.37(1) : Business expenditure – Consultancy charges – Services rendered to assessee in connection with lease of two aircrafts – No evidence that payment excessive or unreasonable – Allowable.**
Court held that the Revenue had been unable to show as to how the consultancy charges should be treated as unreasonable. Even in the present appeal the Revenue had been unable to show that the payment has been excessive or unreasonable. Therefore, the consultancy charges were held to be allowable. (AY. 1995-96 to 1999-2000)
CIT v. Jet Lite (India) Ltd. (2015) 379 ITR 185 / 128 DTR 91 / (2016) 236 Taxman 453 / 282 CTR 113 (Delhi)(HC)

658 **S.37(1) : Business expenditure – Staff welfare expenses – Not necessary for every employee to sign voucher – Expenses was held to be allowable. [S. 37(2)(iii)]**
Court held that the Commissioner (Appeals) was right in observing that it was not necessary for every employee to sign a voucher and that the Assessing Officer had erred in treating the staff welfare expenses as entertainment expenses. However, he found that the expenses claimed as conveyance expenses were in the nature of entertainment

expenses as defined by section 37(2)(iii) and directed the Assessing Officer to restrict the disallowance in so far as conveyance expenses of ₹ 7,31,324. There was no illegality in the order of the Commissioner (Appeals) as upheld by the Tribunal.(AY. 1995-96 to 1999-2000)
CIT v. Jet Lite (India) Ltd. (2015) 379 ITR 185 / 128 DTR 91 / (2016) 236 Taxman 453 / 282 CTR 113 (Delhi)(HC)

S.37(1) : Business expenditure – Airlines – Free tickets – Business pro-motion – Allowable. 659
Court held that the 50 per cent of the expenses on free tickets were disallowed by the Assessing Officer which worked out to ₹ 30,40,170. The Tribunal following its order in the case of the assessee accepted the sub-mission of the assessee that the free charged tickets were being issued on account of business promotion to various persons and merely because they had been issued to spouses or infants or where full names had not been given it could not be presumed that they were not for business purposes. It was held that this discretion of the management at the time of issue of free of charge tickets is of the issuance thereof and the Department had no right to question the prudency of the decision. There was no basis for disallowance of 50 per cent of such expenses. The view taken by the Commissioner (Appeals) as concurred with by the Tribunal was plausible. The disallowance of 50 per cent of these expenses was not based on any material. (AY. 1995-96 to 1999-2000)
CIT v. Jet Lite (India) Ltd. (2015) 379 ITR 185 / 128 DTR 91 / (2016) 236 Taxman 453 / 282 CTR 113 (Delhi)(HC)

S.37(1) : Business expenditure – Capital or revenue – Technical know how 25% as capital expenditure was held to be justified. [S. 35AB] 660
Assessee (licensee) entered into an agreement with a foreign company (licensor) for acquiring germplasm and technical know-how. During year, it paid a certain amount to foreign company for acquiring germplasm and technical know-how and claimed deduction of same as revenue expenditure. The Assessing Officer held that the expenditure incurred by the assessee for acquiring germplasm and technical know-how fell within the ambit of section 35AB and allowed one-sixth of the amount so claimed as deduction. Commissioner (Appeals) treated 75 per cent of expenditure incurred by assessee as revenue expenditure and 25 per cent as being capital in nature. On further appeal, the Tribunal allowed the entire expenditure incurred by the assessee as revenue expenditure. On appeal to High Court by revenue, the Court held that since it was apparent from agreement that it had ensured benefits of research, development and improvements to assessee and both parties intended to benefit for a considerable period of time out of relationship emanating from agreement, order of Commissioner (Appeals) treating 25 per cent of expenditure as capital expenditure was justified. (AY.1995-96)
CIT v. Advanta India Ltd. (2015) 235 Taxman 365 (AP)(HC)

S.37(1) : Business expenditure – Capital or revenue – Royalty – Allowable as revenue expenditure. 661
Assessee paid certain amount to foreign company towards royalty and claimed deduction of same as revenue expenditure. Assessing Officer treated one-fourth of royalty paid

as capital expenditure. Tribunal held that entire royalty payment was to be allowed as revenue expenditure. On appeal by revenue dismissing the appeal the Court held that entire royalty payment was allowable as revenue expenditure.(AY. 1995-96)
CIT v. Advanta India Ltd. (2015) 235 Taxman 365 (AP)(HC)

662 **S.37(1) : Business expenditure – Protect the title of immovable property is held to be allowable as business expenditure.**
Allowing the appeal of assessee the Court held that; where assessee entered into an agreement to sell its cement factory in running condition, various expenses incurred by assessee such as rates and taxes, legal profession fee, travel and conveyance etc., in order to perfect title of movable and immovable properties, were to be allowed as business expenditure. (AY. 2002-03)
Karnataka Instrade Corporation Ltd. v. ACIT (2015) 235 Taxman 374 / (2016) 130 DTR 195 (Karn.)(HC)

663 **S.37(1) : Business expenditure – Royalty – Illegal payment – Payment exceeding prescribed limit was paid as per direction of Government – Held to be allowable – Not hit by explanation.**
Assessee company was engaged in oil exploration. Assessee was bound to pay royalty to State Government in respect of oil exploration done on onshore and in respect of off-shore exploration royalty was to be paid to Central Government. Assessing Officer noted that despite injunction contained in section 6A of the Oilfield (Regulation and Development) Act, 1948, royalty was paid by assessee at rate 29 per cent to State Government which exceeded prescribed limit of 20 per cent. Accordingly, Assessing Officer, by invoking Explanation to section 37, disallowed royalty paid in excess of 20 per cent. Assessee submitted that royalty payment at pre discount price of oil paid to State Governments was as per instructions and guidelines of Central Government and hence, it could not be said to be a payment by infraction of law. Tribunal allowed the claim of assessee. On appeal by assessee dismissing the appeal of revenue the Court held that ;since assessee was only faithfully abiding by decision of Government of India, amount was to be allowed.(AY. 2006-07)
CIT v. Oil & Natural Gas Corporation Ltd. (2015) 235 Taxman 65 (Uttarakhand)(HC)

664 **S.37(1) : Business expenditure – Capital or revenue – Forward cover through bank to possible exchange fluctuations – Allowable as revenue expenditure. [S. 28(i)]**
Assessee identified a bulk drug Ebuprofen as one of promising bulk drugs for purpose of marketing. There was an agreement between assessee and one 'K Ltd' whereby marketing of Ebuprofen was to be done by assessee and it had to be paid a commission out of profits accruing to 'K' Ltd., on export of said product. Further, agreement also made it clear that any loss in transaction would be borne by assessee. Due to unfavourable market conditions, product could not be manufactured and sold during period and, therefore, orders were extended. In order to cover possible exchange fluctuation, assessee obtained forward cover through bank in name of 'K Ltd.' which was a requirement under Reserve Bank of India (RBI) guidelines. RBI, thereafter, barred companies from roll-over of forward cover resulting in loss to assessee in view of foreign exchange

fluctuation. Assessing Officer and Commissioner (Appeals) took view that it was a new enterprise on part of assessee and therefore, loss was capital in nature and not a loss that occurred in course of business. Tribunal decided the issue in favour of assessee. On appeal by revenue dismissing the appeal the Court held that the assessee was in business of marketing bulk drugs, formulations, etc., and one of its ventures had ended in a loss and that loss was attributable to business hence said loss would not be treated as capital expenditure. (AY. 1996-97)
CIT v. Saka Marketing Services (P.) Ltd. (2015) 235 Taxman 17 / 373 ITR 330 (Mad.)(HC)

S.37(1) : Business expenditure – Renovation of hotel rooms conference hall, etc. – Held to be allowable as revenue expenditure. 665
Dismissing the appeal of revenue the Court held that Expenditure incurred by assessee-company, which was running a hotel, on renovation of hotel rooms, conference hall, etc., was an allowable revenue expenditure. (AY. 1991-92, 1992-93)
CIT v. Cama Hotels Ltd. (2015) 235 Taxman 206 (Guj.)(HC)

S.37(1) : Business expenditure – Self serving documents – Signature of one person in the vouchers – Rejection of books of account was not justified. [S.145] 666
Assessee is engaged in manufacturing and sale of cloth, paid weaving charges to one person, namely, master weaver, who represented all weavers and also signed vouchers prepared in names of various weavers. Assessing Officer made certain disallowance out of weaving charges holding that vouchers were self-serving documents and signature of one person on vouchers led to suspicion that expenses were inflated. Addition was confirmed by the Tribunal. On appeal allowing the appeal of assessee the Court held that when expenses had been incurred and reflected in books of account, same should be either accepted or rejected on basis of specified data or parameters, when record itself justified expenses claimed by assessee, there was no justification in rejecting books of account or vouchers merely on specious plea that one person signed for all persons. (AY. 2002-03)
Southern Sizing Mills v. Dy. CIT (2015) 235 Taxman 254 (Mad.)(HC)

S.37(1) : Business expenditure – Capital or revenue – Stamp duty on lease of 30 years – Deferred revenue expenditure – Allowable as revenue expenditure. 667
Assessee had taken a land on lease for a period of 30 years. An amount was paid as stamp duty in respect of deed of lease executed by assessee with lessor. Assessee treated same as revenue expenditure as according to it said expenditure was incurred for purpose of carrying on business. Assessing Officer did not dispute that it was a revenue expenditure, however, he held that stamp duty paid for lease of assets should be spread over entire life of lease as deferred revenue expenditure. The Commissioner (Appeals) held that the stamp duty had been paid on the lease deed was to acquire a capital asset. Therefore the stamp duty paid on the document to acquire the leasehold right of land/asset should be disallowed in its entirety being on capital account. The Tribunal held that the payment of stamp duty towards the leasehold land is allowable as revenue expenditure. On appeal dismissing the appeal of revenue the Court held that; since stamp duty amount had been paid on lease deed for purposes of carrying on

assessee's business, then amount of stamp duty paid for had to be allowed as revenue in nature.(AY. 1999-2000)
CIT v. Reliance Industrial Infrastructure Ltd. (2015) 379 ITR 340 / 234 Taxman 256 (Bom.) (HC)

668 **S.37(1) : Business expenditure – Additional excise duty liability – Held to be allowable.**
Assessee entered into contract manufacturing agreements with two companies for manufacture of Tupperware Plastic products. Assessee's parent company provided requisite moulds to said contract manufacturers on a 'free of cost basis', which were then used by said entities for manufacturing process. Excise department levied excise duty and interest thereon to con-tract manufacturers - Excise authorities also levied duty on notional mould value. Additional excise duty liability was borne by assessee as it was in respect of liability that arose on contract goods manufactured for assessee. Assessee claimed deduction for additional excise duty. Revenue authorities rejected assessee's claim taking a view that payment was made by assessee on behalf of contract manufacturers as a part of a collusive attempt to evade tax. On appeal the Court held that; since contract manufacturers were carrying out manufacturing activity for assessee and it was in assessee's business interests that all tax liabilities of manufacturers were duly satisfied, by assessee, payment in question was to be regarded as business expenditure, and thus, allowable. (AY. 2007-08)
Tupperware India (P.) Ltd. v. CIT (2015) 234 Taxman 56 (Delhi)(HC)

669 **S.37(1) : Business expenditure – Rental income was assessed as business income – Compensation paid to existing tenants to obtain vacant possession of building so as to earn higher was held to be allowable as deduction. [S. 28(i)]**
Allowing the appeal of assessee the Court held that where memorandum of assessee company permitted it to carry on business of letting out properties and as 85 per cent of income of assessee was by way of lease rentals, said income was to be regarded as business income, in such a case, compensation paid by assessee to existing tenants to obtain vacant possession of building so as to earn higher rental income by letting out said premises to new tenants had arisen out of business necessity and commercial expediency, which was to be allowed as revenue expenditure.(AY. 1996-97)
Shyam Burlap Company Ltd. v. CIT (2015) 234 Taxman 831 / 281 CTR 458 / (2016) 380 ITR 151 (Cal.)(HC)

670 **S.37(1) : Business expenditure – Travelling expenses of MD and his wife – Expenditure was held to be not allowable.**
Assessee claimed a sum as expenditure related to travelling abroad by company's MD and his wife. Tribunal has allowed the expenditure. On appeal by revenue allowing the appeal the Court held that the assessee could not substantiate said claim by producing cogent evidence. Assessee did not furnish details like business visa, name of person at whose invitation business trip was held, proof of any meetings abroad and details alike therefore said expenditure not allowable. (AY. 2004-05)
CIT v. HMA Data Systems (P.) Ltd. (2015) 235 Taxman 238 (Karn.)(HC)

S.37(1) : Business expenditure – Technical support – Payment as per agreement – Mere agreement is not sufficient – Disallowance was held to be justified. 671
Assessee claimed that technical support charges were paid for promotion of products and services in North America. Assessee was found to have made payment on basis of agreement. Assessee did not place any material to show actual implementation of contract. Further, report which consultant had to furnish to assessee was also not furnished. In absence of any commercial expediency of incurring such expenditure, disallowance was sustained by both appellate authorities. On appeal the Court held that mere existence of a technical agreement with consultant was not sufficient and there being no business activity in current year; burden was on assessee to prove business expediency to claim expenditure, therefore disallowance was held to be justified. (AY. 2004-05)
CIT v. HMA Data Systems (P.) Ltd. (2015) 235 Taxman 238 (Karn.)(HC)

S.37(1) : Business expenditure – Advance payment of professional fees – Year of allow ability – Accounted in current year – Held to be allowable. 672
Assessee made advance payment of professional fees to legal advisor in earlier year and had been showing it as pre-paid professional charges. Dismissing the appeal of revenue the Court held that; since said expenditure took place and accounted for in current year, same was to be allowed. (AY.2004-05)
CIT v. HMA Data Systems (P.) Ltd. (2015) 235 Taxman 238 (Karn.)(HC)

S.37(1) : Business expenditure – Capital or revenue – Compensation to distributor – Commercial expediency was not considered – Matter remanded. 673
Allowing the appeal the Court held that the Tribunal had taken divergent views, one that the expenditure was capital in nature, supporting the Department and, on the other hand, that it was compensation paid to stay afloat in business, meaning thereby that it was for purposes of commercial expediency. In any event, the assessee had, under the agreement, shown the reason for payment in question. However, this aspect had not been discussed by the Tribunal. It was an issue of fact on which the Tribunal ought to have given its finding as to whether the agreement and the payment justified the plea of commercial expediency to stay afloat in the business. Matter remanded. (AY. 2009-10)
Seven Arts Films v. ACIT (2015) 378 ITR 330 / (2016) 282 CTR 182 / 236 Taxman 138 (Mad.)(HC)
Editorial : Order in ACIT v. Seven Arts Films (2014) 33 ITR 694 (Chennai)(Trib.) was set aside and matter remanded.

S.37(1) : Business expenditure – Method of accounting – Provision for breakages – Estimation of transit breakages not based on scientific method – Contingent liability – Actual transit breakages – Allowable as revenue expenditure – Provision was held to be not allowable.[S. 145, Accounting Standard 29] 674
Dismissing the appeals of the assessee the Court held that; No discernable uniform scientific method was followed by the assessees in making provision for the breakages. The explanation offered by the assessees was that they fixed a rate per case of bottles on an *ad hoc* basis. In the case of Andhra Pradesh, the rate was ₹ 10 per case, for Goa and

Karnataka it was ₹ 15 per case. Also the breakages were known within a period of 15 to 30 days after despatch of the goods. The view of the Tribunal that with the assessees having entered the line of business only from the assessment year 2001-02, they could not be said to have gathered sufficient experience to have reasonably estimated such breakages for the assessment years in question was upheld. In the circumstances, the liability on that score could at best be described as a contingent liability as defined in AS-29. (AY. 2001-02 to 2004-05)
Seagram Distilleries P. Ltd. v. CIT (2015) 378 ITR 581 (Delhi)(HC)
Seagram Manufacturing P. Ltd. v. PCIT (2015) 378 ITR 581 (Delhi)(HC)

675 **S.37(1) : Business expenditure – Capital or revenue – Expenditure on refurbishing building taken on lease – Effect of Explanation 1 to section 32(1) – Expenditure is capital in nature. [S. 32(1)]**
Dismissing the appeal of assessee the Court held that, Explanation 1 to section 32(1) of the Income-tax Act, 1961, was introduced with effect from April 1, 1988. On a reading of the Explanation, it is categoric and clear that so far as the expenditure incurred as contemplated in the Explanation is concerned, a legal fiction is created, by which the assessee, enjoying a leasehold right on a building is treated as the owner of the building. So, the question to be considered in such a case is whether the assessee has acquired any enduring benefit by putting the refurbished building to use over a period of time in accordance with the agreement entered into between the assessee and the building owner. So far as the question regarding the expenditure incurred by the assessee for refurbishing the building taken on lease is concerned, after the introduction of Explanation 1 to section 32(1) of the Act, there is no scope left at all for any interpretation, since by a le-gal fiction, the assessee is treated as the owner of the building for the period of his occupation. This means that by refurbishing, decorating or by doing interior work in the building an enduring benefit was derived by the assessee for the period of occupation and, therefore, is a capital expenditure and not revenue expenditure. Court also observed that the law laid down by the Division Bench of this court in *Joy Alukkas India Pvt. Ltd. v. Asst. CIT (2016) 282 CTR 551 (Ker.)* requires reconsideration.(AY 2007-08, 2008-09, 2009-10)
Indus Motor Co. P. Ltd. v. Dy. CIT (2015) 378 ITR 706 (Ker.)(HC)
Editorial: In Indus Motor Company (P) Ltd. v. Dy. CIT (2016) 285 CTR 209 (FB)(Ker.) (HC) the court held that law laid down by the Division Bench of this court in Joy Alukkas India Pvt. Ltd. v. Asst. CIT [2015] 5 ITR-OL 340 (2016) 282 CTR 551 (Ker.) needs no reconsideration. Approved.

676 **S.37(1) : Business expenditure – Capital or revenue – Current repairs – Import of Banbury mixer – Capital expenditure – Expenditure on reduction gear box for 3 coil calendar – Imported item part of 3 roll calendar – Revenue expenditure.**
Dismissing the appeal the Court held that; the assessee had sufficient opportunities to demonstrate before the Assessing Officer that the expenditure incurred by it was not of a capital nature. The assessee was unable to succeed in that effort. The only documents produced by it to showed that the Banbury mixers imported were vital to the tyre manufacturing plant and were of enduring benefit to it. The expenditure incurred in that behalf was rightly held by the Assessing Officer as capital nature. However,

the expenditure on the reduction gear box for the 3 coil calendar stood on a different footing. From the invoice produced by the assessee, it was clear that the imported item was part of the 3 roll calendar. Therefore, the expenditure was revenue in nature. (AY. 2001-02)
CIT v. Modi Rubber Ltd. (2015) 378 ITR 128 (Delhi)(HC)

S.37(1) : Business expenditure – Compensation paid to existing tenant – Rental income was assessed as business income – Held to be allowable. [S. 28(i)] 677
Allowing the appeal of assessee, the Court held that where rental income earned by assessee was taxable as business income, compensation paid to existing tenants to obtain vacant possession of building so as to earn higher rental income by letting it out to new tenants, was to be regarded as business expenditure allowable.(AY. 1996-97)
Shyam Burlap Company Ltd. v. CIT (2015) 234 taxman 831 / 126 DTR 89 / 281 CTR 458 (2016) 380 ITR 151 (Cal.)(HC)

S.37(1) : Business expenditure – Capital or revenue – Research and testing components – Development charges – Revenue expenditure – Rule of consistency followed. 678
Dismissing the appeals, the Court held that, the assessee incurred the development charges on research and testing of components and that this did not result in a benefit to it of an enduring nature so as to characterise the development charges as capital expenditure. Testing of products and components is essentially a continuous process which permeates different accounting years. It is an integral part of a routine manufacturing and monitoring activity. It cannot obviously be a one-time event. Rule of consistency was followed. (AY. 2007-08, 2008-09)
CIT v. JCB India Ltd. (2015) 376 ITR 621 (Delhi)(HC)

S.37(1) : Business expenditure – Hundi discounting charges – Held to be allowable – Rule of consistency is followed. 679
Dismissing the appeal of revenue the Court held that given the dictates of consistency, the view adopted by the Tribunal was fair and reasonable. Having regard to the reasoning adopted by the Tribunal, there was no cause to interfere with as it was in conformity with the decision of the Supreme Court. Thus, the Tribunal was correct in law in deleting the addition made by the Assessing Officer of ₹ 1,15,57,034 on account of hundi discounting charges. Followed *Madhav Prasad Jatia v. CIT [1979] 118 ITR 200 (SC)*.(AY. 1993-94)
CIT v. DLF Universal Ltd. (2015) 378 ITR 197 (Delhi)(HC)

S.37(1) : Business expenditure – Brokerage – Disallowance of brokerage without assigning reasons was held to be not justified. 680
Allowing the appeal of assessee the Court held that; where Assessing Officer had accepted that payment of higher brokerage was required and it was not disputed that transaction of brokerage was through banking channel, reduction of allowance of brokerage paid without assigning or giving any reasons for same was not justified. (AY. 2004-05)
N. Govindaraju v. ITO (2015) 377 ITR 243 / 233 Taxman 376 / 280 CTR 316 (Karn.)(HC)

681 **S.37(1) : Business expenditure – Capital or revenue – Contribution to various industries – Revenue in nature.**
Assessee company was engaged in business of manufacturing and selling petrochemicals. It made certain contribution to various industries which Tribunal held to be revenue in nature. Tribunal had merely followed and applied its earlier orders for prior assessment years in case of this very assessee and on same question. Dismissing the appeal of revenue the Court held that; such factual findings could not be termed perverse and did not give rise to any substantial question of law.(AY. 2003-04, 2004-05)
CIT v. Indian Petrochemicals Corporation Ltd. (2015) 378 ITR 569 / 233 Taxman 89 (Bom.) (HC)

682 **S.37(1) : Business expenditure – Capital or revenue – Reallocation of reactor – Revenue in nature.**
Assessee incurred expenditure on relocation of reactor within factory as it was not functioning properly at place where it was originally installed. Dismissing the appeal of revenue the Court held that such expenditure incurred by assessee for rationalizing, better administration and modernization of its machinery with a view to obtain maximum benefit out of existing resources, could not be treated to be a capital hence was allowable as revenue is nature.(AY. 2003-04, 2004-05)
CIT v. Indian Petrochemicals Corporation Ltd. (2015) 378 ITR 569 / 233 Taxman 89 (Bom.) (HC)

683 **S.37(1) : Business expenditure – Provision for arrears of wages – As there was no basis – Provision was held to be not allowable.**
As there was no evidence on record to justify the provision for arrears of salaries and wages, claim pertaining to earlier year was held to be not allowable. Appeal of revenue was allowed. (AY. 2004-05)
CIT v. Sivalik Cellulose Ltd. (2015) 232 Taxman 364 (Delhi)(HC)

684 **S.37(1) : Business expenditure – Tournament to promote corporate image – Held to be allowable deduction.**
Expenditure incurred in organising tournaments to promote corporate image of group companies was an allowable deduction. (AY. 1998-99, 1999-2000)
CIT v. Williamson Magor & Co. Ltd. (2015) 232 Taxman 533 (Cal.)(HC)

685 **S.37(1) : Business expenditure – Know-how – Provision of section 35AB would arise only if the expenditure is capital in nature and not in respect of revenue expenditure. [S.35AB]**
Assessee-company, a manufacturer, paid certain sum for acquisition of technical know-how for running its business for a short period. Assessing Officer though agreed with assessee that such expenditure was revenue in nature, yet he was of opinion that same would be covered under section 35AB. Tribunal allowed the claim of assessee. On appeal by revenue, dismissing the appeal of revenue the Court held that; applicability of section 35AB would arise only in case of capital expenditure and assessee's claim of allowing said expense under section 37(1) was justified. (AY. 1993-94)
Dy. CIT v. Anil Starch Products Ltd. (2015) 232 Taxman 129 (Guj.)(HC)

S. 37(1) : Business Expenditure – On medical treatment of eyes – Not incurred wholly and exclusively for purpose of profession – Held not deductible. 686

Expenditure incurred by assessee advocate on medical treatment of eyes is for personal wellbeing and the benefit, if any, as a professional is incidental, assessee is not entitled to claim deduction in respect of expenditure incurred by him on foreign tour undertaken by him for the purpose of pre-operative treatment of his eyes. (AY. 1986-87)

Dhimant Hirarla Thakkar v. CIT (2015) 128 DTR 169 / (2016) 282 CTR 87 / 236 Taxman 181 / 380 ITR 275 (Bom.)(HC)

S.37(1) : Business expenditure – Natural justice – Opportunity to cross examination – Disallowance of expenditure on the basis of statements of representatives of payee without giving opportunity to cross examination was held to be invalid – Matter was set aside. 687

Tribunal confirmed the disallowance on the basis of statement of the parties, without giving an opportunity of cross examination. The assessee has filed the affidavit of the parties who have rendered the services. On appeal the Court held that disallowance of expenses without giving an opportunity of cross examination was held to be invalid. Matter was set aside before the AO to decide the matter after giving an opportunity of cross examination. (AY. 2007-08)

R. W. Promotions (P) Ltd. v. ACIT (2015) 376 ITR 342 / 281 CTR 200 (Bom.)(HC)

S.37(1) : Business expenditure – Cost of Employees Stock Option (ESOP) debited to P&L A/c is allowable business expenditure 688

The question sought to be projected by the Revenue is whether the ITAT erred in deleting the addition of ₹ 1,28,19,169/- made by the Assessing Officer ('AO') by way of disallowance of the expenses debited as cost of Employees Stock Option ('ESOP') in profit and loss account? The Court has been shown a copy of the decision dated 19th June 2012 passed by the Division Bench of Madras High Court in *CIT-III Chennai v. PVP Ventures Ltd. (TC(A) No. 1023 of 2005)* where a similar question was answered in favour of the Assessee by holding that the cost of ESOP could be debited to the profit and loss account of the Assessee. This Court has also in its decision dated 4th August 2015 in ITA No.2 of 2002 (*CIT v. Oswal Agro Mills Ltd.*) held that the expenditure incurred in connection with issue of debentures or obtaining loan should be considered as revenue expenditure. In the circumstances, the impugned order of the ITAT answering the question in favour of the Assessee is affirmed. (ITA No. 107/2015, dt. 18.08.2015) (AY.2008-09)

CIT v. Lemon Tree Hotels Ltd. (Delhi)(HC); www.itatonline.org

S.37(1) : Business expenditure – Provision for warranty – Held to be allowable. 689

A provision for warranty claim made by assessee for any claim made by assessee's customers in future in respect of defect on repairs towards goods sold should be allowed as an expenditure during current assessment year itself. (AY. 1993-94 to 1997-98)

CIT v. Motor Industries Co. Ltd. (2015) 55 taxmann.com 377 / 231 Taxman 539 (Karn.) (HC)

690 **S.37(1) : Business expenditure – Technical knowhow fee – Lump sum consideration – Revenue in nature.[S. 35AB]**
Expenditure on procurement of technical know-how by paying a lump sum consideration for use in the course of business is revenue expenditure and provisions of section 35AB are not applicable. The contention of the revenue that irrespective of the expenditure, whether revenue or capital, if it is technical knowhow section 35AB is attracted was held to be not accepted. (AY. 1993-94)
Diffusion Engineers Ltd. v. DCIT (2015) 376 ITR 487 / 122 DTR 161 / 232 Taxman 441 (Karn.)(HC)

691 **S.37(1) : Business expenditure – Advertisement – Brand building – Agarbatti – Businessman point of view – AO cannot question and challenge the right of assessee – Disallowance was held to be not justified. [S.40A(2)]**
Advertisement expenses incurred by the assessee for brand building of Agarbati cannot be disallowed. The expenditure that has been incurred is prerogative and right of assessee and the Assessing Officer cannot question and challenge same. (AY. 2003-04 to 2005-06)
CIT v. Hari Chand Shri Gopal (2015) 231 Taxman 79 (Delhi)(HC)

692 **S.37(1) : Business expenditure – Capital or revenue – Commencement of business – Lease rent to leasing company is held to be allowable as revenue expenditure.**
Lease rent paid to leasing and financing company for imported machinery and equipments taken on lease for establishing a new plant for period during which new plant had not commenced production, was allowable as revenue expenditure. (AY. 1991-92)
CIT v. Gujarat Alkalies & Chemicals Ltd. (2015) 231 Taxman 787 (Guj.)(HC)

693 **S.37(1) : Business expenditure – Capital or revenue – Interest and commitment charges – Expansion of existing plant – Allowable as revenue expenditure. [S.36(1)(iii)]**
Interest on hire purchase in relation to new plant and interest and commitment charges in relation to expansion of existing plant, were deductible either under section 36(1)(iii) or 37(1). (AY. 1991-92)
CIT v. Gujarat Alkalies& Chemicals Ltd. (2015) 231 Taxman 787 (Guj.)(HC)

694 **S.37(1) : Business expenditure – Capital or revenue – Processing charges for financing stock – Revenue expenditure.**
Where loan raised from bank was used by assessee for financing its stock, processing charges incurred for raising said land was an allowable expenditure. (AY. 2008-09)
CIT v. Cellice Developers (P.) Ltd. (2015) 231 Taxman 255 (Cal.)(HC)

695 **S.37(1) : Business expenditure – Capital or revenue – Expenditure to protect the property is capital in nature – Depreciation is also not allowable on said expenditure. [S. 32]**
Dismissing the appeal of assessee the Court held that expenditure incurred to protect the property is capital in nature and the expenditure has been incurred so as to complete the

title/ownership of the land. Therefore, the above expenditure cannot be attributed to the construction of the building hence depreciation is also not allowable. (AY.1990-91)
Sandvik Asia Limited v. DCIT (2015) 378 ITR 114 (Bom.)(HC)

S.37(1) : Business expenditure – Expenses for tea, coffee, cold drinks and snacks – Tribunal sustaining disallowance on estimate basis and deleting balance – Question of fact. 696
The assessee spent a sum of ₹ 16,885 on tea, coffee, cold drinks and snacks which was disallowed by the Assessing Officer under section 37(2). The Tribunal sustained the disallowance of ₹ 5,000 on estimate basis and deleted the balance. The Tribunal had given the relief on estimate basis, which was a question of fact. (AY 1997-98)
Sai Computers P. Ltd. v. JCIT (2015) 375 ITR 285 (All.)(HC)

S.37(1) : Business expenditure – Hospital – Daughter of managing director working in hospital as doctor – Expenditure on higher studies of doctor – Doctor coming back to work in hospital – Expenditure had nexus with business of assessee. 697
Held, before the expenditure was incurred, the daughter had acquired a degree in medicine. She was employed. Apart from the fact that she was the daughter of the managing director and the chief executive, she was an employee of the assessee. She was sent outside the country for acquiring higher educational qualification, which would improve the services, which the assessee was giving to its patients. It was in this context, that the sum of ₹ 5 lakhs was spent. That was not in dispute. After acquiring the degree, she had come back and she was working with the assessee. Therefore, there was a direct nexus between the expenses incurred towards her education, with the business, which the assessee was carrying on. In that view of the matter, the expenditure was deductible. (AY. 2005-06)
Mallige Medical Centre P. Ltd. v. JCIT (2015) 375 ITR 522 / 234 Taxman 253 (Karn.)(HC)

S.37(1) : Business expenditure – Capital or revenue – Fluctuation in price of foreign currency – Increase in price of raw material – Extra amount paid deductible as revenue expenditure. 698
Dismissing the appeal of revenue the Court held that the extra amount paid on account of fluctuations in the rate of foreign exchange was deductible as revenue expenditure. (v) (AY. 1994-95, 1995-96)
CIT v. Tony Electronics Ltd. (2015) 375 ITR 431 / 128 DTR 281 (Delhi)(HC)

S.37(1) : Business expenditure – Method of accounting – Accounting Standards – Lease equalisation charges – Deductible from lease rental income. [S. 145] 699
Accounting Standards issued by Institute of Chartered Accountants of India is not to be disregarded, that at relevant time accounting standard employed by assessee not notified by Central Government is not a ground to discard-Lease equalisation charges-Deductible from lease rental income. (AY. 1996-97 to 1999-2000)
Chandana Leaphin Finance Ltd. v. CIT (2015) 374 ITR 681 / 125 DTR 189 (T&AP)(HC)
Pact Securities and Financial Ltd v. CIT (2015) 374 ITR 681 / 125 DTR 189 / 234 Taxman 17 (T&P)(HC)

700 **S.37(1) : Business expenditure – Capital or revenue – Technical services – Royalty – intranet facility, Technical know how – Revenue in nature. [S. 32,35AB]**
Expenditure for technical services, royalty, intranet facility, technical know-how is held to be revenue in nature. (AY.2002-03, 2003-04)
CIT v. Denso India Ltd. (2015) 374 ITR 62 / 232 Taxman 437 (Delhi)(HC)

701 **S.37(1) : Business expenditure – Scientific research – Expenditure recognised by competent authority. No requirement that such an expenditure should be capitalised in books of account. [S.35]**
Held, dismissing the appeal, that the Revenue could not state that on a plain reading of section 35 that there was no requirement of any project being completed or the entire amount capitalised in the books of account as reported by the auditors. The reasoning of the Tribunal was not only in consonance with the factual position but the plain language of section 35. The Tribunal had also taken care to observe that when the Assessing Officer found that the expenditure on research and development was eligible for deduction under the same provision in the subsequent year then the view taken by the Assessing Officer all the more could not be sustained.(AY. 2003-04, 2006-07)
CIT v. Hindustan Construction Co. Ltd. (2015) 374 ITR 101 / 233 Taxman 446 (Bom.)(HC)

702 **S.37(1) : Business expenditure – Contribution by law firm to IFA to create awareness of its activities is business expenditure**
Contribution by law firm to International Fiscal Association (IFA) to create awareness of its activities is business expenditure. (AY.2009-10)
CIT v. Vaish Associates (2015) 126 DTR 102 / 280 CTR 605 / 235 Taxman 308 (Delhi)(HC)

703 **S.37(1) : Business expenditure – Lease hold rights – Proceedings against partner – Compromise amount paid by firm – Held to be allowable.**
One of two partners in assessee-firm brought in leasehold rights as its share. Other partners shared benefits of lease and agreed to share burden if any. Subsequently a suit was filed by landlord of leasehold property against one of partner, resulting in a compromise between them and with a liability to pay a specified sum which was paid by firm leasehold rights had formed part of assets of firm and, therefore, those having been terminated resulting in legal proceedings though only against one of partners, compromise amount paid by firm would be allowed as deduction in firm's hands. (AY. 2003-04)
CIT v. Sports field Amusement (2015) 231 Taxman 252 (Bom.)(HC)

704 **S.37(1) : Business expenditure – Non-resident – Head office expenses on behalf of Indian Branch of assessee – Deductible – Provision of section 44C is not applicable. [S.44C]**
Head office expenses on behalf of Indian Branch of assessee is deductible and provision of section 44C is not applicable. (AY. 1997-98)
DI(IT) v. Credit Agricole Indo Suez (2015) 377 ITR 102 / 280 CTR 491 / 126 DTR 156 (Bom.)(HC)

S.37(1) : Business expenditure – Capital or revenue – Business of marketing bulk drugs, formulations – One of assessee's ventures ending in loss – Loss attributable to business – No new line of business – Allowable as revenue expenditure. 705
Held, dismissing the appeal, that it was not on a new line of business on which loss occurred. The parameters necessary for the expense to be treated as revenue expenditure were squarely attracted to the facts, justifying the loss of the assessee as a business loss, as admittedly, the assessee was in the business of marketing bulk drugs, formulations and one of its ventures had ended in a loss and that loss was attributable to business and it could not be deemed to be a new enterprise and a capital expenditure. (AY. 1996-97)
CIT v. Saka marketing Services P. Ltd. (2015) 373 ITR 330 / 235 Taxman 17 (Mad.)(HC)

S.37(1) : Business expenditure – Capital or revenue – Amount paid to regain unit which was not in its possession, provided enduring benefit and was capital in nature. 706
The Assessee paid an amount to regain a unit which was earlier leased to a third party due to the unit's labour problems. The amount was claimed as a revenue expenditure which was disallowed by the AO. It was held that the amount was capital in nature since it was paid to retransfer the unit to the Assessee which provided an advantage of enduring benefit. The amount was paid to regain the unit which was not in its possession and was thus, capital in nature. (AY. 1999-2000)
CIT v. McDowell & Co. Ltd. (2016) 380 ITR 80 / (2015) 116 DTR 75 (Karn.)(HC)

S.37(1) : Business expenditure – Advertisement expenses – Expenditure incurred not in nature of advertisement – Rule 6B not applicable – No disallowance could be made. [R.6B] 707
Court held that the expenditure incurred by the assessee was not in the nature of advertisement and no disallowance under rule 6B could be made. *CIT v. Allana Sons P. Ltd. [1995] 216 ITR 690 (Bom.)* followed. (AY. 1986-87, 1987-88)
CIT v. Dharamsi Morarji Chemicals co. Ltd. (2015) 373 ITR 545 (Bom.)(HC.)

S.37(1) : Business expenditure – Production incentives – Held to be allowable. 708
Court held that as far as the assessee's claim for production incentives was concerned, the Tribunal held that once the Revenue could not establish that the nature of production of incentive payments for the assessment year 1987-88 was different from the earlier years then the Tribunal's view for the earlier assessment year on the facts would bind the Revenue. Thus, such view could not give rise to any substantial question of law. (AY. 1986-87, 1987-88)
CIT v. Dharamsi Morarji Chemicals Co. Ltd. (2015) 373 ITR 545 (Bom.)(HC)

S.37(1) : Business expenditure – *Ex gratia* payments to retiring employees – Deductible. 709
Ex gratia payments to retiring employees is held to be allowable. *CIT v. Maina Ore Transport (P.) Ltd. [2010] 324 ITR 100 (Bom.)* followed.(AY. 1986-87, 1987-88)
CIT v. Dharamsi Morarji Chemicals Co. Ltd. (2015) 373 ITR 545 (Bom.)(HC)

710 **S.37(1) : Business expenditure – Matching concept – Ascertained liability was allowable expenditure when the corresponding income was already offered to tax. [S. 4, 145]**

Assessee made a provision for supplies at the rate of 6.5% of the supplies for possible loss due to deduction by the Government for not keeping the supplies to the satisfaction of the Department. The AO disallowed the same stating that it was contingent in nature. It was held that the provision was an allowable expenditure since the liability was ascertained and the Government had in fact deducted at the rate of 10%. Once the entire receipt was shown as income, the corresponding expenditure ought to be allowed. (AY. 1977-78)

CIT v. Om Metals & Mineral (P) Ltd. (2015) 373 ITR 406 / 116 DTR 407 (Raj.)(HC)

711 **S.37(1) : Business expenditure – Capital or revenue – Technical collaboration agreement – The fact that the payment is spread over a period of 10 years does not make the assessee the owner of the technical knowhow – The payment is not of an enduring nature.**

The very nature of a license agreement is that it is not of a permanent nature. The fact that the payment is spread over a period of 10 years does not make the assessee the owner of the technical knowhow. The payment is not of an enduring nature allowable as revenue expenditure. (AY. 2008-09 to 2010-11)

CIT v. SMCC Construction India Ltd. (2015) 234 Taxman 14 (Delhi)(HC)

712 **S.37(1) : Business expenditure – Work in progress – Expenditure on construction/ acquisition of new facility subsequently abandoned is allowable in the year of write-off.**

The High Court allowing the assessee's appeal relied on the decision of the Supreme Court in the case of *CIT v. Indian Mica Supply Co. Pvt. Ltd. (1970) 77 ITR 20* and held that the decision of the assessee to abandon the project was the cause for claiming deduction and further the decision was made in the relevant year and hence it could be said that the expenditure, allowable for a deduction, arose in the relevant year. (AY. 2003-04)

Binani Cement Ltd. v. CIT (2015) 233 Taxman 340 / 277 CTR 49 / 118 DTR 61 / (2016) 380 ITR 116 (Cal.)(HC)

713 **S.37(1) : Business expenditure – Capital or revenue – Pre-capitalisation costs – Expanding its business into polyester films, pharma chemical business and industrial fabrics – Interlacing and intermingling of funds between new and existing venture – Revenue expenditure.**

The assessee was engaged in the manufacture of nylon tyre cord fabrics, packaging film, fluorochemicals, chloromethane and refrigerant gases. During the assessment year 2005-06, it expanded its business in polyester films at Indore, pharma chemical business at Bhiwandi and industrial fabrics business at Trichy. Towards these, it claimed the expenses to the tune of ₹ 7,03,95,000 as pre-capitalisation costs. The Assessing Officer as well as the Commissioner (Appeals) disallowed the claim. The Tribunal allowed the pre-capitalisation expenditure as revenue in nature, holding that there was an element

of interlacing and intermingling of funds between the new or the expanding venture and the existing venture, and, consequently, it treated the expenses as falling on the revenue side. On appeal:
Held, dismissing the appeal, that the expenses to the tune of ₹ 7,03,95,000 as pre-capitalisation costs were allowable as revenue expenditure.(AY. 2005-06)
CIT v. SRF Ltd. (2015) 372 ITR 425 / 232 Taxman 727 (Delhi)(HC)

S.37(1) : Business expenditure – Capital or revenue – Paper industry – Condition of National Forest Policy of 1988 that all forest-based industries must take up plantation to maintain forest ecology – Plantation expenditure – Revenue expenditure. 714
The assessee was a manufacturer of paper based on forest wood. It was laid down in the National Forest Policy of 1988 that all forest-based industries must take up plantation so that forest ecology was maintained. The assessee incurred a sum of ₹ 14,78,231 on eucalyptus tree plantation. Held, the pre-plantation expenditure claimed by the assessee was allowable as revenue expenditure.
CIT v. Orient Paper and Industries Ltd. (2015) 372 ITR 680 / 233 Taxman 529 (Cal.)(HC)

S.37(1) : Business expenditure – Amount paid to employees under voluntary retirement scheme – Expenditure incurred on ground of commercial expediency – Expenditure laid out wholly and exclusively for purposes of business of assessee – Allowable. 715
The claim of the assessee on account of voluntary retirement scheme payments was allowable as revenue expenditure.
CIT v. Orient Paper and Industries Ltd. (2015) 372 ITR 680 / 223 Taxman 529 (Cal.)(HC)

S.37(1) : Business expenditure – Capital or revenue – Expenditure on replacement of membrane in cell plant – Held to be of revenue nature in earlier years – Principle of consistency in tax matters should be followed. 716
The AO treated the expenditure on replacement of remembering in membrane cell-1 plant as capital expenditure which was shown by the assessee in the books of account as revenue expenditure. However, for earlier years, the Tribunal had held that such expenditure was treated as revenue expenditure by the Assessing Officer himself and there being no material to make a departure from the earlier view, the rule of consistency should be followed.(AY. 1999-2000, 2000-01)
CIT v. Gujarat Alkalies and Chemicals Ltd. (2015) 372 ITR 237 / 230 Taxman 433 (Guj.) (HC)

S.37(1) : Business expenditure – Capital or revenue – Collaboration agreement with foreign company – Amounts paid for technical assistance, model fee and technical guidance fee – Revenue expenditure. 717
Held, the payments in question were for the right to use or rather for access to technical know-how and information. The ownership and the intellectual property rights in the know-how or technical information were never transferred or became an asset of the assessee. The ownership rights were ardently and vigorously protected by Honda. The proprietorship in the intellectual property was not conveyed to the assessee but only a limited and restricted right to use on strict and stringent terms were granted.

The ownership in the intangible continued to remain the exclusive and sole property of Honda. The information, etc., were made available to the assessee for day-to-day running and operation, i.e., to carry on business. In fact, the business was not new. Manufacture and sales had already commenced under the agreement dated January 24, 1984. After expiry of the first agreement, the second agreement dated June 2, 1995 ensured continuity in manufacture, development, production and sale. The period of the agreement 10 years, would be inconsequential for the agreement merely permitted and allowed use of technology subject to payment of royalty and compliances and the proprietorship and ownership right was never granted or transferred. The *factum* that after 10 years and after returning the tangible properties, the assessee could still have continued to use the technical know-how and information would be a trivial and inconsequential *factum* as in the automobile industry, technology upgradation is constant and rapid. For 1996-97, the Tribunal had held that the fee was revenue expenditure. The amount was, therefore, deductible.(AY.2000-01 to 2002-03)
CIT v. Hero Honda Motors Ltd. (2015) 372 ITR 481 / 276 CTR 249 / 230 Taxman 58 / 116 DTR 185 (Delhi)(HC)

718 **S.37(1) : Business expenditure – State financial corporation – Guarantee commission paid to State Government – Commission paid for business purposes – Deductible.**
The assessee was created under the State Financial Corporations Act, 1951, for the State of Andhra. Held, that the levy or payment of guarantee commission to the State Government was not something foreign or unrelated to the activities contemplated under the 1951 Act, by offering itself as guarantor for repayment of the amounts covered by the bonds and dividends raised by the assessee, the State Government was certainly exposed to the liability and the State Government levied the guarantee commission to cover the risk. The transaction was in the form of an agreement between the State Government, on the one hand, and the assessee, on the other. Taking into account the structure of the 1951 Act, the provision for the payment of guarantee commission was not extraordinary so as to be said to be impermissible. Therefore, the payment was deductible.(AY.1990-91, 1991-92)
Andhra Pradesh State Financial Corporation v. Dy. CIT(A) (2015) 372 ITR 315 (T & AP) (HC)

719 **S.37(1) : Business expenditure – Deferred interest liability – Mercantile system of accounting – Held to be allowable.[S.145]**
Assessee was an undertaking of Government of Karnataka engaged in food and civil supplies activities in State. Assessee in order to purchase food grains was getting government aid, however, assessee was claiming deductions of interest proportionate to food grains sold and in respect of interest relatable to food grains unsold was carried forward to next year and after sale of food grains, deductions was claimed. From current year they switched on to mercantile system of accounting. In that year, assessee claimed deductions of interest in respect of food grains which were sold and unsold and also interest proportionate to food grains sold which were of preceding year. Allowing the appeal of assessee the Court held that there was no double benefit claim and Tribunal was not right in law in disallowing claim of deduction of deferred interest liability

relating to stock of food grains purchased during preceding assessment year but sold during current assessment year.(AY. 1985-86)
Karnataka Food & Civil Supplies Corporation Ltd. v. CIT (2015) 230 Taxman 645 (Karn.) (HC)

S.37(1) : Business expenditure – Capital or revenue – Convertible debentures – Capital expenditure. 720
Expenditure on issue of convertible debentures is directly related to expansion of capital base of company and is a capital expenditure. (AY. 1994-95)
Torrent Pharmaceuticals Ltd. v. ACIT (2015) 230 Taxman 204 (Guj.)(HC)

S.37(1) : Business expenditure – Advertisement expenses – Prior period expenses – Matter remanded. 721
Tribunal rejected assessee's claim for deduction of advertisement expenses on ground that same were prior years expenses. On appeal the Court held that Tribunal omitted from consideration totally its own order passed for prior assessment years wherein it allowed such deduction holding that when bills were received in current year, expenditure would arise to assessee in current year, therefore on facts order of Tribunal was to be set aside and assessee was to be granted an opportunity of raising this plea before Tribunal again and producing all materials relevant to claim. Matter remanded. (AY. 1998-99)
Crompton Greaves Ltd. v. ACIT (2015) 230 Taxman 509 (Bom.)(HC)

S.37(1) : Business expenditure – Network repair and maintenance – Mercantile system of accounting – Provision – Held to be allowable.[S.145] 722
Assessee claimed network repair and maintenance, etc. expenses which was due and payable. Revenue observed that expenditure should not be allowed as it had not been incurred but only a provision had been made which were for non-existing liabilities and same was not quantified. Dismissing the appeal of revenue the Court held that; since assessee followed mercantile system of accountancy and in said system, expenditure was not confined to money actually paid towards a liability, but would cover a liability accrued or had been incurred in praesenti, although discharge could be at a future date, therefore, impugned expenditure was to be allowed.(AY.2003-04)
CIT v. Vodafone Essar South Ltd. (2015) 230 Taxman 541 (Delhi)(HC)

S.37(1) : Business expenditure – Capital or revenue – Brand launch expenses – Deferred revenue expenditure – Whole expenditure of revenue in nature is allowable as deduction in the current year. 723
Assessing Officer held that brand launch expenses were of revenue nature, he treated same as deferred revenue expenditure and spread said expenditure over 5 years and allowed 1/5th of same during current year. Dismissing the appeal of revenue the Court held that; since impugned expenditure was revenue in nature, whole of said expenditure was allowable in current year. (AY. 2003-04)
CIT v. Vodafone Essar South Ltd. (2015) 230 Taxman 541 (Delhi)(HC)

724 **S.37(1) : Business expenditure – Amount paid to sister concern – Conference, seminars and professional services – Matter remanded to produce the evidence.**
Assessee claimed deduction of a sum paid to its sister concern on account of conferences and seminars and professional services, but no further details were presented to justify that said expenses were incurred wholly for business purposes nor could assessee explain any business expediency of incurring said expenditure. Assessing Officer made disallowance. In appeal before the Court the Assessee submitted that an opportunity should be granted to it to produce all relevant evidences to show business expediency for incurring said expenditure. Matter remanded to readjudication.
S.R. Batliboi & Associates v. CIT (2015) 230 Taxman 433 (Cal.)(HC)

725 **S.37(1) : Business expenditure – Provision for warranty is allowable as deduction.**
Dismissing the appeal of revenue the Court held that the provision for warranty is allowable.(AY. 1997-98)
Jt. CIT v. Kevin Enterprise (2015) 230 Taxman 315 (Guj.)(HC)

726 **S.37(1) : Business expenditure – Provision for obsolescence in inventory was an allowable deduction – Accounting treatment and presentation in financial statements of transactions should be covered by a substance and not merely by legal form.[S. 145]**
Assessee was carrying on business in manufacture and trading of computer hardware. It made provision for obsolescence in inventory as hardware manufactured by it had become obsolete due to changed technology. According to revenue, once items had become obsolete and market value had become nil, they ought to have reduced value of inventory, instead value of these obsolete items was shown in inventory, and provision for obsolescence was made and benefit was claimed, which was not permissible in law. Dismissing the appeal of revenue, the Court held that since accounting treatment given by assessee was in compliance with provisions of AS-2 and assessee was following this mode regularly, provision for obsolescence in inventory was an allowable deduction. (AY. 2001-02)
CIT v. IBM India Ltd. (2015) 230 Taxman 544 (Karn.)(HC)

727 **S.37(1) : Business expenditure – Commercial expediency – In order to avoid execution of said decree against it by way of attachment, arrest and to protect name of assessee, said amount was paid by assessee – Held to be allowable.**
Assessee, along with others, secured loan taken by company 'E' by executing bills of exchange which were accepted on behalf of assessee by its managing director. When default was committed, creditors moved High Court for repayment of loans against 'E' and, thus, coacceptors of bills of exchange. Suit was decreed against assessee and three others and in order to avoid execution of said decree against it by way of attachment, arrest and to protect name of assessee, said amount was paid by assessee. Dismissing the appeal of revenue the Court held that there was commercial expediency in payment of such amount and, therefore, it was allowable as expenditure. (AY. 2004-05)
CIT v. Hitachi Koki India Ltd. (2015) 230 Taxman 643 (Karn.)(HC)

S.37(1) : Business expenditure – Contractual dispute – Interest of earlier years was held to be allowable on the basis of supplementary agreement.[S. 145] 728

Assessee was a dealer of TML and vehicles were supplied to assessee on credit. Initially an agreement was entered into under which outstanding dues of assessee to TML was squared off by grant of a loan from NIT to assessee. Under said agreement loan was provided to assessee by NIT on an interest of 12 per cent per annum. However, assessee disputed said amount consistently and no interest was paid. Eventually, it was only on execution of a supplementary agreement, in current year, liability to pay interest at rate of 6 per cent per annum was agreed upon and in pursuance thereof, assessee debited an amount towards interest in current year. Dismissing the appeal of revenue the Court held that since it was not a statutory liability of assessee but a contractual dispute which eventually was resolved and liability was crystallised only when subsequent agreement was made Tribunal was justified in allowing deduction of interest of earlier years in relevant assessment year on basis of said supplementary agreement. (AY. 2008-09)

CIT v. Shivam Motors (P) Ltd. (2015) 230 Taxman 63 / 272 CTR 277 (All.)(HC)

S.37(1) : Business expenditure – Capital or revenue – Interest – Paid after slump sale – Allowable as revenue expenditure. 729

Dismissing the appeal of revenue the Court held that interest could not be capitalized which was paid after slump sale was effected and factory was in operation, and, therefore, such expenses were revenue in nature. (AY. 2001-02, 2002-03)

CIT v. Sandvik Chokshi Ltd. (2015) 230 Taxman 546 (Guj.)(HC)

S.37(1) : Business expenditure – Capital or revenue – Premium paid for leasehold land is allowable as revenue expenditure. 730

Premium paid for leasehold land is allowable as revenue expenditure. (AY. 1997-98)

United Phosphorus Ltd. v. Addl. CIT (2015) 230 Taxman 596 (Guj.)(HC)

S.37(1) : Business expenditure – Capital or revenue – Replacement of plant and machinery – Matter remanded. 731

Expenditure on replacement of plant and machinery whether capital or revenue. Matter remanded.

Autolec Industries Ltd. v. JCIT (2015) 373 ITR 501 / 231 Taxman 81 (Mad.)(HC)

S.37(1) : Business expenditure – Search and seizure – Commission brokerage – Statement on oath – Retraction – Disallowance of expenditure cannot be made merely on the basis of statement recorded u/s.132(4).[S.132(4), 158BC] 732

Assessing Officer relied upon a statement recorded under section 132(4) from managing director of assessee company, disallowed deduction towards commission and brokerage on sale of automobile parts. Tribunal allowed the claim of assessee. On appeal by the Revenue, dismissing the appeal the Court held that Explanation to section 132(4) is retrospective in nature and since statement recorded under section 132(4) had been retracted and Revenue did not press for serving any other supporting material, assessee was entitled for deduction towards commission and brokerage. (AY. 1984-85)

CIT v. Shri Ramdas Motor Transport Ltd. (2015) 230 Taxman 187 (AP)(HC)

733 **S.37(1) : Business expenditure – Capital or revenue – Expansion of existing business – Revenue expenditure.**
Expenditure in connection with expansion of existing business would be al-lowed as revenue expenditure. (TA No. 358 of 2014 dt. 2-9-2014)(AY. 1998-99)
CIT v. Nirma Ltd. (2015) 55 taxmann.com 125 / 229 Taxman 535 (Guj.)(HC)

734 **S.37(1) : Business expenditure – Credit card business – Scanning or capturing data from application forms – Allowable as business expenditure.**
Expenditure incurred by assessee engaged in credit card business on scanning or capturing data from application forms received from prospective customers into electronic form to reduce possibility of errors and issuance of credit cards to 'undeserving candidates', was to be allowed as revenue expenditure. (AY. 2006-07)
CIT v. SBI Cards & Payment Services (P.) Ltd. (2015) 229 Taxman 356 (Delhi)(HC)

735 **S.37(1) : Business expenditure – Credit card business – Advertisement and sales promotion – Allowable as revenue expenditure.**
Expenditure incurred on advertisement and sales promotion to increase business turnover and attract more and new customers, was to be allowed as revenue expenditure. (AY. 2006-07)
CIT v. SBI Cards & Payment Services (P.) Ltd. (2015) 229 Taxman 356 (Delhi)(HC)

736 **S.37(1) : Business expenditure – Capital or revenue – Registration fee to SEBI – Allowable as revenue expenditure.**
Amount of registration fee paid to SEBI was allowable as revenue expenditure. Followed, *CIT v. Vysya Bank Ltd. [2009] 313 ITR 315 (Karn)(HC)*. (AY. 1996-97)
CIT v. Joint Venture of MCL & MMCL (AOP) (2015) 229 Taxman 527 (Guj.)(HC)

737 **S.37(1) : Business expenditure – Firm – Keyman insurance policy on life of two partners. Held to be allowable – No substantial question of law.[S.260A]**
Keyman Insurance policy on life of two partners is held to be allowable. No substantial question of law. (AY.2005-06)
CIT v. Agarwal Enterprises (2015) 374 ITR 240 / 229 Taxman 525 (Bom.)(HC)

738 **S.37(1) : Business expenditure – Credit card business – Card acquisition expenses – Allowable as revenue expenditure.**
Assessee credit card company claimed card acquisition expenses in relevant year. Commissioner (Appeals) held that said expenses should be treated as deferred revenue expenditure and a part thereof should be allowed in current assessment year and balance amount should be allowed as expenditure in next assessment year. Since expenditure in question was revenue in nature, it had accrued and was paid, and no acts had to be performed and undertaken in future, entire expenditure was to be allowed in relevant assessment year.(AY. 2006-07)
CIT v. SBI Cards & Payment Services (P.) Ltd. (2015) 229 Taxman 356 (Delhi)(HC)

S.37(1) : Business expenditure – Credit card business – Credit investigation – Allowable as business expenditure. 739

In credit card business, expenditure incurred by assessee on account of credit investigation to verify information and data provided by prospective customers for issue of credit cards, is part of running cost incurred to earn profit and, therefore, is to be allowed as revenue expenditure.(AY. 2006-07)

CIT v. SBI Cards & Payment Services (P.) Ltd. (2015) 229 Taxman 356 (Delhi)(HC)

S.37(1) : Business expenditure – Capital or revenue – Hire charges for plastic moulds – Allowable as revenue expenditure. 740

Assessee paid to foreign associates hire charges for plastic moulds. Those moulds were supplied to two contractual manufacturers free of cost to manufacture goods at assessee's behest and cost. Impugned expenditure was to be treated as revenue expenditure.(AY. 2006-07, 2007-08, 2008-09)

CIT v. Tupperware India (P.) Ltd. (2015) 229 Taxman 318 (Delhi)(HC)

S.37(1) : Business expenditure – Excise duty – Additional excise duty on account of contract – Held to be allowable. 741

Assessee entered into contract manufacturing agreements with two companies. Assessee's parent company provided requisite moulds to said contract manufacturers on a "free of cost basis" which were used by said entities for manufacturing process. Excise authorities levied additional excise duty on notional mould value. Additional excise duty was borne by the assessee. On appeal High Court held that since it was in assessee's business interests that all tax liabilities of manufacturers was to be regarded as "business expenditure". (AY. 2007-08)

Tupperware India (P) Ltd v. CIT (2015) 234 Taxman 56 (Delhi)(HC)

Editorial: SLP is granted (SLP(C) No. 18862 of 2015 dt 3-11-2015)(2015) 235 Taxman 51 (SC)

S.37(1) : Business expenditure – Capital or revenue – Film production – Advertisement films – Allowable as revenue expenditure. 742

Expenditure incurred by assessee on film production by way of advertisement films was allowable as revenue expenditure.

CIT v. Proctor & Gamble Home Products Ltd. (2015) 377 ITR 66 / 229 Taxman 383 / 280 CTR 487 / 126 DTR 166 (Bom.)(HC)

S.37(1) : Business expenditure – Provision for post sales – Matter remanded [S.145] 743

Tribunal had held that sum debited towards provision for post sales customers support service was an allowable deduction, however, particulars of same was not furnished nor method of arriving at it was not disclosed. Matter remanded back.(AY. 2001-02)

CIT v. Infosys Technologies Ltd. (2015) 229 Taxman 335 (Karn.)(HC)

S.37(1) : Business expenditure – Club membership fee – Held to be allowable. 744

Sum paid towards club membership fee was an allowable business expenditure.(AY. 2001-02)

CIT v. Infosys Technologies Ltd. (2014) 51 taxmann.com 417 / (2015) 229 Taxman 335 (Karn.)(HC)

745 **S.37(1) : Business expenditure – Capital or revenue – Restaurant business – Developing new recipes to develop clientele – Expenses for food tasting and trials – Revenue expenditure.**

The assessee, as part of its business expenses, claimed deduction for food tasting and development expenses. The assessee argued that it had continuously developed new flavours and food items to keep its customer base. It claimed that these expenses were incurred for food tasting and trials; it also incurred certain expenses for studying demographic trends. According to the assessee, these expenses were revenue in nature. The Assessing Officer treated these expenses as capital in nature. The Commissioner (Appeals) and the Tribunal allowed the assessee's claim.

On appeal by revenue the Court held that the assessee was engaged in the restaurant business. As part of its commercial activity, it strove to develop new recipes to develop its clientele, or expand it. The amounts expended towards such development were part of its business. Possibly, some recipes might be viable; equally possibly, all of them might be unviable. The mere possibility of the result of such exercise being a popular or long lasting recipe would not make the expenditure capital in nature. As such, it could not be held that the food tasting development charges would result in a capital advantage of an enduring nature. Followed, *Alembic Chemical Works Co. Ltd. v. CIT [1989] 177 ITR 377 (SC).*(AY. 2002-03 to 2008-09)

CIT v. Yum Restaurants (I) Pvt. Ltd. (2015) 371 ITR 139 / 115 DTR 129 / 231 Taxman 691 (Delhi)(HC)

746 **S.37(1) : Business expenditure – Commercial expediency – Royalty payments to foreign principals – Deductible.**

Dismissing the appeal of revenue the Court held that the Tribunal recorded a finding that the payment of royalty was for business purposes and what was more, payable to the assessee's foreign principals. Its character as an expense-collected for payment to the foreign party-had not been disputed. Thus, the assessee's claim that it was for business purposes alone, and no other reason, could not have been rejected. Followed, *Sri Venkata Satyanarayana Rice Mill Contractors Co. v. CIT [1997] 223 ITR 101 (SC).* (AY. 2002-03 to 2008-09)

CIT v. Yum Restaurants (I) Pvt. Ltd. (2015) 371 ITR 139 / 115 DTR 129 / 231 Taxman 691 (Delhi)(HC)

747 **S.37(1) : Business expenditure – Subsidiary company of assessee – Administrative expenses – Final effect is revenue-neutral – No allocation or apportionment of expenses could be made.**

Dismissing the appeal of revenue the Court held that the findings of the Tribunal could not be faulted. The ultimate effect on the revenue would be the same, whether the assessee bore the administrative expenses and costs of YRMPL or it remitted such amount to YRMPL, its wholly owned subsidiary, towards such costs. The final effect was revenue-neutral. Thus, no addition could be made from out of administrative expenses. (AY.2002-03 to 2008-09)

CIT v. Yum Restaurants (I) Pvt. Ltd. (2015) 371 ITR 139 / 115 DTR 129 / 231 Taxman 691 (Delhi)(HC)

S.37(1) : Business expenditure – Mercantile system of accounting – Provision made based on past experience – Concurrent finding method not objectionable – Not a contingent liability – Provision allowable.[S.145] 748

The assessee made certain provision on the basis of the mercantile system of accounting followed by it, at the end of the year. The Assessing Officer held that this provision was not utilised by the assessee in the next assessment year and, hence, the excess provision to be disallowed. The Commissioner (Appeals) deleted the disallowance, stating that the provision was made for certain expenses and that if the provision was not exhausted by the assessee, it did not mean that there was no possibility of that kind of expenditure arising when the provision was made. This was confirmed by the Tribunal. On appeal : the Court held that, the provision made by the assessee was based on past experience. Both the Commissioner (Appeals) and the Tribunal held this method was not objectionable. Besides doubting the estimation, the Assessing Officer had not stated whether, in fact, such past experience did not constitute a rational basis for making provision. Therefore, no disallowance could be made. (AY.2002-03 to 2008-09)

CIT v. Yum Restaurants (I) Pvt. Ltd. (2015) 371 ITR 139 / 115 DTR 129 / 231 Taxman 691 (Delhi HC)

S.37(1) : Business expenditure – Capital or revenue – State Government undertaking engaged in contract farming – Expenditure on development of land – Finding by Tribunal that land was fallow and expenses were incurred for business purposes – Expenditure was held to be deductible. 749

The assessee was a Punjab Government undertaking engaged in the business of contract farming, procurement of food grains, marketing and export, etc. It claimed deduction of expenditure incurred on development of land. The Assessing Officer held that the major expenditure incurred by the assessee for the development of the land was capital expenditure. This was confirmed by the Commissioner (Appeals). The Tribunal recorded a finding that the land was lying fallow and was not barren though it was not being put to alternative use. Further, the expenses incurred by the assessee and claimed to be revenue were tractor hiring charges, jeep vehicle expenditure, staff welfare, HSD, preparation and renewal of seeds and electricity charges. The expenses incurred were for the furtherance of the business objectives. The Tribunal on examination of the entire matter, keeping in view the main objects of the assessee, the activities of the assessee, the nature of expenses incurred and also the legal principles, concluded that the expenditure was revenue in nature and deductible. On appeal :

Held, dismissing the appeal, that the findings recorded by the Tribunal were based on appreciation of evidence and the principles laid down by the Supreme Court. The expenses incurred by the assessee could not be categorised as falling in the domain of capital expenditure and were revenue of nature, they were deductible. (AY.2005-06)

CIT v. Punjab Agro Foodgrains Corporation (2015) 371 ITR 100 / 232 Taxman 247 (P&H) (HC)

S.37(1) : Business expenditure – Guarantee commission – Held to be deductible. 750

The Assessing Officer made an addition of ₹ 3,60,000 on account of commitment charges/guarantee commission paid by the assessee to its allied concern. The

Commissioner (Appeals) deleted the addition. The Tribunal found that the loan taken for which the immovable property of the sister concern of the assessee had been pledged was for the purpose of the business of the assessee. Court held that in view of the finding of the Tribunal the guarantee commission paid by the assessee to its sister concern deductible.(AY.1994-95 to 1999-2000)
CIT v. Nuchem Ltd. (2015) 371 ITR 164 (P&H)(HC)

751 **S.37(1) : Business expenditure – Market survey – Held to be allowable.**
The Assessing Officer disallowed the expenditure of ₹ 40,000 as market survey on the premise that the assessee had not utilised the survey report in its business activities as the activity of powder quoting for which the report was obtained had not been carried out. The Commissioner (Appeals) had allowed the expenditure holding that the survey was carried out to determine the potential of powder coatings as the company was manufacturing UF/MF powders. The expenditure was held to be for a business purpose as it was carried out during the course of business activities of the assessee. This was upheld by the Tribunal. Court held that it was not mandatory that the survey report should have essentially it resulted in enhancement of the profits of the company by taking action thereupon except that it was required to be in the course of the business activity. It was not in dispute that the survey report was obtained during the course of business activities of the assessee for exploring the feasibility of powder coatings as the company was manufacturing UF/MF powder. The expenditure on obtaining the survey report was deductible. (AY.1994-95 to 1999-2000)
CIT v. Nuchem Ltd. (2015) 371 ITR 164 (P&H)(HC)

752 **S.37(1) : Business expenditure – Firm doing import and export – Foreign travel expenses of persons including a lady – Lady, one of the founder partners travelling in that capacity with others – Expenditure incurred wholly and exclusively for the purpose of the business – Allowable deduction.**
The assessee was a shoe company and had been issued an importer exporter code. The assessee-firm came into existence on July 1, 1993, and a lady RA was one of the founder partners. The Tribunal held that RA travelled in the capacity of the partner herself of the assessee-firm, which was an importer/exporter of the shoe products and, hence, the foreign travel expenses incurred by the firm for the partner and others were wholly and exclusively for the purpose of the business. On appeal :
Held, dismissing the appeal, that the lady was a partner of the assessee-firm in terms of the partnership agreement. Hence, the expenses incurred towards her foreign travel along with other persons should be treated as expenditure incurred wholly and exclusively for the purpose of the business. There was no reason to discredit the finding of fact, especially since the assessment order passed under section 143(3) read with section 147 of the Income-tax Act, 1961, contained no reason as to why it should not be treated as business expenditure. The mere *ipse dixit* of the officer was not a ground to deny the claim made by the assessee. Therefore, the foreign travel expenses incurred towards the partner of the assessee and others were an allowable deduction.(AY.2005-06, 2007-08)
CIT v. Irbaz Shoe Co. (2015) 371 ITR 215 / 232 Taxman 826 (Mad.)(HC)

S.37(1) : Business expenditure – Lease Rental – affidavit of the MD stating that no machinery purchased by lessor and no lease of the same to the assessee – Held lease is sham and unreal 753

The AO had disallowed the deduction of lease rental on the ground that the lease was a bogus and unreal. AO's conclusion was also affirmed by the affidavit of the managing director of the assessee that the lease was bogus. Further, the AO also disallowed the claim of the assessee that the said lease rental should be allowed as financial charges. Commissioner (Appeals) affirmed the said finding. The Tribunal allowed the deduction of the amount in question as financial charges after concluding that the Revenue could not dispute the claim of the assessee with documentary evidence. On appeal, held:

From the material on record it was clear that lessor had not purchased any asset and therefore the lease was sham and unreal. Further, the same was confirmed by the MD of the company. Thus, the deduction of lease rental disallowed. Also, in absence of any legal evidence, claim of financial expenditure also cannot be allowed. (AY. 1997-98 to 1999-2000)

CIT v. Bellary Steel & Alloys Ltd. (2014) 223 Taxman 491 / (2015) 370 ITR 226 / 114 DTR 287 (Karn.)(HC)

S.37(1) : Business expenditure – Capital or revenue – Royalty – Copy rights – Lump sum payment for the master plate and copyright in the music had enduring benefit, the expenditure could be considered as capital in nature, however, royalty paid to the producers on the sale affected, is a revenue expenditure. 754

The producer had assigned full rights to the assessee in consideration of payment of royalty. The rights included the market rights, whether and/or when to discontinue and recommence the sale or records of the said work and to fix and alter the price of such records. The AO treated it as capital expenditure. CIT(A) treated it as revenue expenditure relying on earlier years assessment order wherein the AO had relied on the case of *Super Cassettes Industries (P) Ltd. v. CIT 41 ITD 530 (Del.)*. Tribunal upheld CIT(A)'s order. On appeal Court held that the proceeding on the premise that 5% of the fixed amount or a lumpsum payment for the master plate and copyright in the music had enduring benefit, the expenditure could be considered as capital in nature, however, royalty paid to the producers on the sale affected, is a revenue expenditure, more so, when it is clear that the main business of the assessee was manufacture of blank cassettes and pre-recorded cassettes. (AY. 1989-90, 1991-92 to 1993-94)

CIT v. Krishan Kumar (2015) 273 CTR 233 / 53 taxmann.com 273 / 228 Taxman 264 (Mag) / 113 DTR 105 (Delhi)(HC)

CIT v. Super Cassettes Industries Ltd. (2015) 113 DTR 105 / 273 CTR 233 / 228 Taxman 264 (Mag.)(Delhi)(HC)

S.37(1) : Business expenditure – Capital or revenue – Expenditure incurred for the repairs and maintenance of hotel building is revenue expenditure. 755

The assessee is a public limited company and carrying on the business of hotel. The assessee had incurred expenditure for the repairs, renovation, refurbishing of building, plant and machinery along with interior decoration expenses and claimed the same as revenue expenditure. The AO however, disallowed the expenditure as considering the

same as capital in nature. The CIT(A) confirm the order of AO. The Tribunal however, allowed the appeal of assessee.
Dismissing the appeal of revenue, High Court held that merely because the income of the hotel has increased, it does not necessarily follow it is because of the refurnishing or repair work done to the hotel rooms. The High Court further held that the real test is whether all those acts constitute replacing existing assets which is not the case since no extra flooring space or extra room capacity is added on account of repairs and expenditure incurred towards repairs and replacement of old parts would in the nature of revenue expenditure and not capital expenditure. (AY. 2001-02)
CIT v. Mac Charles (India) Private Limited (2015) 273 CTR 596 / 233 Taxman 177 / 113 DTR 253 (Karn.)(HC)

756 **S.37(1) : Business expenditure – Consultancy charges – Genuineness was not in doubt – Held to be allowable.**
Assessee claimed consultancy charges as allowable expenditure. The AO opined that no service was rendered by 'B' for installing any plant and machinery, however, he allowed part of amount and made addition for remaining amount. CIT(A) Examined entire materials and observed that full amount of consultancy charges were genuine because same have been received by 'B' and when genuineness of assessee's claim had been accepted by AO there was no reason to give partial relief and order of CIT(A) allowing entire claim of assessee should be upheld. Tribunal affirmed the view of AO. On appeal the High Court affirmed the view of CIT(A) and decided the issue in favour of assessee.(AY. 1996-97)
Maya Machinery (P.) Ltd. v. Dy. CIT (2015) 229 Taxman 398 (All.)(HC)

757 **S.37(1) : Business expenditure – Deferred revenue – Advertisement – Trading of mobile handsets – Allowable as revenue expenditure.**
The assessee, engaged in trading of mobile handsets, its accessories and mobile repairing had incurred certain expenditure on advertisement and claimed same as revenue expenditure. The AO treated said expenditure as deferred revenue expenditure and allowed 25 per cent of expenses in current year observing that balance would be allowed in next three years.
On appeal, the CIT(A) allowed entire expenditure as revenue expenditure. The Tribunal upheld the order of the CIT(A). On revenue's appeal to the High Court affirming the view of Tribunal observed that business of assessee requires continuous and repeated publicity and advertisements to remain in public eye, to do business by attracting customers. It is an expenditure of trading nature. In view of the aforesaid the Tribunal's order did not call for interference. (AY. 2009-10)
CIT v. Spice Distribution Ltd. (2015) 374 ITR 30 / 229 Taxman 400 (Delhi)(HC)

758 **S.37(1) : Business expenditure – Capital or revenue – Installation of software packages – Held to be revenue expenditure.**
Expenses incurred on installation of software packages, enable assessee to carry on its business operations effectively, efficiently, smoothly and profit-ably and such software enhances efficiency of operation, it is an aid in manufacturing process rather than tool itself, and, thus, payment for such application software, though there is an enduring

benefit, does not result in acquisition of any capital asset and it has to be treated as revenue expenditure. (AY. 2002-03)
CIT v. Karur Vysya Bank Ltd. (2015) 229 Taxman 396 (Mad.)(HC)

S.37(1) : Business expenditure – Capital or revenue – Payment to UPPCL towards construction of a transmission line – Allowable as revenue expenditure. 759
Assessee started generating power which had to be sold to UPPCL which was only customer. Assessee made payment to UPPCL towards construction of a transmission line and other supporting work. Power transmission lines would constitute exclusive property of UPPCL. Expenditure incurred by assessee company was an allowable revenue expenditure. Appeal of revenue was dismissed. (AY. 2008-09)
Addl. CIT v. Dhampur Sugar Mills (P) Ltd (2015) 370 ITR 194 / 229 Taxman 271 / 273 CTR 90 (All.)(HC)

S.37(1) : Business expenditure – Subsidiary – New line of business – No nexus with business carried on by assessee – Expenditure was held to be not allowable. 760
The assessee was a public limited company carrying on the business of manufacture and sale of beer and liquor. The assessee company in furtherance of its business started the business of establishment of resorts by incorporating a subsidiary company. The main purpose of the said subsidiary was to put up resorts at important tourist destinations and since the date of incorporation, expenses like employee cost and other establishment costs were being incurred regularly. However, the subsidiary company had not done any business right from the date of incorporation and was also not intending to do any business or commercial activity as laid down in the main objects of its memorandum of association. The company had become defunct. Therefore, a request was made to strike the name subsidiary company under section 560 of the Companies Act. Such a request had been accepted by the Assistant Registrar of Companies. During the financial year ending on 31-3-2001, the assessee made a claim of ₹ 1.42 crore as bad debts written off, including the amount of ₹ 1.28 crore which was given as a loan to the subsidiary company.
The Assessing Officer held that as during enquiry, the assessee was unable to substantiate the said claim and since such expenditure did not relate to any of the existing activities of the assessee-company, it was not allowable.
The assessee thus gave up and withdrew the said claim under section 36(1)(vii) and put up an alternative claim under section 37 contending that it is an expenditure expend wholly and exclusively for the purpose of the business. The Expenditure was disallowed by the AO which was confirmed by the Tribunal. On appeal, dismissing the appeal of revenue the Court held that where assessee company had lent money to its subsidiary, for purpose of setting up a new line of business, it could not be said that all money lent by assessee to subsidiary company was an expenditure laid down and expended wholly and exclusively for purpose of business of assessee. Where such expenditure had no nexus with business carried on by assessee, same was not allowable.(AY. 2001-02)
United Breweries Ltd. v. ACIT (2015) 229 Taxman 113 / 122 DTR 185 (Karn.)(HC)

761 **S.37(1) : Business expenditure – Debenture issue expenditure – Held to be revenue in nature.**

Expenses incurred in issue of debentures could be allowed as revenue expenditure.

ACIT v. VXL India Ltd. (2015) 229 Taxman 199 (Guj.)(HC)

762 **S.37(1) : Business expenditure – Capital or revenue – Expenditure on an abandoned project is revenue in nature & can be claimed as deduction in year of abandoning the project**

(i) Expenditure made for construction/acquisition of new facility subsequently abandoned at the work-in-progress stage is allowable as incurred wholly or exclusively for the purpose of assessee's business. It is revenue expenditure as it does not result in the acquisition of an asset or an advantage of an enduring nature;

(ii) The expenditure has to be claimed in the year in which the decision is taken to abandon the project. There would have been no occasion to claim the deduction if the work-in-progress had completed its course. Because the project was abandoned the work-in-progress did not proceed any further. The decision to abandon the project was the cause for claiming the deduction. The decision was taken in the relevant year. It can therefore be safely concluded that the expenditure arose in the relevant year. (AY. 2003-04)

Binani Cement Ltd. v. CIT (2015) 118 DTR 61 / 277 CTR 49 / 233 Taxman 340 / (2016) 380 ITR 116 (Cal.)(HC)

763 **S.37(1) : Business expenditure – Trading in equipments – Machinery were given to doctors to keep them for demonstrations purposes – Write off of 1/3 every year was held to be justified – Allowable as revenue expenditure.**

Assessee was trading in medical equipments which were treated as stock-in-trade of assessee. Some machinery were given to doctors to keep them for demonstrations purposes. It was a part of promotion for sale of machinery and life of said equipment was 3 years and assessee written off value of said equipment in a period of 3 years deducting 1/3rd for each year. Said sum was revenue nature expenditure.(AY. 1996-97, 2003-04 to 2005-06)

CIT v. Allergan India (P.) Ltd. (2015) 371 ITR 38 / 228 Taxman 362 (Mag.)(Karn.)(HC)

764 **S.37(1) : Business expenditure – Capital or revenue – Creating manufacturing facility in India – Capital in nature.**

Assessee was importing components from abroad for making of elevator. Subsequently, due to change in policy, expenses were incurred for creating manufacturing facility in India. Assessee's claim for deduction of said expenses was rejected. Since expenditure incurred by assessee resulted in bringing enduring benefit for a long time impugned order passed by authorities below was to be upheld.

Schindler India (P.) Ltd. v. Jt. CIT (2015) 228 Taxman 357 (Mag.)(Bom.)(HC)

S.37(1) : Business expenditure – Club subscription – Managing director – Personal in nature – Not allowable as deduction. 765

Club subscription paid by assessee on behalf of its managing director being in nature of personal expenditure, could not be allowed as deduction.

Schindler India (P.) Ltd. v. Jt. CIT (2015) 228 Taxman 357 (Mag.) (Bom.)(HC)

S.37(1) : Business expenditure – Capital or revenue – Royalty paid for obtaining rights of reproduction was allowable as revenue expenditure 766

Where assessee carried on business of reproduction of audio sound and music from master plate provided by film producers and distributors, royalty paid for obtaining rights of reproduction was allowable as revenue expenditure. (AY. 1989-90, 1991-92 to 1993-94)

CIT v. Krishan Kumar (2015) 273 CTR 233 / 228 Taxman 264 (Mag.)(Delhi)(HC)

S.37(1) : Business expenditure – Capital or revenue – Expenditure incurred for purchase of carpet was a replacement cost and in nature of current repairs and allowable as revenue expenditure. 767

Where life of carpets is very short and have to be replaced at frequent intervals, expenditure incurred for purchase of carpet was a replacement cost and in nature of current repairs, therefore, same was allowable as revenue expenditure. (AY. 1989-90, 1991-92 to 1993-94)

CIT v. Krishan Kumar (2015) 273 CTR 233 / 228 Taxman 264 (Mag.)(Delhi)(HC)

S.37(1) : Business expenditure – Capital or revenue – Expenses incurred on video division, i.e., salary, wages to employees, selling expenses, etc., same was allowable as revenue expenditure. 768

Where assessee was engaged in manufacture of audio and video cassettes and expenses incurred on video division, i.e., salary, wages to employees, selling expenses, etc., same was allowable as revenue expenditure. (AY. 1989-90 & 1991-92 to 1993-94)

CIT v. Krishan Kumar (2015) 273 CTR 233 / 228 Taxman 264 (Mag.)(Delhi)(HC)

S.37(1) : Business expenditure – Keyman insurance premium – Matter remanded. 769

Where Tribunal allowed assessee's claim for deduction of Keyman Insurance Premium on ground that similar claim had been allowed in earlier year, in view of fact that even in earlier year assessee's claim had not been allowed on merits, impugned order was to be set aside and, matter was to be remanded back for disposal afresh. Matter remanded. (AY. 2006-07)

CIT v. P G Foils Ltd. (2015) 228 Taxman 313 (Mag.)(Guj.)(HC)

S.37(1) : Business expenditure – Capital or revenue – Wooden partition, electric wiring, power connection, interior layout and carpeting, etc. – Long Lease premises. 770

Assessee got a long lease of a newly constructed building suitable to its own business at a very concessional rent and incurred certain expenditure for wooden partition, electric wiring, power connection, interior layout and carpeting, etc. Assessee did not get any

capital asset by spending aforesaid amount and, therefore, expenditure was revenue expenditure. (AY. 1998-88 & 1975-76)
CIT v. Coromandal Fertilisers Ltd. (2015) 228 Taxman 318 (Mag.)(AP)(HC)

771 **S.37(1) : Business expenditure – Method of accounting – Dispute settled by Supreme Court in current year – Deduction is allowable in the current years.[S.145]**
During current year assessee filed its return of income and claimed deduction of differential sugarcane price relevant to previous year 1996-97. Since liability to make payment of sugarcane price differential itself was under challenge and liability under cane price fixation notification arose only in current year when Supreme Court upheld said notification, expenditure could have been claimed in current year. The appeal is accordingly dismissed. (AY. 2005-06)
CIT v. Dalmia Bharat Sugar & Industries Ltd. (2015) 228 Taxman 315 (Mag.)(Delhi)(HC)

772 **S.37(1) : Business expenditure – Net profit rate – Sales tax payment could be allowed. [S.145]**
Even while making assessment of income on basis of net profit rate, deduction towards sales-tax payment could be allowed. (AY. 1999-2000)
CIT v. Jain Construction Company (2015) 228 Taxman 314 (Mag.)(Raj.)(HC)

773 **S.37(1) : Business expenditure – Commission – No supporting evidence hence disallowance was held to be justified.**
Assessee, who was in a business of import and export of bullion, claimed deduction of commission paid to HBL on ground that services of director of HBL were utilised for purchasing bullion. However, on enquiries made by Tribunal, assessee stated that no such commission was paid in earlier or later year to HBL and assessee could have procured bullion without assistance of any agent. In order to satisfy itself about services rendered by HBL, Tribunal required presence of director of HBL but assessee could not produce him. There being no supporting evidence concerning services rendered by HBL, Tribunal disallowed commission. Finding of fact recorded by Tribunal could not be held to be perverse or vitiated by any error of law apparent on face of record and, therefore, could not be interfered with. (AY. 2004-05)
Sureshkumar G. Hundia v. ACIT (2015) 228 Taxman 317 (Mag.)(Bom.)(HC)

774 **S.37(1) : Business expenditure – Expenditure incurred on advertisement and promotion of associated enterprises – One of the functions of assessee – Amount received by assessee for international transactions accepted by Transfer Pricing Officer – No disallowance could be made.**
The assessee was acting as a selling agent for advertisements to be aired on the channels. It was entitled to retain 15% of the gross receipts as income and pass on or transfer 85% of the gross receipts to the foreign enterprises. Thus, one of the functions being performed by the assessee was to advertise and promote the channels and to earn subscription revenue. Another function was to procure advertisements. The assessee earned 15% commission for the advertisements.
Held, the assessee was earning revenue in view of the functions being per-formed. Expenditure incurred on advertisement was clearly relatable and laid out for the purpose

of business of the assessee and was not extraneous or unconnected with it. Consequently, it could not have been disallowed on the ground that it was not laid out or incurred wholly or exclusively for the purpose of business. One of the functions to be performed by the assessee being to incur the advertisement and promotion expenditure, the expenditure incurred for the purpose should be allowed under section 37(1) as incurred wholly and exclusively for purpose of the assessee. However, adequate compensation/price should be paid for the same by the associated enterprise, with reference to the functions, risk and assets. In case the assessee was not being paid adequate consideration or compensated by its associated enterprise, necessary adjustments could have been made by the Transfer Pricing Officer in accordance with the Act. The Transfer Pricing Officer did not deem it appropriate and proper to make any adjustment in respect of these international transactions. The price received by the assessee for the international transaction was accepted by the Transfer Pricing Officer. Therefore, the advertisement and promotion expenditure as one of the functions which the assessee was mandated and required to per-form for the purpose of its business and would be allowable as a business expenditure under section 37(1).(AY.2002-03 to 2004-05)

CIT v. Discovery Communication India (2015) 370 ITR 57 / 273 CTR 492 / 230 Taxman 539 / 113 DTR 223 (Delhi)(HC)

S.37(1) : Business expenditure – Capital or revenue – One-time lump sum payment for use of technology for a period of six years – Is licence fee for permitting assessee to use technology – Licence neither transferable nor payment recoverable – No accretion to capital asset – No enduring benefit – Allowable as revenue expenditure. 775

The payment made by the assessee was on account of licence fee. By making such payment, the assessee had got permission to use the technology. The money paid was irrecoverable. If the business of the assessee stopped for some reason or the other, no benefit from such payment was likely to accrue to the assessee. The licence was not transferable. Therefore, it could not be said with any amount of certainty that there had been an accretion to the capital asset of the assessee. If the assessee continued to do business and continued to exploit the technology for the agreed period of time, the assessee would be entitled to take the benefit thereof. But if it did not do so, the payment made was irrecoverable. Therefore, the one-time lump sum payment made by the assessee for acquiring technical know-how for a period of six years was revenue expenditure. (AY. 2000-01)

Timken India Ltd. v. CIT (2014) 227 Taxman 262 / (2015) 370 ITR 656 (Cal.)(HC)

S.37(1) : Business expenditure – Interest received was taxed without allowing any expenditure – Matter remanded. 776

The assessee was an association of person operating a club. It filed its return of income declaring a loss. The AO completed the assessment by an order determining the income of the assessee. He not only disallowed the loss claimed but also made some additions. Two such additions were 'interest received from banks' and another was, 'interest received on KEB Deposit'. On appeal the Court held that, AO made addition on account of interest received from banks as income without allowing any expenditure incurred for earning such income. On appeal matter was to be remanded back.(AY. 2008-09)

Vijayanagara Club v. Dy. CIT (2015) 229 Taxman 84 (Karn.)(HC)

777 **S.37(1) : Business expenditure – Development expenses – Held to be allowable.**
Assessee was an apex body responsible for development of dairy activities in co-operative sector in State. Assessee claimed Dairy Co-operative Society Development Expenses. AO held that such claim was not allowable as assessee had incurred expenses on its own and without any business expediency. On appeal Court held that the assessee had incurred said expenditure to launch various schemes for increasing procurement of milk and protecting dairy farmers for inducing more and more milk producers to join primary dairy co-operative society. Expenses were directly related to business of assessee and incurred for commercial expediency, and, hence, expenditure was to be allowed. (AY. 2007-08 to 2009-10)
CIT v. Rajasthan Co-operative Dairy Federation Ltd. (2015) 229 Taxman 34 (Raj.)(HC)

778 **S.37(1) : Business expenditure – Capital or revenue – Product development expenses – Revenue in nature.**
Assessee company was developing and selling leading edge optical networking products and claimed product development expenses for upgrading existing products, however, life span of product so developed was hardly a year and due to severe competition, constant upgradation of original products was required. Court held that the impugned expenditure was to be treated as revenue expenditure. (AY. 2003-04)
CIT v. Tejas Networks India (P.) Ltd. (2015) 229 Taxman 40 (Karn.)(HC)

779 **S.37(1) : Business expenditure – Capital or revenue – Professional fees paid for IT maintenance in respect of restructuring of company – Revenue in nature.**
The assessee company was engaged in the business of generation, transmission and distribution of electricity in the State of Gujarat. The erstwhile Gujarat Electricity Board in a process of restructuring was demerged into seven different companies and assessee company was of the resulting companies. The AO disallowed the "Legal & Professional Fees" pertained to reorganization of the business of erstwhile Gujarat Electricity Board by way of demerger and also included expenditure pertaining to issue of allotment of shares; expenditure pertaining to Internet Bandwidth, supply and installation of software, legal and professional fees in respect of restructuring, etc. treating the said expenses as capital in nature. CIT(A) and Tribunal has allowed the claim of assessee. On appeal by revenue dismissing the appeal the Court held that the professional fees paid for IT system maintenance in respect of restructuring of company was not having enduring benefit and as no asset was brought into existence on such payment, it could not be cateogorised as capital in nature. (AY. 2006-07)
CIT v. Gujarat Urja Vikas Ltd. (2015) 229 Taxman 46 (Guj.)(HC)

780 **S.37(1) : Business expenditure – Wrong claim made under section 35DDA cannot disentitle claim as business expenditure.[S. 35DDA]**
Mere wrongly invoking section 35DDA instead of section 37 in respect of payment to consultant and gift to ex-employees could not disentitle assessee from claiming deduction under section 37(1).(AY. 2001-02)
CIT v. Cadbury India Ltd. (2015) 229 Taxman 5 (Bom.)(HC)

S.37(1) : Business expenditure – Capital or revenue – Expenditure incurred to purchase its shares (Buyback of shares) in terms of settlement was held to be revenue expenditure. 781

There was a dispute between brothers who together owned the assessee company. As a consequence of differences between the two groups, the dispute reached the Company Law Board as well as the Supreme Court. Thereafter, a settlement was arrived at between the two warring groups of shareholders and as per directions of the Company Law Board the assessee was directed to buy 34% shareholding of one of the warring group and cancel the same. The assessee claimed the amount of ₹ 6.81 crores (being the difference between consideration paid and face value of the shares acquired for cancellation) as revenue expenditure. This on the basis that in view of the dispute between its shareholders, the business was adversely affected and therefore, the payment was expected to be incurred for purposes of business. However, the AO & CIT(A) did not accept the same and held the expenditure to be of capital nature. However, the Tribunal allowed the claim by relying on *Echjay Industries Ltd v. DCIT 88 TTJ (Mumbai) 1089*.

The Court held that the Tribunal has recorded the finding of fact that in view of the dispute between the two warring groups of shareholders the business of the assessee had suffered. After the settlement of the dispute there was a substantial increase in the sales. After settlement of the dispute new products were launched by the assessee-company. All this was evidence of the fact that the dispute between two groups of shareholders had affected the business of the company. The amount paid by the assessee for the purchase of its shares for subsequent cancellation was an expenditure incurred only to enable smooth running of the business. Thus, the expenditure was incurred for carrying on its business smoothly and was a deductible expenditure.(AY.2007-08)

CIT v. Chemosyn Ltd. (2015) 371 ITR 427 / (2016) 236 Taxman 202 (Bom.)(HC)

S.37(1) : Business expenditure – Film production-Cost of production could not be redetermined by the AO[R. 9A] 782

The assessee on dissolution of the partnership firm took over the rights of one film at book value and claimed loss after adjusting collection received from said film. AO based on the return filed by the firm for earlier year, reduced the loss as claimed by the assessee and made addition. In appeal CIT(A) deleted the addition which was affirmed by the Tribunal. On appeal by revenue, the High Court affirmed the view, holding the same as question of fact. (AY. 2005-06)

CIT v. Nitin Panchamiya (2015) 228 Taxman 259 (Bom.)(HC)

S.37(1) : Business expenditure – Capital or revenue – Refurnishing, repairs and improvement of assets taken on lease would be revenue expenditure. 783

The assessee-company was engaged in the business of jewellery shops and textile, situated in tenanted premises. It claimed expenditure incurred towards refurnishing, repairs, renovation, interior decoration, fixture and improvements of the leased premises used for business purpose, would always be revenue expenditure and not capital expenditure. The improvement made by the assessee which were of temporary nature and which could not be retrieved by assessee at the end of term of lease could only be revenue expenditure.

AO disallowed refurnishing, repairs and improvement expenses incurred by assessee at premises taken on lease as revenue expenditure, categorising entire expenditure as capital expenditure. On appeal the Court held that since said improvements made by assessee were temporary in nature and same could not be retrieved by assessee at end of term of lease, it could only be revenue expenditure. (AY. 2007-08)
Joy Alukkas India (P.) Ltd. v. ACIT (2015) 228 Taxman 35 / (2016) 282 CTR 551 (Mag.) (Ker.)(HC)

784 **S.37(1) : Business expenditure – Capital or revenue – Expenditure to make rig operation was held to be revenue expenditure.**
Assessee was engaged in business of oil drilling operations, drilling oil wells and giving on hire oil rigs to clients. It purchased new rigs and installed them for purpose of making them operational. Assessee employed salaried workers and technicians for installation purpose. AO disallowed assessee's claim for salaries by treating same as capital in nature. Tribunal held that the expenditure was revenue in nature. On appeal by revenue the Court held that the drilling operations being very business of assessee, expenditure incurred to make rig operational would be covered and should be treated as 'revenue expenditure'. (AY. 1991-92)
CIT v. Triveni Oil Field Services Ltd. (2015) 228 Taxman 134 (Mag.) / 114 DTR 113 (Delhi) (HC)

785 **S.37(1) : Business expenditure – Octroi charges – No supporting evidence was produced – Disallowance was held to be justified.**
Assessee was engaged in business of sale of imported tractor. Assessee claimed expense on account of octroi charges. The High Court held that since assessee had not been able to show before any authorities that said expenditure had been incurred by it and there was no supporting entries showing payment of octroi, Tribunal was right in affirming addition made by AO.(AY. 1975-76 to 1977-78)
Modern Farm Services v. CIT (2015) 228 Taxman 106 (Mag.)(P&H)(HC)

786 **S.37(1) : Business expenditure – Method of accounting – Advertisement & Publicity expenses – Bills received during the year – Crystallized during the year – Allowable as deduction.**
The High Court held that as per mercantile system of accounting, bills received by the assessee in respect of advertisement services pertaining to the previous year and continued during the year were booked only when these were crystallized. Entire expenses were deductible in the relevant to assessment year. (AY.1996-97)
CIT v. Jet Lite (India) Ltd. (2015) 128 DTR 91 / (2016) 379 ITR 185 / 236 Taxman 453 / 282 CTR 113 (Delhi)(HC)

787 **S.37(1) : Business expenditure – Amount paid for non-compliance of terms and conditions of licence – Allowable as deduction.**
Amount paid by assessee to DOT for non-compliance of terms and conditions of licence agreement being made for violation of a contractual liability and not for infraction of any law, could not be disallowed.(AY. 2009-10, 2010-11)
Vodafone East Ltd v. Add.CIT (2015) 43 ITR 551 / (2016) 156 ITD 337 (Kol.)(Trib.)

S.37(1) : Business expenditure – Penalties for violation of rules by Forward Market Commission (FMC) – Civil liability – Held to be allowable. 788
Penalties paid for violations of rules laid by Forward Market Commission (FMC), being in nature of civil liability similar to compounding fees, and not for any serious violation of provisions of law, was to be allowed. (AY. 2006-07 to 2007-08)
ITO v. Shanti Commodities (2015) 171 TTJ 641 / (2016) 156 ITD 34 (Pune)(Trib.)

S.37(1) : Business expenditure – Prior period expenses – Matter remanded. 789
Where assessee claimed prior period expenses, matter was to be remanded to verify whether said expenses had crystallized or not so as to allow said claim.(AY. 2003-04, 2004-05)
Dy. CIT v. Gujarat Mineral Development Corporation Ltd. (2015) 68 SOT 283 (URO)(Ahd.)(Trib.)

S.37(1) : Business expenditure – Preoperative expenses – Expansion of business – Held to be allowable. 790
Where assessee was engaged in mining of lignite and it expanded said business, preoperative expenses incurred on same was allowable as revenue expenditure. (AY. 2003-04, 2004-05)
Dy. CIT v. Gujarat Mineral Development Corporation Ltd. (2015) 68 SOT 283 (URO)(Ahd.)(Trib.)

S.37(1) : Business expenditure – Salary to staff at residence of Chairman – Held to be allowable. 791
Where salary was paid to staff at residence of chairman which was for purpose of assessee's business and same was not prohibited by law, said payment was allowable as revenue expenditure. (AY.2003-04, 2004-05)
Dy. CIT v. Gujarat Mineral Development Corporation Ltd. (2015) 68 SOT 283 (URO)(Ahd.)(Trib.)

S.37(1) : Business expenditure – Capital or revenue – Licence fee – Limited right to use software – Allowable as revenue expenditure. 792
Tribunal held that where assessee, engaged in business of process management services for credit cards, paid licence fee in order to get limited right to use a software programme belonging to other company, amount so paid was to be allowed as business expenditure. (AY. 2007-08, 2008-09)
GE Capital Business Process Management Services (P.) Ltd v. ACIT (2015) 174 TTJ 834 / (2016) 156 ITD 239 (Delhi)(Trib.)

S.37(1) : Business expenditure – Capital or revenue – Brand building expenditure – Allowable as revenue expenditure. 793
Dismissing the appeal of revenue the Tribunal held that where assessee claimed deduction of brand building expenditure, in view of fact that most of expenditure was incurred in field of advertisement with a purpose of creating public awareness and consciousness of product so as to increase sales of assessee, it could not be said to bring

any benefit of enduring nature and, thus, assessee's claim deserved to be allowed. (AY. 2007-08)
Dy. CIT v. Polygel Industries (P.) Ltd. (2015) 68 SOT 130 (URO)(Mum.)(Trib.)

794 **S.37(1) : Business expenditure – Foreign Travel Expenses – Failure by assessee to demonstrate business purpose of travel – Matter remanded to AO to adjudicate issue afresh.**
The assessee claimed deduction of expenditure incurred by it for foreign travel of a senior executive of the assessee representing it in the share-holder's meeting of the joint venture. During the assessment proceedings, the AO made disallowed the expenditure. On appeal to Tribunal, it was held that the business purpose of the assessee was not sufficiently demonstrated. The assessee was to demonstrate where exactly the meeting took place, why the senior executive travelled to Singapore, how the senior executive was connected to the shareholder's meeting when the assessee was a shareholder in the joint venture company. It should also demonstrate what was the fact on the disallowance made by the Assessing officer in the earlier year on account of foreign travel. The matter is remanded back for fresh adjudication by AO on the issue. (AY. 2003-04)
Godavari Corporation P. Ltd. v. ITO (2015) 44 ITR 182 (Mum.)(Trib.)

795 **S.37(1) : Business expenditure – Sales Promotion expenses – No documentary evidence – Disallowance was held to be justified.**
Assessee was engaged in the business of marketing and third party manufacture of system and medical diagnostic imaging products. AO disallowed sales promotion expenses on account that documentary evidence was not produced. CIT(A) confirmed the disallowance. ITAT held that no documentary evidences was submitted during the assessment proceedings or appellate proceedings. Also, no evidence was submitted by assessee even before Tribunal to substantiate its claim of expenses. Disallowance was held to be justified. (AY 2002-03 to 2004-05)
Agfa India Pvt. Ltd. v. ACIT (2015) 44 ITR 608 (Mum.)(Trib.)

796 **S.37(1) : Business expenditure – Telephone Expenses – 1/4th expenses disallowed – Personal use – Disallowance deleted.**
AO disallowed one-fourth of telephone expenses reimbursed to employees on account that expenses were attributable towards personal use. CIT(A) confirmed the disallowance. ITAT held that genuineness of expenses were not in doubt. Reimbursement of telephone expenses cannot be treated as perquisite in the hands of the employee w.e.f. AY 02-03. Relying on decision of Sayaji Iron and Engg. (2002) 253 ITR 749 (Guj.) ITAT held that there is no merit in disallowance of the said expense. (AY.2002-03 to 2004-05)
Agfa India Pvt. Ltd. v. ACIT (2015) 44 ITR 608 (Mum.)(Trib.)

797 **S.37(1) : Business expenditure – Promotional expenses – Details of expenses along with supporting bills, vouchers submitted – Disallowance deleted.**
AO disallowed the expenses on account that no third party evidences has been obtained and produced by the assessee. CIT(A) upheld the addition. ITAT held that in normal business course gifts were distributed to various customers and clients. There is no valid

reason for disallowance. Assessee had submitted full details of expenses along with supporting bills, vouchers. Thereby, disallowance not justified. (AY.2002-03 to 2004-05)
Agfa India Pvt. Ltd. v. ACIT (2015) 44 ITR 608 (Mum.)(Trib.)

S.37(1) : Business expenditure – Foreign exchange Loss – Forward Contract – Revenue Account – Disallowance deleted. 798
AO disallowed foreign exchange loss on account of revaluation of forward contract on account that it constitutes contingent liability. CIT(A) confirmed the said addition. ITAT held that transaction was entered to safeguard itself from potential risks arising from foreign currency fluctuation. It was on revenue account and hence loss was allowable u/s. 37(1). (AY. 2002-03 to 2004-05)
Agfa India Pvt. Ltd. v. ACIT (2015) 44 ITR 608 (Mum.)(Trib.)

S.37(1) : Business expenditure – Commission expense – No details furnished – Disallowance justified 799
AO disallowed the expenses as no details furnished. CIT(A) confirmed the said addition. ITAT held that no confirmation were submitted. Assessee failed to discharge the primary onus of proving that commission so paid was received by the person who rendered the services. Disallowance of commission was proper. (AY 2002-03 to 2004-05)
Agfa India Pvt. Ltd. v. ACIT (2015) 44 ITR 608 (Mum.)(Trib.)

S.37(1) : Business expenditure – Capital or revenue – Licence and Royalty fees paid – Year to Year basis – Revenue in nature 800
Assessee engaged in business of frequency modulation radio broadcasting, paid a licence fee, broadcasting fee and royalty to Government of India. AO treated the said expenses as capital expenditure on the basis that it is for acquisition of an intangible asset giving enduring benefit to the assessee. CIT(A), however, allowed the claim of assessee. On appeal, ITAT held that if the advantage consists merely in facilitating the assessee's trading operations or enabling the management and conduct of the assessee's business to be carried on more effectively or more profitably while leaving the fixed capital untouched, the expenditure would be on revenue account, even though the advantage may endure for an indefinite future. The licence fee and the royalty fee to the Government of India is on a year to year basis and this fact was never disputed by the Revenue at any point of time and thus the same has to be held as revenue in nature. (AY. 2007-08 to 2009-10)
DCIT v. Hitz FM Radio India Ltd. (2015) 44 ITR 318 (Delhi)(Trib.)

S.37(1) : Business expenditure – Capital revenue – Brand development Expenditure – Revenue in nature. 801
AO treated brand development expenditure incurred by assessee as capital in nature. CIT(A) deleted the addition. On appeal, ITAT held that real nature of brand development expenditure is no more than a normal advertisement expenses as it includes expenses on hoardings, pamphlets, advertisement behind buses, expenses relating to promotional events etc. Expenditure on publicity and advertisement is to be treated as Revenue in nature allowable fully in the year in which it was incurred. (AY. 2007-08 to 2009-10)
DCIT v. Hitz FM Radio India Ltd. (2015) 44 ITR 318 (Delhi)(Trib.)

802 **S.37(1) : Business expenditure – Sales commission – Burden of proof on assessee – Failure by assessee to demonstrate nature and extent of service rendered by commission agent – Burden is not discharged expenditure is not allowable.**
Failure by assessee to demonstrate nature and extent of service rendered by commission agent, burden is not discharged expenditure is not allowable.(AY. 2007-08, 2008-09)
DCIT v. Printer House Pvt. Ltd. (2015) 44 ITR 38 (Delhi)(Trib.)

803 **S.37(1) : Business expenditure – Bad and doubtful debt – Voluntarily disallowing provision for bad and doubtful debts in earlier year and claiming it in the current year to avoid double taxation – No infirmity – Deduction allowable.**
Assessee had written back the provision for doubtful debts during the previous year and credited it under the head other income. Since, the said amount was disallowed in the earlier year, the said amount was reduced from the total income to avoid double taxation. AO disallowed part provision on the ground that bad debts written off were more than the provision made in the earlier years. CIT(A) confirmed the said order. On cross appeals, ITAT held that assessee made provision for bad and doubtful debts in the earlier year and was duly disallowed in the earlier year and this fact was not disputed by AO. Even though it was written back in the previous year, said amount was not offered for tax as it would have resulted in double taxation. As per treatment given in the books and in the return, there was no infirmity in the action of the assessee. (AY. 2008-09)
DCIT v. Woodlands Medical Centre Ltd. (2015) 44 ITR 312 (Kol.)(Trib.)

804 **S.37(1) : Business expenditure – *Ad hoc* disallowance of expenses on costume and dress – Substantial part of its income earned by assessee from anchoring – Expenditure incurred wholly and exclusively for the purpose of business.**
The assessee is engaged in the business of film production and distribution. During the assessment proceedings, the AO made *ad hoc* disallowance of costume and dress expenses. On appeal to Tribunal, it was held that the assessee was a television anchor and earned its substantial part of income from anchoring. As the profession of the assessee required him to be presentable while hosting the show, the expenditure incurred by the assessee were wholly and exclusively for the purpose of business. (AY. 2007-08, 2009-10)
Karan Yash Johar v. DCIT (2015) 44 ITR 589 (Mum.)(Trib.)

805 **S.37(1) : Business expenditure – Sales commission – Restricting the disallowance of commission at 5% was held to be justified.**
Assessing Officer disallowed 75 per cent of sales commission paid by assessee on ground that assessee had not furnished any evidence to justify same. Commissioner (Appeals) restricted said disallowance to 5 per cent of sales commission. Tribunal held that it was undisputed that relief granted by Commissioner (Appeals) was in accordance with accepted past history of case and even quantum of expenditure was lesser than similar expenditure incurred by assessee in preceding assessment years therefore impugned order passed by Commissioner (Appeals) did not require any interference. (AY. 2003-04)
ACIT v. Krafts Palace (2015) 68 SOT 338 (URO) / 40 ITR 158 / 154 ITD 275 (Agra)(Trib.)

S.37(1) : Business expenditure – Addition ROC fee paid is not penalty and allowed as business expenditure. 806

The Tribunal held that additional fee paid to ROC is considered to be compansatory in nature and not as penalty and hence allowed as business expenditure of assessee. (AY.2007-08, 2008-09)

Cummins Turbo Technologies Ltd. v. DCIT (IT) (2015) 169 TTJ 358 (Pune)(Trib.)

S.37(1) : Business expenditure – Capital or revenue – Pre-operative expenses for expansion and diversification of business – Held to be capital, however depreciation was allowed. [S. 32] 807

The Tribunal held that expenditure on expansion and diversification of business admittedly resulting in creation or bringing into existence fixed assets is capital in nature. The Tribunal accepted the alternative claim of assessee that assessee is entitled to a claim of depreciation allowances under section 32(1). (AY. 1997-98, 1998-99, 1999-2000)

LML Ltd. v. JCIT (2014) 33 ITR 269 / 151 ITD 303 / (2015) 169 TTJ 10 (Mum.)(Trib.)

S.37(1) : Business expenditure – Inflated payment for purchase of goods – Matter remanded. 808

The Tribunal regarding the issue of inflation of purchase price restored back to the file of AO for adjudication of fresh in accordance with law by issuing definite findings of fact and after allowing the assessee a proper opportunity to represent its case. (AY. 1997-98, 1998-99 1999-2000)

LML Ltd. v. JCIT (2014) 33 ITR 269 / 151 ITD 303 / (2015) 169 TTJ 10 (Mum.)(Trib.)

S.37(1) : Business expenditure – Additional liability on account of foreign exchange rate fluctuation – Allowable as revenue expenditure. 809

Any increase in the purchase value on account of exchange rate fluctuation is trade liability deductible as revenue expenditure under section 37(1). (AY. 1997-98, 1998-99 1999-2000)

LML Ltd. v. JCIT (2014) 33 ITR 269 / 151 ITD 303 / (2015) 169 TTJ 10 (Mum.)(Trib.)

S.37(1) : Business expenditure – Prior period expenses – Contractual liability being crystallised in relevant assessment year is allowable as deduction. 810

It has been held by the Hon'ble Appellate Tribunal that contractual liability in respect of prior period expenses crystallised in relevant year, disallowance made by AO is to be deleted (AY. 2005-06)

Modipon Ltd. v. ITO (2015) 154 ITD 369 / 168 TTJ 480 / 115 DTR 99 (Delhi)(Trib.)

S.37(1) : Business expenditure – Compensation paid by developer on cancellation of an agreement was held to be not deductible from different project. [S.145] 811

Compensation paid by developer on cancellation of an agreement was held to be not deductible from different project.(AY.2008-09, 2009-10)

Nitesh Estates (P) Ltd. v. DCIT (2014) 110 DTR 121 / (2015) 167 TTJ 521 (Bang.)(Trib.)

812 **S.37(1) : Business expenditure – Capital or revenue – Sweat Equity Shares were issued to two employees – Value addition took character of an intangible asset, hence capital expenditure.**

Assessee is engaged in business of trading in grocery, food grains & store items. During the year Assessee issued ₹ 5 lakhs Sweat Equity Shares to two employees at free of cost for providing professional services. Assessee claimed that Sweat Equity Shares was a kind of Fringe Benefit given to its employees and same was allowable as revenue expenditure. It was held by the ITAT that where Sweat Equity Shares were issued to two employees by assessee company for value addition in form of their vast experience in new business concepts and professional experience and, accordingly, value addition took character of an intangible asset, therefore issuance of share was capital in expenditure. (AY. 2008-09)

Future Agrovet Ltd. v. Addl. CIT (2014) 35 ITR 519 / (2015) 155 ITD 786 (Mum.)(Trib.)

813 **S.37(1) : Business expenditure – Unclaimed expenses of earlier years could not be allowed in current year.**

The assessee company claimed deduction of expenses under the head 'prior period expenses' and 'prior period salary'. The Assessing Officer disallowed the claim of the assessee on the ground that the assessee failed to demonstrate how the incurrence of this expenditure had been crystallised during the accounting period relevant to the assessment year in question. CIT(A) upheld the disallowance. The ITAT had taken view that as far as the admissibility of expenses are concerned, that has not been disputed. The Assessing Officer has not doubted genuineness of the expenditure. His grievance is that this cannot be claimed in this accounting year, as these were not incurred in the accounting year relevant to the present assessment year. The rate of tax applicable upon the assessee in this assessment year remains the same. It has been reporting loss in the earlier years and in subsequent years. The assessee could not demonstrate as to how loss has also been incurred in this year. The expenses do not pertain to this year, therefore, they are not allowable. (AY. 2006-07)

Marwar Hotel Ltd. v. ACIT (2015) 155 ITD 655 / (2016) 176 TTJ 753 / 131 DTR 340 (Ahd.) (Trib.)

814 **S.37(1) : Business expenditure – Brokerage and commission – Principle of consistency – Expenditure allowed for other years and no challenge by Revenue – Allowable expenditure.**

Dismissing the appeal of revenue the Court held that there was no dispute by the Revenue that for the other years, the assessee's treatment of such expenses had been in its favour and the Revenue had not chosen to challenge it. Even otherwise, such expenditure had to be allowed.(AY. 1993-94)

CIT v. DLF Universal Ltd. (2015) 378 ITR 197 (Delhi) (HC)

815 **S.37(1) : Business expenditure – Commission – Failure to furnish documentary evidences to substantiate services rendered by commission agents – Disallowance was held to be justified.**

Failure to furnish documentary evidences to substantiate services rendered by commission agents hence disallowance was held to be justified.(AY. 2007-08, 2008-09)

Printer House Pvt. Ltd. v. DCIT (2015) 44 ITR 38 (Delhi)(Trib.)

S.37(1) : Business expenditure – Method of accounting – Claim of interest disputed in court – As the interest liability is not legally enforceable at end of year under consideration the assessee is not entitled to get deduction for interest. 816

The assessee is following mercantile system of accounting. The assessee claimed deduction on account of interest payable. The liability to pay interest became due by the direction given in the order of the Single Judge of the High Court dated 28-1-2000. The assessee against the said Judgment of Single Judge filed a letters patent appeal before the division bench. The Division Bench *vide* order dated 28-2-2001 stayed execution of judgment of Single Judge which was continued till Third Judge finally decided appeal *vide* judgment dated 6-9-2010. The assessee has not debited such amount in the profit and loss account, but directly reduced it from the computation of total income. The Assessing Officer disallowed the claim of deduction on the ground that the assessee has treated the liability of interest as contingent by not debiting it to the profit and loss account. On appeal, the CIT(A) confirmed the action of the Assessing officer. On appeal, the Appellate Tribunal held that the assessee did not incur any liability for payment of interest to Alimenta as at the end of the years under consideration. Since no legally enforceable liability existed, the deduction has been rightly denied. The Appellate Tribunal, further held that where the claim of interest payable is disputed by the assessee in the court of law, the deduction cannot be allowed for the interest claimed in the computation of business income. (AY. 2001-02, 2002-03)

National Agricultural Co-Operative Marketing Federation of India Ltd. v. JCIT (2015) 44 ITR 275 / 173 TTJ 793 / 126 DTR 187 / (2016) 156 ITD 11 (SB)(Delhi)(Trib.)

S.37(1) : Business expenditure – Gift of car by car Manufacturer to State Police department was held to be not an allowable deduction. 817

Assessee a manufacturer and seller of motor vehicles claimed expenditure being cost of 100 cars donated by it to police department of Tamil Nadu as allowable deduction. There was difference of opinion and the matter was referred to third member to consider "Whether the expenditure incurred by the assessee by giving 100 cars to the police department of Tamil Nadu was an eligible expenditure under section 37?". Assessee submitted that the expenditure under head 'advertisement and sales promotion' and claimed that it had made aforesaid donation to test efficacy of their vehicles and to obtain feedback. The expenditure was disallowed by the Assessing Officer. On appeal it was contended that the expenditure was under the head 'advertisement and sales promotion' and the donation was made to test efficacy of their vehicles and to obtain feedback. Dismissing the appeal of assessee the Tribunal held that neither the assessee called for their feedback nor did Police Department deem it fit to give any feedback. The assessee could not effectively prove that cars were given for market research and manner in which cars were given also did not indicate that there was any advertisement value hence, there was no commercial expediency in incurring this expenditure, therefore it was not allowable expenditure. (AY. 2007-08)

Hyundai Motor India Ltd. v. Dy. CIT (2015) 155 ITD 1 / (2016) 131 DTR 257 / 176 TTJ 456 (TM) (Chennai)(Trib.)

818 **S.37(1) : Business expenditure – Software development – Capital or revenue – Matter remanded for fresh examination.**
The ITAT held that the parties had failed to furnish the break-up of details of the software and web development expenditure. Since the break-up details of the expenditure were not available on record, the issue required fresh examination by the A.O.
Dy. CIT v. Kisan Ratilal Choksey Shares and Securities P. Ltd. (2015) 41 ITR 114 (Mum.) (Trib.)

819 **S.37(1) : Business expenditure – Capital or revenue – Expenditure on acquisition of research reports in course of advisory services – Revenue in nature.**
Allowing the appeal of assessee the Tribunal held that the expenditure was for expansion of business, and such expenditure on research reports obtained in the course of advisory services was revenue expenditure. The assessee had declared income from advisory services after obtaining the reports which was in excess of the expenditure incurred. The mere fact that part of the expenditure was incurred for marketing would not change the nature of expenditure. (AY. 2009-10)
Pulsar Knowledge Centre P. Ltd. v. Jt. CIT (2015) 41 ITR 690 (Delhi)(Trib.)

820 **S.37(1) : Business expenditure – Capital or revenue – Expenditure on installation of software for the first time is capital in nature.**
Expenses towards implementation of SAP software, user licence therefore and licence for other software introduced for the first time and not in sup-port or maintenance of existing software, is capital in nature. (AY. 2006-07)
Micro Link Limited v. ACIT (2016) 157 ITD 132 / 175 TTJ 8 (Ahd.)(Trib.)

821 **S.37(1) : Business expenditure – Fines and penalties imposed by Stock exchange for violation of bye-laws – Held to be allowable.**
The assessee paid fine and penalties on violation of bye laws of Stock Exchange. The same has been claimed as business expenditure. The AO had disallowed the same. CIT(A) deleted the disallowance of penalty paid to the stock exchange. The Honourable ITAT has held that Explanation to section S. 37(1) was not applicable for the penalty paid on contravention of bye-laws of the stock exchange. Accordingly order of CIT(A) was affirmed. (Followed, *ITO v. VRM Share Broking P. Ltd v. ITO (2009) 27 SOT 469 (Mum.)(Trib.)*, *Goldcrest Capital Markets Ltd. v. ITO (2010) 2 ITR 355 (Mum.)(Trib.)* (AY. 2007-08)
Dy. CIT v. Kisan Ratilal Choksey Shares and Securities P. Ltd. (2015) 41 ITR 114 (Mum.) (Trib.)

822 **S.37(1) : Business expenditure – A business is "set up" the moment employees are recruited for the purpose of the business. All expenditure incurred thereafter is allowable as a deduction even if the business has not commenced. [S. 28(i)]**
Setting up of business is different from commencement of business and the expenditures are allowable on setting up of business. The assessee has recruited employees for the purpose of its business and about 16 employees are for the job of quality assurance. The

assessee is in the business of Merchandising of diamonds/gold/jewelleries. Undisputedly, this line of business requires expertise who have proficiency in understanding the carats of diamonds and related jewellery, without such recruitment, it would be a futile exercise to commence the business. In our considered opinion upon recruitment of employees, the factum that expenditure under the different heads was incurred is indicative that business was set up. (ITA No. 3855/Mum/2013, dated 28.10.2015) (AY. 2008-09)
Reliance Gems & Jewels Ltd. v. DCIT (Mum.)(Trib.); www.itatonline.org

S.37(1) : Business expenditure – Genuineness expenditure cannot be decided merely because the party to whom the payment was made has not responded to the notice issued by the Assessing Officer – Matter set aside to decide the issue considering the supporting evidence filed by the Assessee. 823
Tribunal held that it is well-settled that genuineness of a payment cannot be denied merely because the party to whom the payment is said to have been made is not responding to the notice issued by the Assessing Officer especially when the assessee has filed sufficient documents in support of the payment. The Tribunal sent the matter back to the file of Assessing Officer to examine the veracity of the documents filed by the assessee in support of genuineness of the impugned payment made and to decide the issue a fresh. (AY. 2007-08)
Cheil India P. Ltd. v. ITO (2015) 172 TTJ 302 / 123 DTR 138 (Delhi)(Trib.)

S.37(1) : Business expenditure – Prior period expenses – Held to be allowable. 824
The Tribunal held that provision for prior period expenses which is still a contingent liability and is not yet finalized is not allowable as deduction. (AY. 2008-09)
Coal India Ltd. v. Addl. CIT (2015) 172 TTJ 103 (Kol.)(Trib.)

S.37(1) : Business expenditure – Capital or revenue – Foreign exchange fluctuation loss – Repair and maintenance. 825
Expenditure incurred for purchase of licence for Window application software is revenue expenditure. Foreign exchange fluctuation loss is revenue expenditure. Expenditure incurred on repair and maintenance is revenue expenditure.(AY. 2004-05, 2005-06)
ACIT v. Boots Piramal Health Care Ltd. (2015) 43 ITR 355 (Mum.)(Trib.)

S.37(1) : Business expenditure – Foreign travel expenses – Expansion of business – Held to be allowable. 826
Where assessee, engaged in business of running pre-schools, incurred foreign travel expenditure in connection with expansion of business and introduction of private equity therein, assessee's claim for deduction of said expenditure was to be allowed. (AY. 2006-07)
ACIT v. Geeta Bhatia (Ms.) (2015) 68 SOT 50 (URO)(Mum.)(Trib.)

827 **S.37(1) : Business expenditure – Civil works – Rented premises – Allowable as revenue in nature.**
Where expenditure was incurred towards civil works in rented premises of assessee's office, said expenditure was revenue in nature. (AY. 2008-09)
Anush Shares & Securities (P.) Ltd. v. ACIT (2015) 68 SOT 359 (Chennai)(URO)(Trib.)

828 **S.37(1) : Business expenditure – Work-in-progress – Expenditure not relating to current year cannot be allowed as deduction. [S.145, AS-I]**
Where an expenditure does not relate to impugned assessment year, in view of AS-I, it cannot be allowed merely on basis that if expenditure is taken to closing work-in-progress in relevant year it will increase value of opening work-in-progress in subsequent year resulting in reduction of in-come in subsequent year. (AY.2009-10)
ACIT v. Alcon Developers (2015) 68 SOT 299 (Panaji)(Trib.)

829 **S.37(1) : Business expenditure – Advertisement expenses – Brand building expenses – *ad-hoc* disallowance of 50% was held to be not justified – Allowable as revenue expenditure.**
During course of assessment proceedings, Assessing Officer noted that assessee had debited a sum on account of contribution for brand building expenses payment meant for marketing Company. Assessing Officer found that assessee company was following the mercantile method of accounting, and, therefore, out of total expenses debited, a sum of 50 per cent in related to profits of subsequent years and could not be allowed. Commissioner (Appeals) held that *ad hoc* disallowance to extent of 50 per cent had been made without any clear & cogent basis thus, he deleted said disallowance. Tribunal held that since there was not dispute that expenditure was a revenue expenditure incurred in relevant year, impugned order passed by Commissioner (Appeal) was to be upheld. (AY.2009-10, 2010-11)
A.B. Hotels Ltd. v. ACIT (2015) 68 SOT 255 (URO) (Delhi)(Trib.)
A.B. Hotels Ltd. v. ACIT (2015) 68 SOT 334 (URO) (Delhi)(Trib.)

830 **S.37(1) : Business expenditure – Rural development expenditure – Held to be allowable.**
Rural development expenditure were allowable as revenue expenditure.(AY 2003-04)
Aditya Birla Nuvo Ltd. v. ACIT (2015) 68 SOT 403(Mum.)(Trib.)

831 **S.37(1) : Business expenditure – Expenditure on maintenance of live stock – Allowable as revenue expenditure.**
Expenditure on maintenance of live stock was allowable as revenue expenditure.(AY. 2003-04)
Aditya Birla Nuvo Ltd. v. ACIT (2015) 68 SOT 403 (Mum.)(Trib.)

832 **S.37(1) : Business expenditure – Raw material discarded – No details were furnished – Disallowance was held to be justified.**
Assessee-company was engaged in business of producing films, TV serials and audio tapes. It claimed deduction on account of 'raw material discarded' but it could not

furnish any relevant details to satisfaction of Assessing Officer disallowance made by Assessing Officer of said deduction was to be confirmed.(AY. 1999-2000)
Amitabh Bachchan Corpn. Ltd. v. Dy. CIT (2015) 68 SOT 217 (URO)(Mum.)(Trib.)

S.37(1) : Business expenditure – Ad hoc disallowance – Self made vouchers – Disallowance is restricted to 50%. 833
Assessing Officer had made *ad hoc* disallowance on account of miscellaneous expenses on ground that corresponding vouchers were not supported with corroborative evidences from side of third party in many cases. It was found that part of vouchers were self made and they were not independently verifiable on occasion. In view of reasonability of claim, disallowance was to be restricted to 50 per cent. (AY.1999-2000)
Amitabh Bachchan Corpn. Ltd. v. Dy. CIT (2015) 68 SOT 217 (URO) (Mum.)(Trib.)

S.37(1) : Business expenditure – Administrative and selling expenses – Held to be allowable. 834
Assessee filed loss return and claimed deduction on account of administrative and selling expenses. It had produced all details along with books of account, bills and vouchers of expenses and no mistake was pointed out therein. Assessee's claim was to be allowed. (AY.1999-2000)
Amitabh Bachchan Corpn. Ltd. v. Dy. CIT (2015) 68 SOT 217 (URO)(Mum.)(Trib.)

S.37(1) : Business expenditure – Debenture issue expenses – Held to be allowable. 835
The assessee has issued fresh debentures after pre-payment of the debentures. The amount incurred by the assessee being pre-payment charges paid in respect of debentures issued are expenses incurred for the purpose of business. The company had issued debenture for meeting its financial requirements. Pending utilization of the proceeds these debenture funds were kept in short term deposit with Bank. Subsequently it was realized that the company is paying heavy interest on debenture for a period of 3 years. Therefore these debentures were cancelled and the money was paid back to Deutsche Bank. But in this process the company had to pay pre-payment charges. The AO had not satisfied with the Assessee and he disallowed the same. The CIT Appeals upheld the order of the AO the Hon'ble ITAT held that it is not the case of the revenue that the assessee has issued fresh debentures after prepayment of the debentures. The amount incurred by the assessee being prepayment charges paid in respect of debentures issued are expenses incurred for the purpose of business and the same is an allowable expenditure. (AY. 2003-04)
ACIT v. GKN Sinter Metal (P.) Ltd. (2015) 153 ITD 311 (Pune)(Trib.)

S.37(1) : Business expenditure – Capital or revenue – Loss on assigned debts – Capital expenditure. 836
Assessee entered into a share sale and purchase agreement with company 'M'. In the said agreement 51 per cent shareholding of 'M' was purchased by assessee. Further, assessee assigned debts of ₹ 1.35 crore to 'M' for ₹ 1 only. Assessee is an assignor had undertaken to collect debts on behalf of assignee 'M' and remitted same periodically. M paid tax on recovered amount. Assessee not shown any income on account of recovery

of part of debt. The Assessee's argument was amount should be allowed either as a bad debts or a business loss. The revenue had taken stand that assessee had adopted a colourable device to compensate 'M' for surrender of their 51 per cent shareholding and this was a capital expenditure.(AY. 2003-04)
ACIT v. GKN Sinter Metal (P.) Ltd. (2015) 153 ITD 311 (Pune)(Trib.)

837 **S.37(1) : Business expenditure – Dividends – No deduction on account of dividend tax delay charges, interest for delay in remitting TDS – Not allowable.**
Dividend tax delay charges, interest for delay in remitting TDS, and expenses incurred for delay in UTI dividend payment, partake of character of dividend tax itself and dividend tax not being deductible, no deduction on account of these expenses will be allowed to assessee. (AY. 2003-04, 2004-05)
ACIT v. SRA Systems Ltd. (2013) 22 ITR 205 / (2015) 153 ITD 338 (Chennai)(Trib.)

838 **S.37(1) : Business expenditure – Capital or revenue – Software development expenses is revenue in nature.**
Assessing Officer disallowed claim of assessee towards software development expenses. Tribunal held that day-by-day systems are developed in a new way and softwares are needed like a raw material for use in manufacturing and, therefore, such expenditure is purely of revenue nature and should be allowed. Therefore software development expenses be allowed as business expenditure. (AY. 2003-04, 2004-05)
ACIT v. SRA Systems Ltd. (2013) 22 ITR 205 / (2015) 153 ITD 338 (Chennai)(Trib.)

839 **S.37(1) : Business expenditure – Capital or revenue – Lease premises – Expenditure incurred for repairs and maintenance of building and theatres – No capital asset comes into existence – Revenue in nature.**
The assessee was engaged in the business of operating cinema theatres (multiplex) taken on lease. The assessee claimed deduction of expenditure on repairs and maintenance of buildings and theatres. The Assessing Officer treated the expenditure as capital in nature and allowed depreciation at 10 per cent. The Commissioner (Appeals) allowed the claim as revenue in nature. On appeal Tribunal held that; these expenses were only for the purpose of carrying on of the business and did not bring any capital asset into existence. Therefore, the deduction claimed by the assessee on account of repair and maintenance expenses to the building and theatres were revenue in nature.(AY. 2009-10)
ACIT v. SPI Cinemas P. Ltd. (2015) 155 ITD 1167 / 39 ITR 563 (Hyd.)(Trib.)

840 **S.37(1) : Business expenditure – Capital or revenue – Non-compete fee – Allowable as revenue expenditure.**
Amount of fee paid by assessee company to its Ex-Managing Director on his retirement to restrict him to share his experience and expertise for a period of 3 years, was an allowable revenue expenditure.(AY. 2007-08)
ACIT v. Clariant Chemicals (I) Ltd. (2015) 67 SOT 244 (URO)(Mum.)(Trib.)

S.37(1) : Business expenditure – Capital or revenue – Software development and consulting charges was allowable business expenditure. 841

Expenditure incurred for software development and consulting charges was allowable business expenditure.(AY. 2007-08)

ACIT v. Clariant Chemicals (I) Ltd. (2015) 67 SOT 244 (URO)(Mum.)(Trib.)

S.37(1) : Business expenditure – Capital or revenue – Purchase of application software is revenue. 842

It was held that where assessee claimed expenditure on purchase of application software for upgradation of existing computers which was required for improving efficiency of existing system for keeping in pace with improvement of technology, same would be revenue expenditure. (AY. 2009-10)

DCIT v. Madras Engineering Industries (P.) Ltd. (2014) 34 ITR 703 / (2015) 67 SOT 152 (URO)(Chennai)(Trib.)

S.37(1) : Business expenditure – Filling up of land – Allowable as deduction. 843

Assessee, company, purchased land and incurred certain expenditure for filling up land with soil. It incurred said expenditure for making land suitable for sale. Assessing Officer disallowed said expenditure on ground that vendors of land had already claimed similar expenditure. It was held by ITAT that assessee's claim could not be denied merely because vendor claimed such expenditure for filling up land especially when documentary evidences were available. (AY. 2007-08, 2008-09)

DCIT v. Damac Holdings (P.) Ltd. (2014) 33 ITR 331 / (2015) 67 SOT 148 (URO)(Cochin) (Trib.)

S.37(1) : Business expenditure – Deduction at source – Matter set aside to CIT(A). 844

Assessing Officer disallowed claim of ₹ 1.53 lakhs noticing that it pertained to TDS paid in respect of technical know-how fees payable to collaborators which had not been paid and hence could not be said to be business expenses of assessee. The Commissioner (Appeals) had not given cogent reasoning while upholding order of Assessing Officer and had merely stated that amount in question being TDS could not be said to be business expenditure of assessee company and, therefore, same could not be allowed. It was held that matter was to be restored to file of Commissioner (Appeals) for decision afresh. (AY. 2008-09, 2009-10)

Advik Hi Tech (P.) Ltd. v. ACIT (2015) 67 SOT 158 (URO)(Pune)(Trib.)

S.37(1) : Business expenditure – Vehicle expenses – *Ad hoc* disallowance of 10 per cent was held to be not justified. 845

Where assessee had furnished complete information regarding vehicle expenses and Assessing Officer did not find any discrepancy in same, impugned disallowance of 10 per cent of said expenses on account of personal use on *ad hoc* basis was not sustainable.(AY. 2009-10)

UEM India (P.) Ltd. v. ACIT (2015) 67 SOT 215 (URO)(Delhi)(Trib.)

846 **S.37(1) : Business expenditure – Capital or revenue – Renovation of hotel taken on lease – Revenue expenditure. [S.32, Explanation 1]**
The question that arises for consideration is, when the assessee has incurred expenditure on renovation of the hotel taken on lease, then whether the assessee is entitled for deduction of the expenditure incurred on such repairs as revenue expenditure or whether it has to be treated as capital expenditure in view of Explanation 1 to section 32. In the case on hand, the assessee incurred the expenditure for efficient running of the business and therefore the expenditure incurred is revenue in nature. In such a case the expenditure incurred by the assessee would be out of the ambit and purview of the provisions of Explanation 1 to section 32. Therefore, the Commissioner (Appeals) was not right in upholding the disallowance of the expenditure by holding it as capital in nature.(AY. 2005-06 to 2008-09)
Rupesh Anand v. ACIT (2015) 67 SOT 227 (URO)(Bang.)(Trib.)

847 **S.37(1) : Business expenditure – Lease rentals on vehicle hire – Lease in question was to be regarded as an operation lease and therefore the assessee would be entitled to claim the lease rentals as deduction as revenue expenditure.**
In the present case LPIN finances purchase of the vehicle. The vehicle is purchased as and when the assessee (client) makes a demand for hiring of vehicle. The ownership of the vehicle is registered in the name of the client only for the purpose of passing the risk of ownership in law on the client. The lease deed clearly spells out the above purpose and reiterates that LPIN is the owner of the vehicle and that the client is only a lessee. The bifurcation of the monthly payment as partly towards recovery of cost and partly towards interest is only for accounting purposes. It can decide the character of the transaction for early termination of the lease. On the occurrence of either termination or on expiry of period, the client is required to return the vehicle to the lessor along with the various documents as mentioned therein. Thus the *de facto* ownership and control of the vehicle is always with LPIN. The assessee (client) had a right to use the vehicle subject to payment of the hire instalments and complying with the other terms of the agreement. The assessee (client) has no other rights. On a consideration of the terms of the agreement between the parties, it is opined that the lease in question was to be regarded as an operation lease and therefore the assessee would be entitled to claim the lease rentals as deduction as revenue expenditure. (AY. 2009-10, 2010-11)
Resil Chemicals (P.) Ltd. v. Dy. CIT (2015) 67 SOT 189 (URO)(Bang.)(Trib.)

848 **S.37(1) : Business expenditure – Corporate cost allocation – Appellate Tribunal – Additional evidence before ITAT – Matter restored to Assessing Officer.[S.254(1)]**
Assessee company was engaged in business of identifying and evaluating raw material suppliers. Assessing Officer observed that assessee had debited certain amount under head corporate cost allocation. Assessing Officer noted that assessee had neither produced basis of allocation nor produced documentary evidence for receipt of actual services, hence proposed disallowance under section 37(1). It was held that where assessee filed additional evidence before Tribunal and same was

relevant for adjudication of allowability of corporate cost of allocation expenses, matter was to be restored to Assessing Officer to decide issue afresh. (AY. 2009-10)
Eaton Industries Manufacturing GmbH v. DCIT (IT) (2015) 67 SOT 213 (URO)(Pune)(Trib.)

S.37(1) : Business expenditure – Contributions towards provident fund – Entitled to deduction though fund not recognized.[S. 36(1)(iv)] 849
Contributions towards provident fund is entitled to deduction though fund not recognized. (AY. 2009-10, 2010-11)
Dy. CIT v. Greater Ludhiana Area Development Authority (2015) 39 ITR 100 / 170 TTJ 457 (Chd.)(Trib.)

S.37(1) : Business expenditure – Statutory body – Contribution towards public welfare fund – Construction of sewerage system through an independent agency – Commercial expediency – Allowable as deduction. 850
Contribution towards public welfare fund. Nexus with business activities of assessee. Allowable as deduction. Construction of sewerage system through an independent agency. Allowable as deduction. (AY. 2009-10, 2010-11)
Dy. CIT v. Greater Ludhiana Area Development Authority (2015) 39 ITR 100 / 170 TTJ 457 (Chd.)(Trib.)

S.37(1) : Business expenditure – Construction of railway under-bridge – Allowable as deduction. 851
Assessee, a statutory body constituted by State Government Construction of railway under bridge. Objects of assessee commercial in nature. Expenditure directly relating to business purpose is allowable as deduction. (AY. 2009-10, 2010-11)
Dy. CIT v. Greater Ludhiana Area Development Authority (2015) 39 ITR 100 (Chd.)(Trib.)

S.37(1) : Business expenditure – Gratuity – Matter remanded. 852
Payment to Life Insurance Corporation of India towards gratuity. Assessing Officer to consider afresh—Matter remanded.(AY. 2006-07, 2008-09)
Dy. CIT v. GAC Shipping (India) P. Ltd. (2015) 39 ITR 183 (Cochin)(Trib.)

S.37(1) : Business expenditure – Capital or revenue – Expenses for securing agency – Capital in nature – Compensation on termination of agency revenue in nature – Expenses cannot be set off against capital expenses. 853
Expenses incurred for securing agency business is capital in nature. Compensation on termination of agency business is revenue in nature. Expenditure cannot be set off against capital expenditure.(AY. 2006-07, 2008-09)
Dy. CIT v. GAC Shipping (India) P. Ltd. (2015) 39 ITR 183 (Cochin)(Trib.)

S.37(1) : Business expenditure – Capital or revenue – Royalty expenses – Revenue in nature. 854
Royalty payment is allowable as revenue expenditure. (AY. 2009-10)
ACIT v. Gamma Pizzakraft P. Ltd. (2015) 39 ITR 567 / 70 SOT 768 (Delhi)(Trib.)

855 **S.37(1) : Business expenditure – Capital or revenue – Prior period expenses – Lease premium and interest on delayed payment – Crystallising only during previous year pursuant to court order – Allowable as deduction.**
Assessee paying lease premium and interest on delayed payment for holding land. Court directing assessee to deposit balance premium with interest for surrendering lease hold land. Liability to pay interest crystallising only during previous year pursuant to court order. Not prior period expenses. Acquiring property closely related to carrying on of business and integral part of profit earning process expenditure revenue in nature. Deduction is allowable. (AY. 2005-06)
ING Vysya Bank Ltd. v. ACIT (2015) 39 ITR 250 (Bang.)(Trib.)

856 **S.37(1) : Business expenditure – Provision for salary arrears – Allowable as deduction.**
Estimate made by assessee reasonable. Excess provision written back. Liability not contingent. Deduction on account of provision for salary arrears is allowable. (AY. 2005-06)
ING Vysya Bank Ltd. v. ACIT (2015) 39 ITR 250 (Bang.)(Trib.)

857 **S.37(1) : Business expenditure – Capital or revenue – Discount on stock option scheme – Matter remanded.**
The assessee debited an amount towards employee compensation under the employee stock option scheme and debited these expenses to the profit and loss account in accordance with the SEBI guidelines. The Assessing Officer disallowed the claim for deduction while computing income on the ground that the expenses were contingent in nature and hence not allowable as revenue expenditure. The Commissioner (Appeals) confirmed this. On appeal:
Held, that discount on employee stock option scheme being a general expense, was an allowable deduction under section 37(1) of the Act during years of vesting on the basis of the percentage of vesting during the period, subject to upward or downward adjustment at the time of exercise of the option. Therefore, the Assessing Officer was to consider the quantification of the deduction to be allowed. Matter remanded.(AY. 2005-06)
ING Vysya Bank Ltd. v. ACIT (2015) 39 ITR 250 (Bang.)(Trib.)

858 **S.37(1) : Business expenditure – Capital or revenue – Depreciation – Application software – Allowable as revenue expenditure.**
Expenditure on purchase of application software. Assessing Officer allowing depreciation. Expenditure allowed as revenue expenditure in assessee's case in earlier assessment year. Expenditures allowable. (AY. 2005-06)
ING Vysya Bank Ltd. v. ACIT (2015) 39 ITR 250 (Bang.)(Trib.)

859 **S.37(1) : Business expenditure – Corporate entity – Even if no business is carried, the expenditure incurred to maintain the corporate entity has to be allowed as a deduction. [S. 57(iii)]**
Permission/denial by the RBI to register an assessee as NBFC does not decide the issue of carrying of business or make the business illegal. If the assessee had violated any

provisions of law under the RBI Act it would be penalised by the appropriate authority. But that does not mean that the systematic organized activity carried out by the assessee for earning profit would not be treated as business. The explanation to sec.37(1) of the Act is not at all applicable to the case under consideration. In the scrutiny assessment, completed in the earlier years, the AO had assessed the interest income as business income and had allowed all the expenditure related with the business activity. The rule of consistency demands that for deviating from the stand taken in the earlier AY, the AO should bring on record the distinguishing feature of that particular year. We find that the AO or the FAA has not mentioned even a single line as to how the facts of the case under appeal were different from the facts of the earlier or subsequent years. We find that the disallowance of the expenses was without any basis. In the case of *CIT v. Rampur Timber & Turnery Co. Ltd. (1981) 129 ITR 58 (All.)(HC)*, the Hon'ble Allahabad High Court has held that expenditure incurred for retaining the status of the company, namely miscellaneous expenses, salary, legal expenses, travel expenses, expenses would be expenditure wholly and exclusively for the purpose of making and earning income. There is no doubt that the assessee is a corporate entity. Even if it is not carrying on any business activity it has to incur some expenditure to keep up its corporate entity. Therefore expenditure incurred by it has to be allowed.
Premiums Investment and Finance Ltd. v. DCIT (Mum.)(Trib.) www.itatonline.org

S.37(1) : Business expenditure – Capital or revenue – Payments for mining lease – Revenue expenditure. 860
The Government of India had granted approval for mining lease over forest land in favour of the assessee. The Assessing Officer treated the payment made by the assessee for obtaining the mining rights as capital expenditure. The Commissioner (Appeals) held that the expenditure was revenue in nature. On appeal by the Department :
Held, dismissing the appeal, that the payment made by the assessee to carry on its mining business was revenue in nature. There was no infirmity in the order of the Commissioner (Appeals).(AY. 2007-08)
Dy. CIT v. Rungta Mines Ltd. (2015) 38 ITR 754 / 70 SOT 596 (Kol.)(Trib.)

S.37(1) : Business expenditure – Land levelling expenses – Commissioner (Appeals) restricted to 50 per cent. of disallowance – Held to be justified. 861
The assessee claimed deduction of expenses on levelling land. During the assessment proceedings, the Assessing Officer noticed that the assessee had debited Rs. 15,20,300 in the profit and loss account towards sand charges. He held that the assessee not furnished any evidence and disallowed 50 per cent of expenses. The Commissioner (Appeals), considering the evidence of the assessee, held that these expenses were incurred for levelling the access road to a property which was sold from which commission income was also returned by the assessee and that invoices were self-made. Therefore, he restricted disallowance to 50 per cent of ₹ 7,60,150 to ₹ 3,80,075. On appeal by the Department disallowance restricted to 50 percent was held to be justified. (AY. 2008-09)
ACIT v. Red Brick Realtors P. Ltd. (2015) 38 ITR 749 / 70 SOT 592 (Chennai)(Trib.)

862 **S.37(1) : Business expenditure – Capital or revenue – Wind mill – Expenditure on replacing damaged parts of existing wind mill or replacing entire old wind mill with new one – Allowable only if done without any substantial change in original performance and generation capacity – Matter remanded to verify factual aspect.**
The authorities treated the expenditure on replacing the existing wind mill with a new one as capital in nature. On appeal, the assessee contended that what was replaced was only the damaged parts of wind mill and not the whole wind mill :
Held, that it was not clear on the record whether the assessee had replaced only damaged parts of the existing wind mill or had replaced the entire old wind mill with the new one. If the assessee had replaced only damaged parts of the wind mill, without any substantial change in original performance and generation capacity, the expenditure was to be allowed as claimed by the assessee. If the assessee had replaced the old wind mill with a new one, the expenditure would be capital in nature. Matter remanded to decide afresh after verifying the factual aspect. (AY. 2010-11)
Pandian Chemicals Ltd. v. Dy. CIT (2015) 38 ITR 620 / 70 SOT 143 (Chennai)(Trib.)

863 **S.37(1) : Business expenditure – Contingent or accrued liability – Provision for warranty claims in respect of after sales service year after year – Historical trend indicating provision almost equal to actual expenditure incurred – Provision fair and estimate reasonable – Expenditure is to be held allowable.**
The assessee was engaged in manufacture and sale of sophisticated engineering goods. The assessee made provision for warranty claims in respect of after sales service year after year. The Assessing Officer disallowed 50 per cent of such provision in respect of after sales service. The Commissioner (Appeals) deleted the disallowance. On appeal Held, dismissing the appeal, that the historical trend indicated that the provision made for post sales expenses by the assessee was almost equal to the actual expenditure incurred. In most of the years, the provision made was less than the expenditure incurred and only in two years did the provision marginally exceed the actual expenditure incurred. Thus, the provision made by the assessee was fair and the estimate of post sales expenses to be incurred by the assessee in respect of goods supplied by it was reasonable. Therefore, the expenditure was allowable. (AY. 2005-06 to 2010-11)
Jt. CIT v. MIL India Ltd. (2015) 38 ITR 577 (Delhi)(Trib.)

864 **S.37(1) : Business expenditure – Expenditure incurred on employee and director remuneration – Failure by assessee to specify duties allotted to different employees and functional responsibility of directors 50 per cent. of personnel costs including director's remuneration to be allocated to work-in-progress.**
The assessee claimed the expenditure incurred on general office and administrative expenses including employee and director remuneration. The Assessing Officer capitalised 80 per cent of that expenditure towards work-in-progress. The Commissioner (Appeals) confirmed this. On appeal:
Held, that indirect costs could include only production or project overheads and not general office and administrative expenses. The assessee had not specified the duties allotted to different employees or the functional responsibility of the directors.

Managerial and supervisory costs were necessary inputs to project execution. Therefore, 50 per cent of the personnel costs including director's remuneration, as liable for inclusion in the project cost, was to be allocated on some systematic or rational basis which would capture project execution, which was a composite activity commencing with site identification to the construction in a deliverable state. (AY. 2009-10)
Vardhman Developers Ltd. v. ITO (2015) 38 ITR 512 / 68 SOT 107 (URO)(Mum.) (Trib.)

S.37(1) : Business expenditure – Capital or revenue – Expenditure incurred on repair and renovation of rented premises – Expenditure towards making premises functional in accordance with assessee's requirements – Capital in nature. 865
The assessee had taken office premises on rent for a period of five years. The assessee incurred expenditure towards repair and renovation of the premises. The Assessing Officer held that the nature and the volume of the expenditure would not qualify it to be a repair and the expenditure was to be capitalised. The Commissioner (Appeals) confirmed this. On appeal :
Held, that the assessee incurred expenditure towards making the premises functional rather transforming them from an inoperable state. Further the renovation was for the first time and in accordance with the assessee's requirements. Therefore, the expenditure was capital in nature.(AY. 2009-10)
Vardhman Developers Ltd. v. ITO (2015) 38 ITR 512 / 68 SOT 107 (URO)(Mum.) (Trib.)

S.37(1) : Business expenditure – Capital or revenue – Expenditure incurred on advertisement, sponsorship and brand-building – Expenditure in nature of selling costs – Not capital expenditure – Expenditure is allowable.[S. 28(i)] 866
The assessee was a builder and developer engaged in executing projects, after bidding for and taking projects from various housing societies. The assessee claimed the expenditure incurred on architect and engineering, tender and survey, advertisement and sponsorship and brand-building, treating them as part of the construction work. The Assessing Officer disallowed the claim on the ground that the expenditure could not be related to income of the assessee. The Commissioner (Appeals) confirmed this. On appeal :
Held, that advertisement, sponsorship and brand-building expenses were in the nature of selling costs which could not be capitalised. As the assessee was carrying on a particular business during the year, income therefrom was to be computed under section 28 of the Act, 1961, allowing it all permissible deductions in accordance with the provisions of sections 30 to 43D of the Act. Therefore, the expenditure was allowable. (AY. 2009-10)
Vardhman Developers Ltd. v. ITO (2015) 38 ITR 512 / 68 SOT 107 (URO)(Mum.) (Trib.)

S.37(1) : Business expenditure – Capital or revenue – Expenditure incurred on purchase of software – Application software for developing software for clients – No enduring benefit – Revenue expenditure. 867
The Assessing Officer disallowed software expenses considering them as capital in nature. The Commissioner (Appeals) held that the expenditure was revenue in nature.

On appeal : Held, dismissing the appeal, that the software acquired was application software used by the assessee for its business of developing software for its clients and did not result in enduring benefit. Therefore, the expenditure was revenue in nature and was allowable under section 37 of the Income-tax Act, 1961. (AY. 2005-06, 2006-07)
Dy. CIT v. ITC Infotech India Ltd. (2015) 38 ITR 401 / 67 SOT 289 (Kol.)(Trib.)

868 **S.37(1) : Business expenditure – Capital or revenue – Payment towards right to use trademark – Assessee not entitled to become exclusive owner of trademark – Payment is revenue in nature – Licence fee paid towards purchase of computer software – Revenue in nature.[S.32]**
In terms of an agreement, the assessee was allowed to use the brand name of its parent company and was required to pay the trademark fee. The Assessing Officer treated the fee as capital in nature in view of the amended provisions of section 32(1)(ii) of Act, and also disallowed the licence fee paid towards purchase of computer software for its users. The Commissioner (Appeals) deleted the disallowance made by the Assessing Officer. On appeal the Department contended that "the right to use the trademark" and proportionate rights to use the software acquired by the assessee were an intangible asset as defined under section 32 of the Act :
Held, dismissing the appeal, (i) that on payment of the trademark fee, at no point of time, would the assessee be entitled to become the exclusive owner of the technical know-how and the trademark. Hence the expenditure incurred by the assessee as trademark fee was revenue expenditure relatable to section 37(1) of the Act.
(ii) That the licence fee paid towards purchase of computer software was revenue in nature. (AY. 2008-09)
Dy. CIT v. Graziano Transmission India P. Ltd. (2015) 38 ITR 426 (Delhi)(Trib.)

869 **S.37(1) : Business expenditure – Rent – Matter remanded.**
That the addresses registered by the assessee for warehouse purposes with the provident fund and employees State insurance departments showed that the assessee was operating its business activities from the premises for which rent was paid to F. However, the documents submitted by the assessee required proper examination and verification by the Assessing Officer to evaluate whether the assessee incurred expenditure on rent wholly and exclusively for the purpose of its business. Matter remanded. (AY. 2009-10)
Dilli Karigari Ltd. v. Dy. CIT (2015) 38 ITR 379 (Delhi)(Trib.)

870 **S.37(1) : Business expenditure – Professional services – Services availed of for smooth running of business – Expenditure is allowable.**
Eminent board was providing full flash legal, technical and professional services to the assessee for smooth running of its business. Therefore, the expenditure incurred by the assessee on legal and professional services was incurred wholly and exclusively for the business purposes of the assessee and it was fully allowable. (AY. 2009-10)
Dilli Karigari Ltd. v. Dy. CIT (2015) 38 ITR 379 (Delhi)(Trib.)

S.37(1) : Business expenditure – Interest – Receiving loan from its debtor – Assessee would receive money even after adjusting loan amount – Allowing expenditure would cause indirect benefit and diversion of income – Expenditure not allowable. 871

The Assessing Officer held that the assessee neither carried out manufacturing activity nor trading activity and disallowed part of the expenditure on rent, professional charges and interest paid to group companies. The Commissioner (Appeals) partly disallowed the interest and partly allowed the rent and professional charges. On appeal by the assessee and the Department :

Held, (i) that the assessee received loan and at the same time lender was the debtor of the assessee. Even after adjusting the loan amount against sundry debtors, the assessee was still to receive an amount from debtor. Therefore, interest on such loan could not be allowed and expenditure claimed by the assessee on interest was not allowable. If interest so paid was allowed, then it would be an indirect benefit given by the assessee to debtor and amount to diversion of income of the assessee which was not permissible. (AY. 2009-10)

Dilli Karigari Ltd. v. Dy. CIT (2015) 38 ITR 379 (Delhi)(Trib.)

S.37(1) : Business expenditure – Prior period expenses to be allowed as deduction. 872

For the assessment years 2002-03 and 2004-05, the assessee raised bills on certain parties towards advertisement charges at prime time rates and credit notes were given for excess amount bills by debiting prior period expenses. The Assessing Officer disallowed the sum on the ground that the expenditure did not pertain to the year under account and the Commissioner (Appeals) upheld the order of disallowance. On appeal: Held, that the prior period expenses were to be allowed as deduction. (AY. 2005-06, 2006-07)

Ushodaya Enterprises Ltd. v. Dy. CIT (2015) 155 ITD 701 / 38 ITR 148 (Hyd.)(Trib.)

S.37(1) : Business expenditure – Employees' contribution towards Employees' State Insurance – Contribution made before due date for filing return of income – Disallowance cannot be made.[S.139(1)] 873

The assessee deposited the employees' contribution towards Employees' State insurance for the month of June, 2008, belatedly. The Assessing Officer disallowed the payment and the order was confirmed in the First Appeal. On appeal : Held, allowing the appeal, that admittedly, the contribution relating to the month of June, 2008 was deposited before the due date of filing the return under section 139(1) of the Act. No disallowance could be made. (AY. 2009-10)

Universal Precision Screws v. ACIT (2015) 38 ITR 233 / 169 TTJ 84 (Delhi)(Trib.)

S.37(1) : Business expenditure – Festival expenses – Assessing Officer cannot step into shoes of businessman to decide whether a particular expenditure necessary or not – Disallowance not sustainable. 874

The assessee claimed deduction of ₹ 86,400, on account of festival expenses. The Assessing Officer disallowed the amount on the ground that the expenditure was unnecessary and no proper bills were produced. The Commissioner (Appeals) upheld the order of the Assessing Officer. On appeal :

Held, allowing the appeal, that the Assessing Officer could not step into the shoes of the businessman to decide whether or not a particular expenditure was necessary. The complete details in respect of Diwali expenses were available in the records. There was no reason to make or sustain any disallowance. Tribunal also held that there was no infirmity in the orders of the authorities in disallowing 10 per cent of the expenses as being on entertainment, conveyance and telephone expenses towards personal use.(AY. 2009-10)

Universal Precision Screws v. ACIT (2015) 38 ITR 233 / 169 TTJ 84 (Delhi)(Trib.)

875 **S.37(1) : Business expenditure – Capital or revenue – Expenditure incurred towards product development including design charges – Revenue expenditure.**

The assessee incurred expenditure in respect of product development included design charges. The Assessing Officer, without assigning any proper reason, held it was to be capital expenditure. The Commissioner (Appeals) held that out of disallowance of ₹ 21,20,897 as made by the Assessing Officer, a sum of ₹ 13,58,256 had been debited by the assessee as expenditure on March 31, 2008. Moreover, there was increase in the expenses under this head from last year. Thus, the amount having been debited on the last day, reflected abnormality of the expenditure claimed by the assessee. Accordingly, the Commissioner (Appeals) held that 75 per cent of ₹ 13,58,256 was to be disallowed.

On appeal :

Held, that the expenditure incurred on product development and design charges was revenue expenditure and was to be allowed. The Commissioner (Appeals) had only gone by the premise that a substantial amount had been debited on the last day, and therefore, these expenses could be overstated on the ground that they did not relate to this year. Such a finding of the Commissioner (Appeals) could not be upheld without there being a concrete finding that these expenses pertained to the subsequent year or had not been incurred during the year. Thus, the order of the Commissioner (Appeals) was not correct and was to be deleted. (AY. 2008-09)

Parle Agro P. Ltd. v. ACIT (2015) 38 ITR 203 (Mum.)(Trib.)

876 **S.37(1) : Business expenditure – Creating parking facilities – 50% disallowance was held to be justified – Business promotion – Disallowance was held to be proper – Research and development expenses – Allowable as business loss. [S.28(i)]**

The assessee was engaged in the manufacture of textile machinery. Expenditure incurred on creating parking facilities and repair of link road. CIT(A) restricting disallowance to 50 per cent based on personal inspection Tribunal held restriction was proper. Expenses incurred on business promotion. The Commissioner (Appeals) restricted the business promotion expenditure to 50 per cent. Tribunal held that failure by assessee to place document in support of expenditure Tribunal held that restriction of disallowance by Commissioner (Appeals) merely on estimation was held to be not proper. The assessee entered into an agreement to undertake research and development activities under mill conditions and made payment for using its premises for installing machines and making observation under actual working conditions. Assessee making payment for installing machines and observation under actual working conditions .Machinery stopped on several days for number of hours causing loss of production. The assessee paid compensation for production loss

on account of frequent intervention during production period, and expenditure on research and development. The Assessing Officer disallowed the expenditure but the Commissioner (Appeals) allowed the expenditure on research and development in full. Tribunal held that compensation for loss was held to be allowable.(AY. 2007-08, 2008-09)
ACIT v. Lakshmi Machine Works Ltd. (2015) 38 ITR 61 / 69 SOT 157 / 167 TTJ 40 (UO) (Chennai)(Trib.)

S.37(1) : Business expenditure – Capital or revenue – Market research expenses for deciding market strategy for promoting its products – Expenses for sustaining market and to push up sales – Revenue expenditure. 877
The assessee claimed deduction of market research expenses. The Assessing Officer held that the assessee could not explain the nature of expenditure and therefore, it was to be treated as capital expenditure and disallowed. The Commissioner (Appeals) confirmed this. On appeal : Held, that the expenditure regularly incurred for sustaining the market and to push up the sales was not in the capital field but was essential and incurred in the ordinary course of business for promoting existing brands. The expenditure was to be allowed. (AY. 2008-09)
Parle Agro P. Ltd. v. ACIT (2015) 38 ITR 203 (Mum.)(Trib.)

S.37(1) : Business expenditure – Foreign travel expenditure – No doubt in details of expenses – Disallowance cannot be made on flimsy ground. 878
The assessee claimed deduction of foreign travel expenses. The Assessing Officer held that the assessee had only provided sketchy details that the business of the assessee had benefited because of the foreign travel and in the absence of proper facts the expenditure was to be disallowed. The Commissioner (Appeals) confirmed this. On appeal: Held, that the assessee's explanation with the details of foreign travel could not be doubted. The business and commercial expediency had to be seen from the point of view of a businessman and if proper explanation with supporting evidence had been given, disallowance could not be made on some flimsy ground. The Commissioner (Appeals) confirmed the expenses mainly on the ground that travel expenses were more than rupees one lakh. Any expenditure less than rupees one lakh had been deleted by him holding it to be so for business purpose and other for non-business purpose, without pointing out any personal uses. Thus, the finding of the Commissioner (Appeals) based on such a dichotomy was not sustainable. (AY. 2008-09)
Parle Agro P. Ltd. v. A CIT (2015) 38 ITR 203 (Mum.)(Trib.)

S.37(1) : Business Expenditure – Capital or revenue – Artwork charges – Artwork mainly for advertisement and for use for short duration – No enduring advantage – Not capital expenditure. 879
The assessee was engaged in the business of manufacturing of fruit juice based drink, non-alcoholic beverage base, packaged drinking water, pet preforms, etc., manufacturing of confectionery, snack products and trading in chemicals. It claimed expenditure of ₹ 34,22,131 on artwork charges under section 37 of the Income-tax Act, 1961. The Assessing Officer held that the assessee was incurring similar expenses in the earlier years as well and disallowed the expenses as capital expenditure. The

Commissioner (Appeals) held that some of the artwork prepared in electronic form could be reused, but it was also possible that certain artwork could be used for many years and agreed that some of it could not be reused and therefore, directed the Assessing Officer to examine each artwork and decide whether or not the art was reusable for more than a year. On appeal by the assessee : Held, that the artwork were mainly for advertisement and was usable for short duration, which could be less than a year. Even if in some cases, these ideas were used for slightly more than a year, it could not be held that some enduring benefit had accrued to the assessee in the capital field. The expenses claimed under the head artwork were to be allowed as business expenditure. (AY. 2008-09)
Parle Agro P. Ltd. v. ACIT (2015) 38 ITR 203 (Mum.)(Trib.)

880 **S.37(1) : Business expenditure – Capital or revenue – Extension of existing business – Failure by authorities to find nature of project undertaken – Suspension of capitalisation of borrowing requiring examination of facts – Matter remanded to Assessing Officer**
The assessee, a printer and publisher of newspapers and magazines, extended its existing business at Greater Noida. The Assessing Officer disallowed the claim of expenses incurred in connection with extension of the existing business as capital expenditure. Commissioner (Appeals) confirmed the order of the Assessing Officer. On appeal : Held, that the authorities had failed to find out the nature of the project undertaken by the assessee at Greater Noida. The issue of suspension of capitalisation of borrowing costs also needed examination of facts by the Assessing Officer. Matter remanded. (AY. 2003-04)
Hindustan Times Ltd. v. Dy. CIT (2015) 38 ITR 165 (Delhi)(HC)

881 **S.37(1) : Business expenditure – Travelling and conveyance expenses – Failure by assessee to produce bills and vouchers supporting expenses incurred – Disallowance was restricted at 20 per cent.**
The assessee claimed expenditure of ₹ 50.81 lakhs on account of foreign travelling expenses. The Assessing Officer disallowed ₹ 19,46,144 out of the total expenses claimed by the assessee on the ground that the copy of the passport and a letter for purchase of foreign currency had not proved that the expenditure related to business purpose of the assessee. The Commissioner (Appeals) restricted the disallowance to fifty per cent on the ground that the assessee did not produce bills and vouchers in respect of foreign travel expenses and mere submission of purchase of foreign currency could not lead to allowance of the entire expenditure. On appeal : Held, that the assessee had not produced any relevant bills and vouchers to support the expenses incurred by it. The Tribunal further restricted the disallowance to 20 per cent of ₹ 19,46,144.(AY. 2004-05)
Himson International P. Ltd. v. Dy. CIT (2015) 38 ITR 218 (Ahd)(Trib.)

882 **S.37(1) : Business expenditure – Capital or revenue – Technical consultancy charges to foreign company – Enduring benefit – Capital in nature – Depreciation was held to be allowable.[S.32]**
Consultancy charges paid to foreign company was held to be capital in nature as the assessee had failed to produce any material to show that the benefit of the expenditure

would not be derived by the assessee in future. No material was brought on record to show that no new technical know-how was acquired by the assessee by incurring the expenditure. Depreciation was allowed.(AY. 2004-05)
Himson International P. Ltd. v. Dy. CIT (2015) 38 ITR 218 (Ahd.)(Trib.)

S.37(1) : Business Expenditure – Capital or revenue – Expenditure towards permission from Government for using factory premises for other purposes – Factory premises already in use of assessee – Expenditure towards payment including interest cannot be capitalised – Expenditure revenue in nature. 883
The assessee was engaged in the business of manufacture of precision instruments. During the previous year the assessee paid an amount towards permission from the Government for using the land for other purpose including commercial or service activities, besides running a factory. The amount of instalment included interest. The Assessing Officer held that the instalment inclusive of interest was capital in nature and could not be allowed as revenue expenditure. The Commissioner (Appeals) allowed the claim as revenue expenditure. On appeal:
Held, dismissing the appeal, that since the factory premises were already in the use of the assessee, the payment made with interest towards conversion charges of land could not be capitalised and was allowable as revenue expenditure. (AY. 2008-09)
Dy. DIT v. Micron Instruments P. Ltd. (2015) 38 ITR 242 (Delhi)(Trib.)

S.37(1) : Business expenditure – Business activity carried on, though no revenue generated during previous year – Expenditure is allowable as deduction. 884
The assessee was engaged in the business of development and sale of software. The AO disallowed the business expenditure which the assessee had debited without earning business income. The assessee had earned interest which was assessable under the head "Income from other sources". The Assessing Officer held that there was no business activity at all carried on by the assessee and the assessee itself had offered interest under the head "Income from other sources" and therefore, no expenses could be allowed. The Commissioner (Appeals) confirmed this. On appeal: Held, allowing the appeal, that the Assessing Officer erred in rejecting the business loss of the assessee admitted in the return of income. The Assessing Officer should have appreciated that there was business activity, though there was no revenue during the previous year. Hence, the expenditure was relatable to the business activity and was allowable as a deduction. (AY. 2004-05, 2005-06)
S. P. P. S. Systems P. Ltd. v. Dy. CIT (2015) 38 ITR 49 (Hyd.)(Trib.)

S.37(1) : Business expenditure – Expenses incurred on renovation and cost of improvement of building are allowable as revenue expenditure. 885
Assessee-firm incurred expenditure on renovation and cost improvement of leased building only for day-to-day business and claimed deduction as revenue expenditure. A.O and CIT(A) disallowed it being as capital expenditure. Tribunal allowed it as expenditure as no capital asset was brought into existence.(AY. 2008-09 to 2010-11)
Nandini Delux v. ACIT (2015) 54 taxmann.com 162 / 37 ITR 52 / 167 TTJ 746 / 68 SOT 5 (URO)(Bang.)(Trib.)

886 **S.37(1) : Business expenditure – Payment of front end fees for raising loan – Such payment is allowable as revenue expenditure even it is written off in the assessee's books.**
Front end fee paid by assessee to HUDCO as a precondition for sanction of loan raised by it is allowable as revenue expenditure in its entirety in the year of payment even though the assessee has written off the amount in its books over a period of years. (AY. 2008-09)
DCIT v. Jaipur Vidyut Vitran Nigam Ltd. (2015) 167 TTJ 24 (UO) (Pune)(Trib.)

887 **S.37(1) : Business expenditure – Commission – Disallowance was confirmed.**
Where expenditure on account of commission was found to be much higher as compared to earlier years and assessee could not justify its claim with relevant material, disallowance of commission was held to be justified.(AY. 2009-10)
Krishna R. Bhat v. ACIT (2015) 152 ITD 441 (Mum.)(Trib.)

888 **S.37(1) : Business expenditure – Disallowance to 10 per cent of expenditure was held to be reasonable.**
Expenditure incurred by assessee towards conveyance, office expenses and sales promotion in cash was disallowed as being not fully verifiable and restricted disallowance to 10 per cent of expenditure claimed. (AY. 2009-10).
Krishna R. Bhat v. ACIT (2015) 152 ITD 441 (Mum.)(Trib.)

889 **S.37(1) : Business expenditure – Method of accounting – Liability arises during relevant previous year, same has to be allowed as a deduction.[S.145]**
For determining the admissibility of an expenditure under the mercantile method of accounting, as followed by the assessee, is the point of time when liability to pay sum accrued or arises. As long as such a liability arises during the relevant previous year, the same is to be allowed as a deduction. A portion of such insurance policy payment may pertain to the subsequent period, but then the total payment made during the relevant year does not exceed for one previous year in as much as corresponding adjustment for the year paid expenses in the immediately preceding year has not been made either. The technical approach adopted by the AO is thus does not appeal to in order to determine admissibility of an expenditure under mercantile method of accounting, relevant is point of time when liability to pay sum accrues or arises and, therefore, liability arises during relevant previous year, same has to be allowed as a deduction.(AY. 2008-09)
Sai Builders v. ITO (2015) 152 ITD 462 (Agra)(Trib.)

890 **S.37(1) : Business expenditure – Travelling and conveyance expenses – Discrepancies in remuneration received from two firms – Matter remanded.**
Commissioner receiving no remand report from AO. No evidence for additions. Matter remanded for fresh adjudication. (AY. 2003-04 to 2006-07)
Dy. CIT v. Yuvanshankar Raja (2015) 37 ITR 355 (Chennai)(Trib.)

S.37(1) : Business expenditure – Expenditure incurred in maintenance of vehicles used by employees, held to be allowable. 891

The assessee claimed expenditure towards running and maintenance expenses of its vehicles used by the employees. The Assessing Officer, following the direction of the Dispute Resolution Panel, held that 50 per cent of running and maintenance expenses of the vehicles was to be disallowed for non-business purpose. On appeal :

Held, that there was to be no disallowance on account of running and maintenance of the vehicles used by the employees of the company. The addition was to be deleted. (AY. 2006-07)

Microsoft Corporation India P. Ltd. v. Add. CIT (2015) 37 ITR 290 / 67 SOT 340 / 168 TTJ 314 (Delhi)(Trib.)

S.37(1) : Business expenditure – *Ad hoc* disallowance – Low net profit – Held to be not justified. 892

Entire expenses incurred duly vouched and supported by necessary documents. Gross profit earned from trading division reasonable. AO cannot make *ad hoc* disallowance without pointing out single instance of inflation of expenditure.(AY. 2006-07)

Dy. CIT v. Eicher Motors Ltd. (2015) 37 ITR 427 / 67 SOT 306 (URO) / 53 taxmann.com 317 (Delhi)(Trib.)

S.37(1) : Business expenditure – Capital or revenue – Repair and maintenance – Software licence – Allowable as revenue expenditure.[S.30] 893

Expenditure incurred on repairs and maintenance was held to be revenue expenditure. Capital or revenue expenditure. Expenditure incurred on software licences. Assessee not in business of manufacturing software or rendering services through use of software. Payment for application software not resulting in creation of new profit-earning apparatus or source of income allowable as revenue expenditure. (AY. 2006-07)

Dy. CIT v. Eicher Motors Ltd. (2015) 37 ITR 427 / 67 SOT 306 (URO) / 53 taxmann.com 317 (Delhi)(Trib.)

S.37(1) : Business expenditure – Prior period expenses – Expenses relating to earlier years – Assessee producing details of expenses debited in profit and loss account and receipt of bills in respective assessment years – Disallowance to be deleted. 894

Held, dismissing the appeal, that the assessee had produced complete details before the Commissioner (Appeals) in respect to expenses debited in the profit and loss account, on receipt of bills in the respective assessment years. Therefore, there was no infirmity in the order of the Commissioner (Appeals). (AY. 2006-07 to 2010-11)

Dy. CIT v. Selvel Advertising P. Ltd. (2015) 37 ITR 611 (Kolkata)(Trib.)

S.37(1) : Business expenditure – Restricting office expenses to forty per cent was held to be proper. 895

The assessee, a licensed document writer and engaged in sale of stamps, claimed 60 per cent of total receipts as expenditure. The Assessing Officer restricted the office expenses to 40 per cent. The CIT(A) confirmed the order of the AO. On appeal :

Held, dismissing the appeal, that admittedly, the assessee had employed some personnel to carry out his professional duties, but claiming 60 per cent of the gross receipts as

expenditure without furnishing any details was not correct. The assessee was expected to maintain records for writing the documents and sale of stamp papers. The total receipts from document writing and sale of stamp papers could be ascertained only if the assessee was maintaining proper records. There was no infirmity in the order of the authorities.

Assessee engaging in drafting documents and sale of stamps. Duty of assessee to maintain proper books of account. Total receipts cannot be ascertained without proper records. Order restricting office expenses to forty per cent proper.(AY. 2003-04 to 2009-10)

K. Govinda Pillai v. Dy. CIT (2015) 37 ITR 772 (Cochin)(Trib.)

896 **S.37(1) : Business expenditure – Share of expenses of common effluent plant – By virtue of notice of demand issued by Government – Held to be allowable.[S.145]**

Share of expenses on common effluent treatment plant. Amount payable by virtue of notice of demand issued by Government is held to be allowable as deduction. (AY. 2009-10)

T and T Motors Ltd. v. Addl. CIT (2015) 37 ITR 682 (Delhi)(Trib.)

897 **S.37(1) : Business expenditure – Expenditure on purpose which is illegal or offence Fees paid to advocate for seeking bail for assessee's driver on account of road accident – Not allowable.**

Held, that the advocate's fees for seeking bail in respect of the offence committed by the assessee's driver were not allowable in terms of the Explanation to section 37(1) of the Act which prohibits deduction of expenditure incurred for a purpose which was an offence or which was prohibited by law. (AY. 2009-10)

T and T Motors Ltd. v. Addl. CIT (2015) 37 ITR 682 (Delhi)(Trib.)

898 **S.37(1) : Business expenditure – Expenditure incurred for certification of net worth of directors for obtaining loan – Allowable.**

The expense related to certification charges of the net worth of directors was deductible in accordance with law as the certificates were used for obtaining loans by the assessee from banks. (AY. 2009-10)

T and T Motors Ltd. v. Addl. CIT (2015) 37 ITR 682 (Delhi)(Trib.)

899 **S.37(1) : Business expenditure – Finance charges on borrowings from banks – Loss on purchase and sale of units cannot be allowed as deduction – Disallowance was justified.**

Assessee claimed to have paid finance charges on borrowings from bank and its broker. However, in books of account, difference between sale unit and purchase unit was claimed as finance charges. AO disallowed the claim. On appeal the Tribunal held that transaction clearly showed that there was loss on purchase and sale of units and same could not be considered as equivalent to finance charges, hence finance charges claimed was to be disallowed.(AY. 1987-88 to 1990-91)

Dhanraj Mills (P.) Ltd. v. ACIT (2015) 152 ITD 253 (Mum.)(Trib.)

S.37(1) : Business expenditure – Membership entrance fee to club – Allowable expenditure. 900

Expenditure incurred on account of payment of membership entrance fee to club was an allowable expenditure.(AY. 2006-07)

Clariant Chemicals (I) Ltd. v. Addl. CIT (2015) 152 ITD 191 (Mum.)(Trib.)

S.37(1) : Business expenditure – Capital or revenue – Right to use a particular software – Revenue expenditure. 901

Expenditure incurred by assessee towards acquisition of right to use a particular software that helped to work do effectively was to be treated as revenue expenditure. (AY. 2006-07)

Clariant Chemicals (I) Ltd. v. Addl. CIT (2015) 152 ITD 191 (Mum.)(Trib.)

S.37(1) : Business expenditure – Interest paid on intercorporate deposit – Allowable as business expenditure. 902

The assessee-company, engaged in the business of real estate and construction. Assessee had taken loan and in order to reduce interest cost, said loan amount was utilised for inter corporate deposit and currency swap arrangement. Tribunal held that where interest expenditure was incurred for earning income from inter-corporate deposit and currency swap arrangement in regular course of business, said interest expenditure was an allowable expenditure.(AY. 2008-09)

Dy. CIT v. Prestige Garden Constructions (P.)Ltd. (2014) 52 taxmann.com 263 / (2015) 67 SOT 139 (Bang.)(Trib.)

S.37(1) : Business expenditure – Consent fee to SEBI – Not penalty – Allowable as deduction. 903

Assessee, a stock broker, claimed deduction on account of payment of consent fee to SEBI – Said payment was not related to penalty imposed by SEBI, rather it was a "Consent Fee" paid by assessee for settlement of dispute, legal expenses and other administrative charges of SEBI. Tribunal held that the said amount was paid clearly specifying that it was paid without admitting or denying guilt just to settle dispute on commercial expediency and said fee could not be equated with penalty for infraction of law under Explanation to section 37(1) but it was an allowable business expenditure. (AY. 2008-09)

ITO v. Reliance Share & Stock Brokers (P.) Ltd. (2014) 51 taxmann.com 215 / (2015) 67 SOT 73 (Mum.)(Trib.)

S.37(1) : Business expenditure – Trademark and patent registration – Expenditure is allowable as revenue expenditure. 904

The assessee-company was a manufacturer and trader of pharmaceutical goods, diagnostic kits, medical instruments etc. It claimed deduction of trademark registration fees and patent registration fees. The revenue authorities rejected assessee's claim holding that by incurring said expenditure the assessee had created an intangible asset and, thus, expenditure in question was in the nature of capital expenditure. Tribunal held that where assessee, engaged in manufacturing of pharmaceutical product, paid certain amount as trademark and patent registration fee, in view of fact that said

expenditure was incurred for protection of its running business without generating any new asset, same was to be allowed as deduction. (AY. 2006-07)
Cadila Healthcare Ltd. v. Addl. CIT (2012) 21 taxmann.com 483 / (2015) 67 SOT 110 (URO)(Ahd.)(Trib.)

905 **S.37(2A) : Business expenditure – Expenditure on maintenance of accommodation of employees was held to be deductible – Expenditure on inauguration of new centre was held to be deductible. [S.37(3)]**
The Assessing Officer made an addition of ₹ 37,667 on account of maintenance of guest house on the ground that such expenses were not allowable under section 37(3). The Commissioner (Appeals) deleted the addition holding that the expenditure had been incurred for accommodation of employees. The Tribunal upheld the deletion. Court held that the Commissioner (Appeals) and the Tribunal concurrently concluded that the expenditure was incurred for maintenance of the place for the employees who visited the factory for official purposes for the purpose of business. Hence, it was deductible.
The Assessing Officer disallowed expenses of ₹ 3,735 under section 37(2A) of the Act on account of inauguration of a new centre. The Commissioner (Appeals) deleted the addition and the Tribunal confirmed the deletion. The Court held that, the expenditure on inauguration of a new centre was deductible. (AY.1994-95 to 1999-2000)
CIT v. Nuchem Ltd. (2015) 371 ITR 164 (P & H)(HC)

906 **S.37(3) : Business expenditure – Rule 6D by taking each trip of an individual employee and not with reference to total trips made by an individual employee in previous year. [R.6D]**
Allowance of expenditure incurred for travelling of employees has to be limited under rule 6D by taking each trip of an individual employee and not with reference to total trips made by an individual employee in previous year. (AY. 1998-99, 1975-76)
CIT v. Coromandal Fertilisers Ltd. (2015) 228 Taxman 318 (Mag.)(AP)(HC)

907 **S.37(4) : Business expenditure – Guest house – Deletion of section 37(4) with effect from 1-4-1988 – Deletion of disallowance on account of guest house expenses was held to be justified.**
The assessee, claimed deduction of guest house expenses. The Assessing Officer disallowed the guest house expenses in view of the bar in sub-section (4) of section 37 of the Income-tax Act, 1961. The Commissioner (Appeals) deleted the disallowance on the ground that sub-section (4) of section 37 had been deleted with effect from April 1, 1988. The Tribunal affirmed this. On appeal, held, that in view of the clear and self-evident position of law during the subject assessment year, viz., absence of section 37(4), no fault could be found with the order. Thus, no substantial question of law arose. (AY.1999-2000)
DIT(IT) v. Citibank N.A. (2015) 377 ITR 69 (Bom.)(HC)

908 **S.37(4) : Business expenditure – Guest house – Depreciation was not allowable.[S.32]**
Court held that while computing the disallowance under section 37(4) depreciation on guest house was not allowable. *Britannia Industries Ltd. v. CIT [2005] 278 ITR 546 (SC)* followed. (AY. 1986-87, 1987-88)
CIT v. Dharamsi Morarji Chemicals Co. Ltd. (2015) 373 ITR 545 (Bom.)(HC)

S.37(4) : Business expenditure – Guest house – Depreciation – Rent and repairs – Expenditure on guest house disallowable. 909

Held that the Tribunal was not correct in deleting the addition being the guest house expenses. Followed, *Britannia Industries Ltd. v. CIT [2005] 278 ITR 546 (SC)*.(AY. 1989-90, 1990-91)

CIT v. Kelvinator of India Ltd. (2015) 371 ITR 51 / 275 CTR 1 / 114 DTR 297 (Delhi)(HC)

S.37(4) : Business expenditure – Guest house – Rents – Repairs – Disallowance was held to be justified. [S. 30, 32, 37(1)(5)] 910

Expression "premises and buildings" in sections 30 and 32 and expression "residential accommodation including any accommodation in nature of guest house" in sub-sections (3), (4) and (5) of section 37, could not be similarly interpreted, therefore, expenses towards rents, repairs and maintenance of accommodation used for purpose of a guest house of nature indicated in sub-section (4) of section 37 was to be excluded from deduction.

ACIT v. VXL India Ltd. (2015) 229 Taxman 199 (Guj.)(HC)

Section 40 : Amounts not deductible.

S.40(a)(i) : Amounts not deductible – Deduction at source – No clause in agreement that lessor to provide facilities or services in connection with leased aircraft – Payment not chargeable to tax prior to 1-4-1996 – No obligation on assessee to deduct tax at source.[S. 10(15A), 195, 201] 911

Court held that on the facts the Revenue was unable to point out any clause in the agreement that required the lessor to provide facilities or services in connection with the leased aircraft. Therefore, the supplemental rent did not fall within the ambit of the exclusionary provisions of section 10(15A). Since prior to April 1, 1996, such payments continued to be exempted under section 10(15A), they were not chargeable to tax. Consequently, there was no obligation on the assessee to deduct the tax at source under section 195. The question of holding the assessee an assessee in default under section 201(1) did not arise. (AY. 1995-96 to 1999-2000)

CIT v. Jet Lite (India) Ltd. (2015) 379 ITR 185 / (2016) 236 Taxman 453 / 282 CTR 113 (Delhi)(HC)

S.40(a)(i) : Amounts not deductible – Deduction at source – Payment for computerised reservation system without tax deduction at source after obtaining no objection from Income-tax Officer – Allowable. 912

Court held that on the issue of disallowance of ₹ 1,77,82,789 for non-deduction of tax at source from payment to non-residents for computerised reservation system, no objection was raised in the assessment year 1995-96 with respect to the certificates issued by the Income-tax Officer. The Tribunal also confirmed that the certificate issued by the Income-tax Officer was valid. The Revenue had not been able to persuade the Court to hold that the decision was perverse. The assessee had made the payment after obtaining the certificates. (AY. 1995-96 to 1999-2000)

CIT v. Jet Lite (India) Ltd. (2015) 379 ITR 185 / (2016) 236 Taxman 453 / 282 CTR 113 (Delhi)(HC)

913 **S.40(a)(i) : Amounts not deductible – Deduction at source – Non-resident – Commission – Not liable to deduct tax at source. [S.195]**
Commission earned by a non-resident agent who carried on business of selling Indian goods outside India cannot be said have deemed to be income which has accrued and/or arisen in India. Circular No. 23 of 1969 & Circular No.786 of 2000 were withdrawn on 22.10.2009. The withdrawal of a Circular cannot have retrospective operation. (AY.2007-08, 2008-09)
CIT v. Gujarat Reclaim & Rubber Products (2016) 383 ITR 236 / 136 DTR 138 (Bom.)(HC)

914 **S.40(a)(i) : Amounts not deductible – Deduction at source – Non-resident – Remuneration paid to liaisoning agent for soliciting the work cannot be included within the meaning of consultancy services and would not come in purview of technical services hence not liable to deduct tax at source – DTAA-India – UAE. [S. 9(1)(i), 9(1)(vii), 194J, Articles 14, 22]**
Dismissing the appeal of revenue the Court held that 'consultancy services' would mean something akin to advisory services provided by non-resident, pursuant to deliberation between parties and ordinarily, it would not involve instances where non-resident is acting as a link between resident and another party, facilitating transaction between them, or where non-resident is directly soliciting business for resident and generating income out of such solicitation. Where agent of assessee-company at UAE acted as a liaisoning agent for assessee, and received remuneration from each client successfully solicited for assessee, such services could not be said to be included within meaning of 'consultancy services' and consequently, remittances made by assessee to it would not come within scope of phrase 'fees for technical services' as employed in section 9(1)(vii). The assessee was not liable to deduct tax at source. (AY. 2004-05)
CIT v. Grup Ism (P.) Ltd. (2015) 378 ITR 205 / 232 Taxman 846 / 278 CTR 194 (Delhi)(HC)

915 **S.40(a)(i) : Amounts not deductible – Deduction at source – Non-resident – Business connection – Sales commission – Not liable to deduct tax at source. [S.9(1)(i), 195, OECD Model Convention, Art. 7]**
Where assessee, engaged in business of strategic and consultancy services, paid sales commission to non-resident agents for rendering services abroad, since said agents did not have PE in India, no taxable income accrued to them in India and, consequently, assessee was not required to deduct tax at source while making payments in question. (AY. 2009-10)
CIT v. Fluidtherm Technology (P.) Ltd. (2015) 231 Taxman 259 (Mad.)(HC)

916 **S.40(a)(i) : Amounts not deductible – Deduction at source – Non-resident – Royalty – Cost of software products imported – Liable to deduct tax at source. [S.9(1)(i), 195]**
Remittances towards cost of software products imported from foreign suppliers was held as royalty hence liable to deduct tax at source.(AY. 2003-04)
CIT v. Rational Software Corpn. India (P.) Ltd. (2015) 230 Taxman 68 (Karn.)(HC)

S.40(a)(i) : Amounts not deductible – Deduction at source – Non-resident – Income deemed to accrue or arise in India – Commission – Procuring export orders outside India – Fees for technical services – Not liable to deduct tax at source. [S. 9(1)(vii), 195, OECD Model Convention, Art. 12] 917

The assessee was engaged in manufacturing and exporting of leather garments. It entered into agreement with foreign agents to procure export orders outside India on commission basis. Assessing Officer disallowed the payment of commission on the ground that non-resident agents services were technical in nature and would fall under purview of section 9(1)(vii). CIT(A) held that assessee had neither received any services such as managerial or technical from the foreign agents except procurement of orders on commission basis which was received abroad constituting income in the hands of the agents accruing outside India and thus, no disallowance under section 40(a)(i) was called for. On appeal Tribunal confirmed the order of CIT(A). On appeal by revenue dismissing the appeal of revenue, the Court held that no limb of activity had taken place in India, services rendered by agents would not fall within definition of "fees for technical services". Order of Tribunal was affirmed. (AY. 2010-11)

CIT v. Orient Express (2015) 230 Taxman 602 (Mad.)(HC)

S.40(a)(i) : Amounts not deductible – Deduction at source – Live telecast of races – Broadcast right – Copyright. [S.9(1)(vi), 194J, Copyright Act, 1957, 2(y), 13, 14] 918

The assessee had made payment to other clubs/centres on account of live telecast of races. The assessee was engaged in the business of conducting horse races and derived income from betting, commission, entry fee etc. and had made payment to other centres whose races were displayed in Delhi.

The AO made a disallowance under section 40(a)(ia) on account of 'royalty paid to other centres' and on account of 'live telecast royalty' being royalties covered by section 194J as TDS was not deducted on said expenses.

The CIT(A) upheld the finding of the AO in respect of expenses incurred after 13-7-2006 i.e., the date when royalty was included in the scope of section 194J.

On appeal, the Tribunal allowed the appeals of the assessee and held that the payment made for live telecast of horse races is not covered under section 9(1)(vi) and as such not being royalty, TDS was not required to be deducted.

On appeal to High Court held that payment for live telecast of horse race was neither payment for transfer of any 'copyright' nor any 'scientific work' to fall under ambit of royalty under Explanation 2 to section 9(1)(vi), hence no section 194J TDS was attracted. There is a clear distinction between a copyright and broadcast right, broadcast or live coverage does not have a 'copyright'. In view of the above, the appeals filed by the revenue are dismissed. (AY. 2007-08 & 2009-10)

CIT v. Delhi Race Club (1940) Ltd. (2015) 273 CTR 503 / 228 Taxman 185 (Delhi)(HC)

S.40(a)(i) : Amounts not deductible – Deduction at source – Purchase of film copyright was neither covered under section 194J nor under section 194C – Not liable to deduct tax at source.[S.9(1)(v), 194C, 194J] 919

The assessee was in the business of Media and dealings in Movie/Film Satellite Rights by taking them on assignment basis and reassigning to channels and derived income from salary, business and other sources.

The AO was of the view that the transaction claimed was in reality a transfer/lease of right for a definite period of use by convening the film rolls to DVCAM for satellite usage without permanently transferring the satellite right to the assessee. Thus, the payments debited as purchase warranted TDS under section 194J and worked out disallowance under section 40(a)(i) for non-deduction of TDS under section 194J.
The Tribunal held that the payments made would fall within the definition of 'royalty' and in that situation, the assessee was duty bound under section 194J to deduct tax at source on the payments effected, and such deductions having not been made, rigours of section 40(a)(i) stood attracted.
On appeal the Court held that, transfer of satellite right to assessee under an agreement for a period of 99 years, in terms of section 26 of Copyright Act and definition under clause (5) of Explanation 2 to section 9(1)(vi) is a sale and, therefore, excluded from definition of royalty under section 9(1). Therefore, the Tribunal erred in concluding that payment made by the assessee was royalty and not sale. (AY. 2009-10)
S.P. Alaguvel v. Dy. CIT (2015) 228 Taxman 202 (Mag.)(Mad.)(HC)

920 **S.40(a)(i) : Amounts not deductible – Deduction at source – Non-resident – Amended provision was held to be applicable prior to 1-4-2005**
Tribunal granted benefit to assessee in terms of substituted provisions of section 40(a)(i). Department resisted said order on ground that said substituted provision had no application prior to 1-4-2005 and prayed for interference of Court. There being no substantial difference in language employed in unamended and amended sections, no substantial question of law arose for consideration. (AY. 1996-97, 2003-04 to 2005-06)
CIT v. Allergan India (P.) Ltd. (2015) 371 ITR 38 / 228 Taxman 362 (Mag.)(Karn.)(HC)

921 **S.40(a)(i) : Amounts not deductible – Deduction at source – Technical services – For services to qualify as technical services, service provider must itself develop technical plan or design and then transfer same to recipient of services – DTAA – India-Finland [S. 9(1)(vii), 195, 201(1), Article 5, 7, 12]**
The assessee-company was in the process of setting up a manufacturing facility at Chennai. For this purpose, the contract for design, manufacturing and completion for the manufacturing facilities was given to a company (Leighton). The Assessing Officer held that the services rendered by OLOF were in the nature of technical services and further held that the assessee-company was deemed to be assessee in default under section 201(1) for non-deduction of tax at source under section 195. The Commissioner (Appeals) held that OLOF had provided mainly design review services and that the Assessing Officer had not established that this technical knowledge, experience, skill, know-how or processes had been transmitted to the assessee and the assessee was equipped to use it in future without resorting to the non-resident service provider. Therefore, it held that services provided by OLOF to the assessee could not be characterized as technical services and, hence, payments made by the assessee did not bear the character of FTS. Further, it was held that non-resident OLOF did not have any PE in India and, therefore, these payments were not taxable as business receipts under Article 7. On appeal Tribunal held that, services were performed by Finnish enterprise primarily from outside India and its employees made intermittent visits to India only for

purpose of attending meetings with assessee, it could not be said that Finnish enterprise had a PE in India; thus, payments received by Finnish enterprise from assessee for providing services were not liable to taxation in India. (AY. 2006-07)
ITO v. Nokia India (P) Ltd. (2015) 42 ITD 708 / 172 TTJ 246 / (2016) 156 ITD 307 (Delhi) (Trib.)

S.40(a)(i) : Amounts not deductible – Deduction at source – Commission on sales – Not liable to deduct tax at source. [S.9(1), 195] 922
Dismissing the appeal of revenue the Tribunal held that where commission on sales was paid by assessee to foreign nationals for procuring orders on behalf of assessee from customers outside country, said payment was not taxable in hands of non-resident and no TDS was required to be deducted under section 195 from said payment. (AY. 2001-02)
ACIT v. S. K. International (2015) 68 SOT 262 (URO)(Luck.)(Trib.)

S.40(a)(i) : Amounts not deductible – Deduction at source – Commission – Service rendered outside India – Not liable to deduct tax at source. [S. 195] 923
Dismissing the appeal of revenue the Tribunal held that where assessee made payment of commission to foreign agents for services rendered outside India in marketing of its products, since those agents did not have PE in India, amount in question was not taxable in India and, thus, there was no need to deduct tax at source while making such payment. (A.Y.2010-11)
ACIT v. Shiva Texyarn Ltd. (2015) 68 SOT 42 (Chennai)(Trib.)

S.40(a)(i) : Amounts not deductible – Commission payment – Service was rendered outside India – Not liable to deduct tax at source.[S. 9(I)(i), 195] 924
Dismissing the appeal of revenue the Tribunal held that services had been rendered by payer wholly outside India hence the assessee is not required to deduct tax at source. Disallowance was held to be not justified. (AY.2009-10)
ACIT v. Vilas N. Tamhankar (2015) 68 SOT 124 (URO)(Mum.)(Trib.)

S.40(a)(i) : Amount not deductible – Payroll and related services to employees sent on secondment basis could not be regarded as Fees for technical services – Not liable to deduct tax at source – Amount paid as management fees – DTAA-India-USA. [S.9(1)(vii), Art. 12] 925
The Tribunal held that the payment cannot be considered as 'fees for included services' so as to be charged to tax in the hands of foreign AE. Once the amount is not chargeable to tax in India as per Article 12 of the DTAA there can be no question of impossibility any liability on the payer-assessee to make deduction of tax at source. Tribunal held that section 9(1)(vii) is not applicable so disallowance made under section 40(a)(i) is deleted. (AY. 2009-10)
Hughes Systique India (P) Ltd. v. DCIT (2014) 151 ITD 208 / (2015) 169 TTJ 193 (Delhi) (Trib.)

926 **S.40(a)(i) : Amounts not deductible – Deduction at source – Non-resident – Export Sales Commission – No permanent establishment or business connection in India and services rendered by non-residents abroad – Assessee to prove – Matter remanded. [S.195]**

During assessment proceedings, AO noted that assessee had made payment of sales commission to non-resident agents. Since assessee did not deduct tax at source while making said payments, AO disallowed same by invoking provisions of section 40(a)(ia). CIT(A) deleted the addition made by AO. On appeal by revenue, ITAT held that Section 40(a)(i) makes it clear that the disallowance shall be made in case of any payment made which is chargeable under this Act and is payable outside India or in India to a non-resident not being a company or to a foreign company on which tax is deductible at source. Even section 195(1) prescribes the same. Assessee has not produced the agreement entered into by the assessee with foreign agents to show that they were appointed to act as commission agents outside India in their respective countries. Assessee had not established that the non-resident had rendered services abroad and there was no business connection in India by producing relevant records, viz., either agreement entered into by the assessee with them or correspondence took between the parties. Without examining these details, one is not in a position to decide the nature of services rendered by the non-resident agent. Therefore, ITAT found it appropriate to remit the entire issue back to the file of the AO with direction to the assessee to prove that it was sales commission towards procurement of orders from abroad. (AY. 2011-12)

ACIT v. Euro Leder Fashions Ltd. (2015) 44 ITR 571 / (2016) 156 ITD 208 (Chennai)(Trib.)

927 **S.40(a)(i) : Amounts not deductible – Deduction at source – Non-resident – Commission – Service was rendered outside India – Not liable to deduct tax at source. [S.9(1)(i), 195]**

The commission charges were paid to the foreign agents for procuring business orders. The commission charges were deducted by the foreign buyers from the sale value and paid to the agents directly. The foreign buyers sent payments by LC only for 97% amount. The services were rendered by the agents outside India and the payments were made outside India. The said foreign agents have no business connection or PE in India and the services are rendered by the agents outside India. Therefore, the commission income earned by the foreign agents is not chargeable to tax in India. Therefore, the assessee was not liable to deduct tax at source on the said payments. Since, the income of foreign agents is outside the purview of section 9, consequently section 195 will not come into play and the issue was decided in favour of the assessee.(AY. 2008-09 to 2010-11)

Sri Rajalakshmi Enterprises v. ITO (2015) 67 SOT 240 (URO)(Chennai)(Trib.)

928 **S.40(a)(i) : Amounts not deductible – Deduction at source – Payments liable to deduction of tax at source – Failure to remit deducted tax before expiry of time limit – Expenditure is liable to be disallowed.[R. 30]**

Failure by assessee to remit deducted tax before expiry of time limit. Expenditure is liable to be disallowed. (AY. 2006-07, 2008-09)

Dy. CIT v. GAC Shipping (India) P. Ltd. (2015) 39 ITR 183 (Cochin)(Trib.)

S.40(a)(i) : Amounts not deductible – Deduction at source – Non-resident – Income deemed to accrue or arise in India (Independent personal services) – Payment to foreign agent, on account of legal consultancy fee for initiating anti-counterfeiting proceeding, since agent was not having any fixed base in India, it could not be taxed in India in respect of fees paid by assessee – Not liable to deduct tax at source – DTAA-India-Morocco. [S.9(1)(i), 195, Article 5, 14] 929

Assessee Company was engaged in business of licensing, protection and defense of trademark. Assessee paid a certain sum to Saba, a trademark and patent agent of Morocco, on account of legal consultancy fees for initiating and prosecuting an anti-counterfeiting proceedings before Tribunal of Commerce at Rabat (Morocco). Though services rendered by lawyers are included in independent personal services as per Article 14 of DTAA, but since Saba was not having any fixed base in India, condition of Article 14 was not fulfilled and Saba could not be taxed in India in respect of said fees and disallowance under section 40(a)(i) was not justified. (AY.2008-09)

Kirloskar Proprietary Ltd. v. Dy. CIT (2015) 153 ITD 11 / 171 TTJ 129 (Pune)(Trib.)

S.40(a)(i) : Amounts not deductible – Deduction at source – Non-resident – Sales commission payment to non-resident agents for services outside India is not tax deductible at source.[S.9(1)(i), 195, Model OECD Convention, Art. 7] 930

Sales commission paid by assessee to non-resident agents for services rendered by them outside India in procuring export orders for assessee, is not chargeable to tax in India. Consequently, assessee is not under any obligation to deduct tax at source, therefore, provisions of section 40(a)(i) have no application. (AY.2010-11)

ACIT v. T. Abdul Wahid & Co.(2015) 153 ITD 128 (Chennai)(Trib.)

S.40(a)(i) : Amounts not deductible – Deduction at source – Purchases – Not liable to deduct tax at source – DTAA-India-Japan. [S.195, Art, 9, 24] 931

As there is no requirement in the Act to deduct TDS on purchases made from Indian residents, imposing such a condition while making payments to non-residents violates the non-discrimination provision in Article 24 of the DTAA-India-Japan. (ITA No. 945/Del/2015, dt. 26.05.2015) (AY. 2010-11)

Mitsubhishi Corporation India Pvt. Ltd. v. DCIT (Delhi)(Trib.); www.itatonline.org

S.40(a)(i) : Amounts not deductible – Deduction at source – Internet charges paid to foreign company – Payments not taxable in India in terms of Double Taxation Avoidance Agreement – Failure by Assessing Officer to establish that data storage charges falling under fees for technical services – Disallowance not attracted.[S.9(1)(vi)] 932

The Assessing Officer disallowed the data storage space charges made to a non-resident company by the assessee, under section 40(a)(i) of the Act, on the ground that the payment made towards internet charges fell under the category of fees for technical services and the assessee had failed to deduct tax at source therefrom. The Commissioner (Appeals) allowed the claim of the assessee holding that the payments were not taxable in India in terms of the Double Taxation Avoidance Agreement between India and the U. S. A. On appeal by the Department :

Held, dismissing the appeal, that the Assessing Officer had not given any finding how data storage charges paid by the assessee would fall either under royalty or fees for technical

services so as to require deduction of tax at source. The Commissioner (Appeals) was right in deleting the disallowance under section 40(a)(i) of the Act.(AY. 2003-04 to 2006-07)
ACIT v. Vishwak Solutions P. Ltd. (2015) 38 ITR 522 / 68 SOT 118 (URO) (Chennai)(Trib.)

933 **S.40(a)(i) : Amounts not deductible – Deduction at source – Failure to deduct tax at source – Deduction to be allowed in accounting year in which tax has been paid. [S.40(a)(ia)]**
Held, that the assessee had not deducted tax at source on the payment in question. Therefore, the expenditure could be disallowed under section 40(a)(ia) of the Act. In view of the provisos to section 40(a)(i) and (ia) the deduction claimed by the assessee had to be allowed in the year in which the tax was actually paid by the assessee. The Department having raised no objection to allowing the claim of the assessee in the year in which the tax was actually paid by the assessee, the AO was to verify the actual payment of tax by the assessee on the expenditure claimed and thereafter allow the claim in the year in which the tax was actually paid. (AY. 2006-07)
Termo Penpol Ltd. v. ACIT (2015) 37 ITR 87 (Cochin)(Trib.)

934 **S.40(a)(ia) : Amounts not deductible – Deduction at source – Reimbursement of service charges – Not taxable – Tax not deductible at source from such amount.**
Reimbursement of expenses cannot be regarded as a revenue receipt. It is not taxable. Hence, tax need not be deducted at source from such payment.(AY. 2007-08, 2008-09)
CIT v. DLF Commercial Project Corporation (2015) 379 ITR 538 / 123 DTR 1 (Delhi)(HC)

935 **S.40(a)(ia) : Amounts not deductible – Deduction at source – Transaction charges – Bona fide belief – Disallowance was held to be not justified.**
Dismissing the appeal of revenue in view of decision of *CIT v. Kotak Securities Ltd. [2012] 340 ITR 333*, where assessee was under *bona fide* belief that tax was not deductible at source on payment of transaction charges being in nature of fees for technical services, disallowance made by Assessing Officer under section 40(a)(ia) could not be sustained.
CIT v. HSBC Securities & Capital Markets (India) (P.) Ltd. (2015) / 379 ITR 146 / 234 Taxman 341 (Bom.)(HC)

936 **S.40(a)(ia) : Amounts not deductible – Deduction at source – Interest – Second proviso to section 40(a)(ia) introduced with effect from 1-4-2013 is only prospective – Disallowance was held to be justified – Recipient has subsequently has paid the tax will not absolve payee from consequence of disallowance.[S. 44AB(a), 44AB(b), 194A]**
The assessees paid interest on amounts drawn by them from partnership firms of which they were partners, without deducting tax at source under section 194A and, therefore, such interest was disallowed in terms of section 40(a)(ia).Disallowance was confirmed by the Commissioner (Appeals) and the Tribunal. On appeal to the High Court, the assessees contended that an individual is excluded from the liability to deduct tax and, therefore, disallowance was without jurisdiction; that second proviso to section 40(a)(ia) introduced by the Finance Act, 2012, being retrospective in operation, disallowance could not have been ordered invoking section 40(a)(ia), that recipient of the amount paid

by the assessees had already paid tax and, therefore, interest could not be disallowed; and that the assessees had already paid the amount and, therefore, provisions of section 40(a)(ia) were not applicable. Dismissing the appeal the Court held that Second proviso to section 40(a)(ia) introduced with effect from 1-4-2013 is only prospective. Court also held that provision is automatically attracted on failure of an assessee to deduct tax on interest paid by him and fact that recipient has subsequently paid tax, will not absolve assessee from consequence of disallowance. Language of section 40(a)(ia) does not warrant an interpretation that it is attracted only if interest remains payable on last day of financial year. Benefit of exclusion from purview of section 194A is restricted only to those individuals and Hindu Undivided Families, whose total sales, gross receipts or turnover fro business or profession do not exceed monetary limit specified under section 44AB(a) or 44AB(b). Order of Tribunal was upheld. (AY. 2005-06 to 2007-08)
Thomas George Muthoot v. CIT (2015) 235 Taxman 246 (Ker.)(HC)

S.40(a)(ia) : Amounts not deductible – Deduction of Source – Failure to deduct tax at source – Payment to mastercard international and visa card international – Not disallowable – DTAA-India-USA. [Art. 26(3)] 937

On appeal, dismissing the appeal of revenue the Court held that, the payment to Master card International and Visacard International without deduction of tax at source was not disallowable under section 40(a)(i) in view of article 26(3) of the Double Taxation Avoidance Agreement between India and the USA. Whenever the order of the Tribunal merely followed its earlier orders and the Revenue had accepted the earlier order and had not filed an appeal therefrom, the order should normally also apply in subsequent orders unless the Revenue brings on record the reasons which necessitated or justified filing of an appeal from the order of the Tribunal when no appeal was filed from the earlier order. However, there was nothing on record to indicate the reasons for filing an appeal from order of the Tribunal when no appeal was filed from the earlier order of the Tribunal. (AY.1999-2000)
DIT(IT) v. Citibank N.A. (2015) 377 ITR 69 (Bom.)(HC)

S.40(a)(ia) : Amounts not deductible – Deduction at source – Sub-contractor – Aggregate payments of more than ₹ 50,000 to other logistics company for transportation of iron ore – No requirement that sub-contract should be in writing – Liable to deduct tax at source.[S.194C] 938

On appeal by revenue, reversing the Tribunal's decision, the Court held that S.194C of the Act enjoins a duty on the person to deduct tax at source on the payments for carrying out any work, *inter alia*, including transportation of goods or carriage of goods by any mode of transport other than railways and only if such payments, in aggregate, made to a person exceeded ₹ 50,000 in a single assessment year. The HC further held that the Tribunal gravely erred in inferring that there ought to be a sub-contract in writing to invoke provisions of 194C of the Act. Tribunal further erred in holding factual issue in favour of assessee only on the basis of oral assertions and without there being any material before it to do so. (AY. 2005-06)
CIT v. Maruti Subray Patil (2015) 280 CTR 532 / 235 Taxman 147 / 126 DTR 209 / (2016) 383 ITR 504 (Karn.)(HC)

939 **S.40(a)(ia) : Amounts not deductible – Deduction at source – Payee filing income-tax return and offering sum received for taxation – Disallowance was not justified – Second proviso is declaratory and curative and has retrospective effect from April 1, 2005. [S. 194J, 201(1)]**

Dismissing the appeal of revenue the Court held that The payees had filed returns and offered the sums received to tax. No disallowance could be made under section 40(a)(ia). Second proviso is declaratory and curative and has retrospective effect from April 1, 2005. (AY. 2008-09, 2009-10)

CIT v. Ansal Land Mark Township P. Ltd. (2015) 377 ITR 635 / 279 CTR 384 / 234 Taxman 825 / 124 DTR 18 (Delhi)(HC)

Editorial: Rajeev Kumar Agarwal v. Add.CIT (2014) 149 ITD 363 / 34 ITR 479 / 109 DTR 33 (Agra)(Trib.) is impliedly approved.

940 **S.40(a)(ia) : Amounts not deductible – Deduction at source – Sub-contractor – Non-filing of Form No. 15I, 15J is only a technical defect and provisions of section 40(a)(ia) are not attracted in such a case. [S.194C, Form 15I, 15J]**

During relevant year, assessee made payments of freight charges to sub-contractors without deducting tax at source. The Assessing Officer finding that assessee did not file Form 15J within prescribed time, disallowed said payments by invoking provisions of section 40(a)(ia).

The Commissioner (Appeals) as well as the Tribunal taking a view that non-filing of Form No. 15J was merely a technical defect, deleted said disallowance. On revenue's appeal; dismissing the appeal the Court held that, non-filing of Form Nos. 15I, 15J is only a technical defect and provisions of section 40(a)(ia) are not attracted in such a case. (AY. 2009-10)

CIT v. Sri Marikamba Transport Co. (2015) 379 ITR 129 / 231 Taxman 484 / 124 DTR 181 / 281 CTR 235 (Karn.)(HC)

941 **S.40(a)(ia) : Amounts not deductible – Deduction at source – Civil contracts – Material supplied by contractee cannot be taken into account – Assessee, a sub-contractor, not responsible for purchase of raw materials – Assessee not responsible to deduct tax at source – Tribunal ignoring factual as well as legal position – Matter remanded.**

The assessee was a sub-contractor for road construction. For the assessment year 2006-07, he filed a return showing a total income of ₹ 3,13,995 stating that he was working as sub-contractor for G. The Assessing Officer passed an *ex parte* order and assessed the income of the assessee at ₹ 29,88,132 applying the profit at 8% and disallowed payments of rent and labour, rent of machinery under section 40(a)(ia), observing that no tax at source had been deducted. The Commissioner (Appeals) gave substantial relief to the assessee. The Tribunal restored the disallowance of ₹ 3,23,00,625 made by the Assessing Officer. On appeal:

Held, allowing the appeal, the material supplied by the contractee cannot be taken into account. The profit rate should be estimated with reference to the net payment only after excluding the cost of material supplied to the assessee in terms of the contract. The Tribunal had ignored the factual aspect that under the agreement the assessee was not responsible to purchase the raw materials like sand, gitti, etc. and it was purchased by the main contractor. Therefore, prima facie the assessee was not responsible to deduct

tax at source. Therefore, the order of the Tribunal was set aside and the matter was restored to the Tribunal to decide afresh.(AY. 2006-07)
Ravi Dubey v. CIT (2015) 375 ITR 469 (All.)(HC)

S.40(a)(ia) : Amounts not deductible – Deduction at source – Finding that payment made to a group company not in the nature of income but expenditure reimbursed and not a revenue receipt – Disallowance not warranted. 942
Held, the issue relating to disallowance under section 40(a)(ia) was never raised before the appellate authorities. The Commissioner (Appeals) observed that the payment made to the W group was not in the nature of income but was expenditure reimbursed which could not be regarded as a revenue receipt and, therefore, the Tribunal considering the provisions of section 194C had upheld the order of the Commissioner (Appeals). There was no question of law which arose from the order of the Tribunal.(AY. 2002-03 to 2006-07)
CIT v. Karma Energy Ltd. (2015) 375 ITR 264 / 232 Taxman 496 (Bom.)(HC)

S.40(a)(ia) : Amounts not deductible – Deduction at source – Amounts paid during assessment year itself and nothing payable at close of year – No disallowance could be made – Tribunal restoring matter to Assessing Officer to determine whether payments made by assessee during assessment year – No reason to interfere either in fact or in law. 943
Held that the Tribunal merely restored the matter to the Assessing Officer to determine whether the payments were made by the assessee during the year under consideration. There was no reason to interfere either in fact or in law. (AY. 2008-09)
CIT v. Rajinder Parshad Jain (2015) 374 ITR 545 (P&H)(HC)

S.40(a)(ia) : Amounts not deductible – Deduction at source – Deduction under a wrong provision of law will not save an assessee from disallowance – Deduction u/s. 194C instead of u/s. 194J renders the shortfall liable for disallowance u/s. 40(a)(ia).[S.194C, 194J, 201] 944
The assessee, a hospital, entered into an agreement with M/s. Lakeshore Hospital and Research Centre Limited by which, the latter had undertaken to perform various professional services in the assessee's hospital. On the payments made, the assessee deducted tax at the rate of 2% under Section 194C. However, assessment was completed on the basis that tax deductible was at 5% as prescribed under Section 194J and the entire tax in this regard was disallowed under Section 40(a)(ia)of Act. The CIT(A) confirmed the assessment and the Tribunal also rejected the appeal filed by the assessee concerning the Assessment Year 2005-06. However, in 2006-07, the Tribunal followed the Calcutta High Court judgment in *CIT v. S.K. Tekriwal [2014] 361 ITR 432 (Cal.)* and held that where tax is deducted by the assessee, even if it is under a wrong provision of law, as in this case, the provisions of Section 40(a)(ia) of the Act cannot be invoked. On appeal to the High Court HELD dissenting from *CIT v. S.K. Tekriwal [2014] 361 ITR 432 (Cal)*:
(i) As per these provisions of the agreement, M/s. Lakeshore Hospital and Research Centre had undertaken to render professional services to the assessee and this

was not a case where they were undertaking a contract work. If that be so, tax was deductible under Section 194J and not under Section 194C as done by the assessee.

(ii) Section 40(a)(ia) (supra) is not a charging Section but is a machinery Section and such a provision should be understood in such a manner that the provision is workable. The expression "tax deductible at source under Chapter XVII-B" occurring in the Section has to be understood as tax deductible at source under the appropriate provision of Chapter XVII-B. Therefore, as in this case, if tax is deductible under Section 194J but is deducted under Section 194C, such a deduction would not satisfy the requirements of Section 40(a)(ia). The latter part of this Section that such tax has not been deducted, again refers to the tax deducted under the appropriate provision of Chapter XVII-B. Thus, a cumulative reading of this provision, therefore, shows that deduction under a wrong provision of law will not save an assessee from Section 40(a)(ia).

(iii) In so far as the judgment of the Calcutta High Court in *CIT v. S.K. Tekriwal [2014] 361 ITR 432 (Cal.)*, which was relied on by the Tribunal is concerned, with great respect, for the aforesaid reasons, we are unable to agree with the views that if tax is deducted even under a wrong provision of law, Section 40(a)(ia) cannot be invoked. (AY. 2005-06, 2006-07)

CIT v. P.V.S. Memorial Hospital Ltd. (2015) 234 Taxman 46 / 280 CTR 511 / 126 DTR 188 (2016) 380 ITR 284 (Ker.)(HC)

945 **S.40(a)(ia) : Amounts not deductible – Deduction of source – Payable – Disallowance can be made even if the payment has already been made by the assessee to the payee/ contracting party – Deduction is mandatory irrespective of fact as to whether assessee is following cash or mercantile system of accounting. [S.194C]**

The assessee made certain payment to the contracting party without deducting tax at source u/s. 194C. The AO disallowed the payment made u/s. 40(a)(ia). The assessee argued that the disallowance u/s. 40(a)(ia) cannot be made if the payment had already been made by the assessee to the payee/contracting party. The CIT(A) and Tribunal rejected the contention of the assessee and upheld the order of the AO. On an appeal by the assessee, the High Court held that the term "payable" used in the section is descriptive of the payments which attract the liability to deduct tax at source. It does not categorise defaults on the basis of when the payments are made to the payees of such amounts which attract the liability to deduct tax at source and, hence, disallowance u/s. 40(a)(ia) can be made even if payment has already been made by the assessee to the payee/contracting party. (AY. 2005-06)

P. M. S. Diesels v. CIT (2015) 374 ITR 562 / 119 DTR 212 / 232 Taxman 544 / 277 CTR 491 (P&H)(HC)

Rana Polycot Ltd. v. CIT (2015) 374 ITR 562 / 119 DTR 212 / 232 Taxman 544 (P&H)(HC)

Torque Pharmaceuticals (P) Ltd. v. CIT (2015) 374 ITR 562 / 119 DTR 212 / 232 Taxman 544 (P&H)(HC)

Swift Laboratories Ltd. v. CIT (2015) 374 ITR 562 / 119 DTR 212 / 232 Taxman 544 (P &H)(HC)

S.40(a)(ia) : Amounts not deductible – Deduction at source – Royalty – Subscription charges paid to non-resident would amount to royalty liable to TDS. [S. 40(a)(i), 195] 946
Subscription charges paid to non-resident would amount to royalty liable to TDS, for non-deduction of tax same was to be disallowed.(AY. 2001-02)
CIT v. Infosys Technologies Ltd. (2015) 229 Taxman 335 (Karn.)(HC)

S.40(a)(ia) : Amounts not deductible – Deduction at source – Commission or brokerage – Credit card payment – Bank providing banking services in form of payment and subsequently collecting payment – Bank does not render any service in the nature of agency – Bank not concerned with buying or selling of goods – Principle of doubtful penalisation is applicable and has to be applied strictly – Not liable to deduct tax at source – Recipient has paid the tax on the receipt – No loss to revenue.[S. 194H]. 947
The assessee was engaged in the business of trading in readymade garments. HDFC provided card swiping machines to the assessee. The assessee paid commission to HDFC on payments received from customers who had made purchases through credit cards. The details of the bill amount, etc., were thereupon forwarded to HDFC, which then made payment to the assessee after withholding or deducting the fee payable to HDFC. Thereafter, HDFC recovered the bill amount from the issuing bank of the customer. The Assessing Officer held that the amount earned by HDFC was in the nature of commission and should have been subjected to deduction of tax at source at 10% under section 194H.
Held, HDFC was not acting as an agent of the assessee. Once the payment was made by HDFC, it was received and credited to the account of the assessee. In the process, a small fee was deducted by HDFC. On swiping the credit card on the swiping machine, the customer whose credit card was used, got access to the internet gateway of the acquiring bank resulting in the realisation of payment. Subsequently, HDFC realised and recovered the payment from the bank which had issued the credit card. HDFC had not undertaken any act on "behalf" of the assessee. The relationship between HDFC and the assessee was not of an agency but that of two independent parties on principal to principal basis. HDFC was also acting and equally protecting the interest of the customer whose credit card was used in the swiping machines. HDFC or its employees were not present at the spot and were not associated with buying or selling of goods as such. Upon swiping the card, HDFC made payment of the bill amount to the assessee. Thus, the assessee received the sale consideration. In turn, HDFC had to collect the amount from the bankers of the credit card holder. HDFC had taken the risk and also remained out of pocket for some time as there would be a time gap between the date of payment and recovery of the amount paid. Therefore, the amount retained by HDFC was a fee charged for having rendered the banking services and could not be treated as a commission or brokerage paid in course of use of any services by a person acting on behalf of another for buying or selling of goods. Therefore, section 194H would not be attracted.
Also, another reason why section 40(a)(ia) should not have been invoked in the present assessee was the principle of doubtful penalisation which required strict construction of penal provisions. The principle applies not only to criminal statutes but also to provisions which create a deterrence and result in punitive penalty. Section 40(a)(ia)

is a deterrent and a penal provision. It has the effect of penalising the assessee, who has failed to deduct tax at source and acts to the detriment of the assessee's property and other economic interests. It operates and inflicts hardship and deprivation, by disallowing expenditure actually incurred and treating it as disallowed. The Explanation, therefore, requires a strict construction and the principle against doubtful penalisation would come into play. The detriment in the present assessee would include initiation of proceedings for imposition of penalty for concealment, as was directed by the Assessing Officer. The principle requires that a person should not be subjected to any sort of detriment unless the obligation is clearly imposed. When the words are equally capable of more than one construction, the one not inflicting the penalty or deterrent may be preferred. The principles and interpretations can apply to the taxing statutes. HDFC would necessarily have acted as per law and it was not the case of the Revenue that HDFC had not paid taxes on its income. It was not a case of loss of revenue as such or a case where the recipient did not pay its taxes.) (AY 2009-10)
CIT v. JDS Apparels P. Ltd. (2015) 370 ITR 454 / 113 DTR 137 / 273 CTR 1 (Delhi)(HC)

948 **S.40(a)(ia) : Amounts not deductible – Deduction at source – Royalty Fee – Paid to Government of India – No requirement to deduct TDS as per S. 196 – No disallowance can be made. [S.196]**
Assessee paid royalty to Government of India. AO invoked disallowance u/s. 40(a)(ia) on contention that assessee failed to deduct tax as per section 196. CIT(A) deleted the addition. On appeal, ITAT held as per Section 196 of the Act, no deduction of tax shall be made by any person from any sums payable to Government. AO has overlooked the provisions of Section 196 of the Act and CIT(A) has rightly allowed the deduction to the assessee.(AY. 2007-08 to 2009-10)
DCIT v. Hitz FM Radio India Ltd. (2015) 44 ITR 318 (Delhi)(Trib.)

949 **S.40(a)(ia) : Amounts not deductible – Deduction at source – Deductee has paid the taxes – No disallowance can be made – Matter remanded.**
Provision would cover not only amounts which are payable as on 31st March of a particular year but also which are payable at any time during relevant year. However no disallowance can be made if it is established that deductee has paid tax on amount received. Matter remanded. (AY. 2009-10)
ACIT v. Raja Chkravarty (2015) 68 SOT 504 (URO)(Luck.)(Trib.)

950 **S.40(a)(ia) : Amounts not deductible – Deduction at source – Non-resident – Commission – Service rendered outside India – Liable to deduct tax at source.[S.195, Explanation 2]**
In view of retrospective amendment to S.195 to provide that S. 195 applies whether or not the non-resident person has a residence or place of business or business connection in India, commission to non-resident agents for services rendered outside India is liable for TDS u/s. 195 and has to suffer disallowance u/s. 40(a)(ia). (ITA No. 252/PNJ/2015, dated 20.08.2015) (AY. 2009-10)
Sesa Resources v. ACIT (Panji)(Trib.); www.itatonline.org
Editorial: Bombay High Court has set a side the order of Tribunal. (Sesa Resources Ltd. v. DCIT (Bom)(HC); www.itatonline.org, (ITA. No. 11 of 2016, dated 7-3-2016)

S.40(a)(ia) : Amounts not deductible – Deduction at source – No disallowance can be made, if nothing remained to be payable on last day of previous year. [S. 194C] 951
No disallowance can be made if payments on which tax was required to be deducted were paid during relevant previous year and nothing remained payable on last day of previous year.
Dy. CIT v Veera Associates (2015) 68 SOT 218 (URO) (Visakhapatnam)(Trib.)

S.40(a)(ia) : Amounts not deductible – Deduction at source – Method of accounting – Disallowance is justified even if assessment is made on estimation of income. [S. 145(3)] 952
Disallowance u/s. 40(a), being a *non obstante* provision, would be attracted even in case where assessment is made by invoking S. 145(3).(AY 2008-09)
Prabhat Construction Company v. CIT (2015) 155 ITD 813 / (2016) 176 TTJ 501 (Pat.) (Trib.)

S.40(a)(ia) : Amounts not deductible – Deduction at source – Purchase of software for utilisation of computers – No payment of royalty – No requirement to deduct tax at source – Depreciation is allowable. [S. 9(1)(vi)] 953
Dismissing the appeal of revenue the Tribunal held that, mere purchase of software, a copyrighted article, for utilisation of computers could not be considered as purchase of royalty. Expl. 2 to s. 9(1)(vi) could not be applied to purchase of a copyrighted software, which would not involve commercial exploitation. The assessee simply purchased software delivered along with computer hardware for utilisation in the day-to-day business. The assessee was not required to deduct TDS and depreciation was allowable. (AY. 2009-10)
Dy. CIT v. WS Atkins India P. Ltd. (2015) 41 ITR 397 / 70 SOT 628 (Bang.)(Trib.)

S.40(a)(ia) : Amounts not deductible – Deduction at source – Sale of world negative rights on perpetual and permanent basis – No Royalty – Assessee not required to deduct Tax Deducted at Source – Disallowance cannot be made. [S. 9(1)(vi), 194J] 954
Dismissing the appeal of revenue, the Tribunal held that the transactions on account of the agreement between the producers and the assessee appeared to be the sale of world negative rights on perpetual and permanent basis and the provisions of S.194J were not applicable and there was no liability to deduct tax at source.(AY. 2008-09, 2009-10)
Dy. CIT v. V. Rama Krishna (2015) 155 ITD 394 / 41 ITR 157 (Hyd.)(Trib.)

S.40(a)(ia) : Amounts not deductible – Internet lease line charges – Assessing Officer was directed to disallow only amount outstanding at close of assessment year – Matter remanded. [S. 194J] 955
The assessee, engaged in transcription business, incurred lease line expenditure towards the use of internet. The AO disallowed the internet lease line charges u/s. 40(a)(ia) on the ground that the assessee had failed to deduct tax at source u/s. 194J. CIT(A) confirmed the addition.
The ITAT held that the amount of internet lease line charges outstanding at the end of the close of the assessment year can be disallowed. Matter remanded.(AY. 2008-09)
DCS BPO P. Ltd. v. ACIT (2015) 41 ITR 750 (Chennai)(Trib.)

956 **S.40(a)(ia) : Amounts not deductible – Deduction at source – Scope is not limited to those expenses alone which fall u/s. 30 to 38 but covers all those expenses which are specifically enumerated in s. 40. [S. 30 to 38]**
It is expenditure *per se*, and not nature of business in which expenditure is incurred, which is subject matter of disallowance u/s. 40(a)(ia). Scope of disallowance of expenses contemplated by section 40(a)(ia) is not limited to those expenses alone which fall u/s. 30 to 38 but covers all those expenses which are specifically enumerated in s. 40. (AY. 2007-08)
ITO v. Rajesh A. Boricha (2015) 153 ITD 537 (Raj.)(Trib.)

957 **S.40(a)(ia) : Amounts not deductible – Deduction at source – Hiring of trucks – Oral contract is also covered – Failure to deduct tax at source – Disallowance was held to be justified.[S. 44AB, 194C]**
Assessee was engaged in business of transport contracts. Goods received by assessee from consignors for their carriage were sent through truck owners hired by assessee. There was no privity of direct contract between truck owners hired by assessee and consignors. It was assessee's responsibility to transport goods received from them for which purpose assessee hired services of truck owners. Assessee was not a mere transport commission agent and services of truck owners were hired as sub-contractors. Therefore, assessee was required to deduct TDS out of payments made by him to such truck owners/drivers in terms of section 194C(2). Since he did not do so, provisions of s. 40(a)(ia) were to be invoked for making disallowance. Provision is applicable to individual when exceeds the monetary limits specified in section. (AY. 2007-08)
ITO v. Rajesh A. Boricha (2015) 153 ITD 537 (Raj.)(Trib.)

958 **S.40(a)(ia) : Amounts not deductible – Deduction at source – Additional evidence – Matter remanded to Assessing Officer.**
Expenditure incurred on software development and licence on software. Commissioner (Appeals) allowing it on obtaining requisite evidence. Assessing Officer to consider it afresh in light of fresh evidence. Matter remanded. (AY. 2006-07, 2008-09)
Dy. CIT v. GAC Shipping (India) P. Ltd. (2015) 39 ITR 183 (Cochin)(Trib.)

959 **S.40(a)(ia) : Amounts not deductible – Deduction at source – VSAT charges – Lease line charges – Not liable to deduct tax at source.**
Payments made to Bombay Stock Exchange and National Stock Exchange towards VSAT charges and lease line charges. No requirement to deduct tax at source. (AY. 2008-09)
Centrum Broking Ltd. v. ACIT (2015) 39 ITR 23 / 70 SOT 389 (Mum.)(Trib.)

960 **S.40(a)(ia) : Amounts not deductible – Deduction at source – The amendment is clarificatory and retrospective w.e.f. 01.04.2005 – Tax deducted was deposited before due date of filing of return – Disallowance was deleted. [S.139(1)]**
It is not in dispute in the light of a series of judgments of Hon'ble jurisdictional High Court, that the amendment brought to Section 40(a)(ia), which provides that as long as the taxes deducted at source have been deposited before the due date of filing return under section 139(1), disallowance under section 40(a)(ia) cannot be invoked for delay

in depositing the tax deducted at source, is only clarificatory in nature and it will also apply to the assessment years prior to the assessment years 2010-11 as well. In the case of *CIT v. Omprakash R. Chaudhury & Others* (TA No. 412 of 2013; judgment dated 22nd November 2013), it was held that the amendment made in section 40(a)(ia) of the Income-tax Act, 1961, as retrospective in operation having effect from 1st April 2005, i.e. from the date of insertion of Section 40(a)(ia) of the Act. (ITA No. 211/Ahd/2010, dt. 07.07.2015) (AY. 2006-07)
Shri. Umeya Corporation v. ITO (Ahd.)(Trib.); www.itatonline.org

S.40(a)(ia) : Amounts not deductible – Deduction at source – Contractor – Disallowance cannot be made for amount already paid before end of previous year – Matter remanded. [S.194C] 961
The assessee-firm was engaged in the business of providing cable network services. During the previous year the assessee made payments to various pay channels. The Assessing Officer held that as the assessee had written agreements with the pay channels for a specific period, the assessee was liable to deduct tax at source under section 194C of the Act and failure to deduct it would result in disallowance of payment under section 40(a)(ia) of the Act and thereby disallowed it. The Commissioner (Appeals) confirmed this. On appeal Held, that the disallowance under section 40(a)(ia) of the Act was not attracted for amounts which had already been paid before the end of the previous year. The Assessing Officer was to allow the expenditure, if it was found to be paid within the previous year. Matter remanded. (AY. 2009-10)
S. S. Networks v. ITO (2015) 39 ITR 46 / 68 SOT 351 (Hyd.)(Trib.)

S.40(a)(ia) : Amounts not deductible – Deduction at source – Finance Act 2012, with effect from 1-4-2013, second proviso is curative and retrospective – Legitimate business expenditure cannot be disallowed if the payee has paid tax thereon. [S. 194A] 962
(i) The second proviso to section 40(a)(ia) of the Act inserted by the Finance Act, 2012 is curative in nature intended to supply an obvious omission, take care of an unintended consequence and make the section workable. Section 40(a)(ia) without the second proviso resulted in the unintended consequence of disallowance of legitimate business expenditure even in a case where the payee in receipt of the income had paid tax. It has for long been the legal position that if the payee has paid tax on his income, no recovery of any tax can be made from the person who had failed to deduct the income tax at source from such amount.
(ii) The settled position in law is that if the deductee/payee has paid the tax, no recovery can be made from the person responsible for paying of income from which he failed to deduct tax at source. In a case where the deductee/payee has paid the tax on such income, the person responsible for paying the income is no longer required to deduct or deposit any tax at source. In the similar circumstances, the first proviso to section 40(a)(ia) inserted by the Finance Act, 2010, which has been held to be curative and therefore, retrospective in its operation by the Hon'ble Calcutta High Court in ITAT No. 302 of 2011, GA 3200/2011, *CIT v. Virgin Creations* decided on November 23, 2011 provides for allowance of the expenditure in any subsequent year in which tax has been

deducted and deposited. The intention of the legislature clearly is not to disallow legitimate business expenditure. The allowance of such expenditure is sought to be made subject to deduction and payment of tax at source. However, in a case where the deductee/payee has paid tax and as such the person responsible for paying is no longer required to deduct or pay any tax, legitimate business expenditure would stand disallowed since the situation contemplated by the first proviso viz. deduction and payment of tax in a subsequent year would never come about. Such unintended consequence has been sought to be taken care of by the second proviso inserted in section 40(a)(ia) by the Finance Act, 2012. There can be no doubt that the second proviso was inserted to supply an obvious omission and make the section workable. (AY. 2007-08)

Santosh Kumar Kedia v. ITO (2015) 43 ITR 687 (Kol.)(Trib.)

963 **S.40(a)(ia) : Amounts not deductible – Deduction at source – Second proviso was inserted by FA 2012 to rectify the unintended consequence of disallowance in the hands of the payer even if the payee has paid tax. It is curative and retrospective in operation. Assessee's claim of having obtained declarations u/s. 197A from the payees should not be disbelieved without evidence. Assessee is not expected to go into the correctness of the declarations filed by the payees. [S. 194C, 197A, Form 15I]**

Allowing the appeal of assessee, the Tribunal held that; Second proviso was inserted by FA 2012 to rectify the unintended consequence of disallowance in the hands of the payer even if the payee has paid tax. It is curative and retrospective in operation. Assessee's claim of having obtained declarations u/s. 197A from the payees should not be disbelieved without evidence. Assessee is not expected to go into the correctness of the declarations filed by the payees. (ITA No. 1278/Kol/2011, dated 22.05.2015) (AY. 2008-09)

Ballabh Das Agarwal v. ITO (2016) 65 taxmann.com 36 / (Kol.)(Trib); www.itatonline.org

964 **S.40(a)(ia) : Amounts not deductible – Deduction at source – Payments made within accounting year cannot be disallowed – Matter remanded.**

The assessee claimed deduction of the expenditure incurred in freight transportation. The Assessing Officer disallowed the expenditure on the ground that the assessee failed to deduct tax at source. The Commissioner (Appeals) confirmed this. On appeal contending that the expenses were reimbursement and provisions of deduction of tax at source were not applicable and provisions of section 40(a)(ia) of the Act had no application for the payments made within the accounting year:

Held, that there was no categorical finding that the expenses were only reimbursements made by the assessee. The provisions of section 40(a)(ia) of the Act had no application for the payments made within the accounting year. The issue was to be remitted back to the Assessing Officer for examining whether all the payments were made within the accounting year. The payments made within the accounting year could not be disallowed under section 40(a)(ia) of the Act. Matter remanded. (AY. 2004-05, 2008-09)

Devendra Exports P. Ltd. v. ACIT (2015) 38 ITR 744 (Chennai)(Trib.)

S.40(a)(ia) : Amounts not deductible – Deduction at source – Electricity charges – Assessee contesting quantification of demand raised by Electricity Board – Liability certain and not contingent – Allowable. 965

The Assessing Officer disallowed electricity charges payable by the assessee on the ground that the assessee was contesting the demand raised by the Electricity Board and the liability was yet to crystalise. The Assessing Officer held that the liability was uncertain and contingent liability till the exact liability was quantified by the Board. The Commissioner (Appeals) confirmed this. On appeal :

Held, that according to sub-clause (4) of the notification No. S. O. 69(E), relating to disclosure of accounting policies, provision should be made for all known liabilities and losses even though the amount could not be determined with certainty. In the assessee's case, the assessee was not disputing the whole liability, but only the quantification of the demand raised by the Electricity Board. The liability was certain and not contingent. Therefore, the expenditure was allowable.(AY. 2004-05, 2008-09)

Devendra Exports P. Ltd. v. ACIT (2015) 38 ITR 744 (Chennai)(Trib.)

S.40(a)(ia) : Amounts not deductible – Deduction at source – Architect fees – Amount paid before end of accounting year – No disallowance can be made. 966

The assessee claimed deduction of ₹ 18 lakh paid towards architect's fees. The expenditure was disallowed by the Assessing Officer under section 40(a)(ia) of the Income-tax Act, 1961, on the ground that the assessee had not deducted the tax at source on the payment. The Commissioner (Appeals) deleted the disallowance as the amount was already paid before the end of the year. On appeal by the Department:

Held, that when the amount was paid by the assessee before the end of the accounting year, the expenditure could not be disallowed under section 40(a)(ia) of the Act. (AY. 2008-09)

ACIT v. Red BrickRealtors P. Ltd. (2015) 38 ITR 749 / 70 SOT 592 (Chennai)(Trib.)

S.40(a)(ia) : Amounts not deductible – Deduction at source – Making payments towards contract within accounting year – No disallowance can be made. 967

The Assessing Officer disallowed the amount paid to contractors under section 40(a)(ia) of the Act on the ground that the assessee had failed to deduct tax at source. The Commissioner (Appeals) sustained the order of the Assessing Officer. On appeal:

Held, that the provisions of section 40(a)(ia) had no application in case of payments were already made before the end of the accounting year. Since the assessee had made the payments within the accounting year, the provisions of section 40(a)(ia) had no application. (AY. 2007-08)

Sri Narayana Moorthy Travels v. ITO (2015) 38 ITR 592 / 70 SOT 800 (Chennai)(Trib.)

S.40(a)(ia) : Amounts not deductible – Deduction at source – Payments to parties for hiring buses – No disallowance merely because persons to whom hiring charges paid not responding to letters issued by Assessing Officer. 968

The Assessing Officer disallowed the bus hire charges paid by the assessee to various persons on the ground that the persons to whom the payments had been made, did not confirm such payments. The Commissioner (Appeals) sustained the order of disallowance. On appeal:

Held, that the assessee had made payments to the parties for hiring buses and returned the receipts from the business of transportation of students. The parties might not have responded to the letters issued by the Assessing Officer in view of the strained relationship with the assessee and on this ground alone, the payments made to the parties for hiring buses by the assessee could not be doubted. The disallowance was to be deleted. (AY. 2007-08)
Sri Narayana Moorthy Travels v. ITO (2015) 38 ITR 592 / 70 SOT 800 (Chennai)(Trib.)

969 **S.40(a)(ia) : Amounts not deductible – Deduction at source – Depositing tax deducted at source in next financial year but before filing return of income – Sufficient compliance – Disallowance cannot be made. [S.139(1)].**
Where the assessee had deposited the tax deducted at source on the remittance on April 29, 2004, i.e., in the next financial year but before filing the return under section 139(1) of the Income-tax Act, 1961:
Held, allowing the appeal, that there was sufficient compliance and section 40(a)(ia) could not be invoked. (AY. 2004-05)
Rolls-Royce India P. Ltd. v. Dy. CIT (2015) 38 ITR 599 (Delhi)(Trib.)

970 **S.40(a)(ia) : Amounts not deductible – Deduction at source – Payments to newspaper publishers for matrimonial advertisements as an agent to its clients – No contractual relationship between assessee and publishers – Disallowance cannot be made. [S.194C]**
The assessee, engaged in the business of marriage bureau, made payments to newspapers for publication of matrimonial advertisements on behalf of its clients. The Assessing Officer disallowed the payment made by the assessee under section 40(a)(ia) of the Income-tax Act, 1961, on the ground that the assessee had failed to deduct tax at source under section 194C of the Act. The Commissioner (Appeals) held that the fact that the assessee had placed advertisements on a regular basis throughout the year for which payments had been made to the publishers would not create a contractual relationship between the assessee and the publishers attracting section 194C of the Act. On appeal by the Department:
Held, dismissing the appeal, that admittedly, the assessee acted as an agent to its customers and there was no contractual relationship with the newspaper publishers for carrying the advertisement placed by the assessee. The assessee had a contractual relationship only with its clients for providing marriage related services for which the assessee had placed matrimonial advertisements in the newspapers from time-to-time in terms of the requirements of its business. Though the payment for the entire year was in excess of ₹ 50,000, in the absence of a contractual relationship between the assessee and the publishers, section 194C would not apply to the payments made to the publishers and no disallowance could be made under section 40(a)(ia) of the Act. (AY. 2005-06)
ITO v. Vanaja Rao Quick Marriages P. Ltd. (2015) 38 ITR 547 / 69 SOT 547 (Hyd.)(Trib.)

971 **S.40(a)(ia) : Amounts not deductible – Deduction at source – Disallowance cannot be made for amounts paid before end of relevant accounting year. [S. 139(1), 194C]**
The assessee entered into agreements with its sister concerns for production of television serials and made payments on the basis of revenue sharing from income generated from advertisements. The Assessing Officer disallowed the expenditure under section 40(a)(ia)

of the Income-tax Act, 1961, on the ground that the assessee had not deducted tax at source under section 194C of the Act. The Commissioner (Appeals) upheld the order of the Assessing Officer. On appeal: Held, that as the assessee had already made payments before the end of the relevant accounting year, the disallowance may not be made under section 40(a)(ia) on such payments.(AY. 2005-06, 2006-07)
Ushodaya Enterprises Ltd. v. Dy. CIT (2015) 155 ITD 701 / 38 ITR 148 (Hyd.)(Trib.)

S.40(a)(ia) : Amounts not deductible – Deduction at source – Amount paid before due date for filing of return – No amount remaining unpaid to truck owners at end of year – Disallowance cannot be made. [S.139(1)] 972
The Assessing Officer disallowed the payment made by the assessee for hiring of trucks under section 40(a)(ia) of the Income-tax Act, 1961, on the ground that the assessee had failed to deduct tax at source. The Commissioner (Appeals) confirmed the order of the Assessing Officer. On appeal: Held, allowing the appeal, that the payments had been made before the due date for filing of the return and no amount remained unpaid to the truck owners at the end of the year. The disallowance was not attracted. (AY. 2009-10)
Dipendra Bahadur Singh v. ACIT (2015) 38 ITR 67 (Cuttack)(Trib.)

S.40(a)(ia) : Amounts not deductible – Deduction at source – Merilyn Shipping (2012) 136 ITD 23 (SB) should be followed in view of approval by Allahabad HC and dismissal of SLP by Supreme Court. In any event as two views are possible, view in favour of assessee should be followed. Amounts already paid without TDS cannot be disallowed. 973
The assessee, having made the payment, section 40(a)(ia) cannot be attracted because it speaks of the amount "payable" and it does not cover the amount already paid. The ITAT Chennai Benches have taken into consideration the decision of the ITAT Special Bench in the case of Merilyn Shipping & Transport (2012) 136 ITD 23 (SB), the order of which was suspended by the High Court but at the same time there was a subsequent judgment of the Hon'ble Allahabad High Court in the case of M/s. Vector Shipping Services (P) Ltd. wherein it was held that section 40(a)(ia) applies only to those amounts which remains payable by the end of the previous year. In other words, in respect of payments already made section 40(a) (ia) is not attracted: – i. *ACIT v. M/s. Eskay Designs* – ITA No.1951/Mds/2012 dated 09.12.2013. ii. *ITO v. Theekathir Press* – ITA No. 2076/Mds/2012 & CO No. 155/Mds/2013 dated 18.09.2013. Though there are contrary decisions of the other Hon'ble High Courts, i.e. Hon'ble Calcutta High Court and Hon'ble Gujarat High Court, in the light of the decision of the Hon'ble Allabahad High Court it can be said the there can be two views possible in this matter in which event the one which is in favour of the assessee has to be followed in the light of the decision of the Hon'ble Supreme Court in the case of Vegetable Products Ltd. 88 ITR 192. Hon'ble Allahabad High Court in the case of *CIT v. Vector Shipping Services (P) Ltd. (supra)* has held that for disallowing expenses from business and profession on the ground that TDS has not been deducted, amount should be payable and not which has been paid by end of the year. The said decision of Hon'ble Allahabad High Court was made subject to Special Leave Petition filed before Hon'ble Supreme Court and their Lordships *vide* their order dated 2-7-2014 in CC No.8068/2014 have dismissed the SLP. In view of above

discussion, the decision relied upon by Ld. DR would have no application therefore the Hon'ble ITAT accept the claim of the assessee to the extent of labour payments are made during the year under consideration and to that extent no disallowance should be made. (ITA No. 2293-2294/Mum/2013, dt. 4.03.2015) (AY. 2005-06, 2006-07)
Jitendra Mansukhlal Shah v. DCIT (Mum.)(Trib.); www.itatonline.org

974 **S.40(a)(ia) : Amounts not deductible – Deduction at source – If an amount becomes taxable due to a retrospective amendment, payments prior to the amendment cannot be disallowed for want of TDS – DTAA – India-China-Singapore.[S. 5A, 9(1)(i)(vii), 195, Articles 8, 12]**

It is an undisputed fact that the Finance Act, 2010 received the assent of the President on 8.5.2010 and all the payments have been made by the assessee to the non-resident party prior to receiving of assent of the President making the retrospective amendment by adding explanation to Sec. 9(1). At the time when the assessee made the payment there was no provision u/s. 9(1) making the technical fees deemed to accrue or arise in India whether or not (a) the non-resident has residence or place of business or business connection in India or (b) the non-resident has rendered services in India. It is not disputed that the non-resident did not have residence or place of business or business connection in India. The non-resident has also not rendered services in India. The source of the income in the hands of the non-resident was outside India. Even the place of business which earned the income was also outside India. Since the technical fees was not deemed to accrue or arise in India at the time when the assessee made the payment as there was no provision under Sec. 9(1), the income received by the non-resident as per the existing law at the time when the assessee made the payment, in our opinion, was not taxable in India under the Income Tax Act. Prior to the insertion of explanation to S. 9(1) by the Finance Act, 2010 with retrospective effect, the professional and consultancy services even though rendered outside India were not deemed to accrue or arise in India irrespective of the fact whether the party who rendered the services is having place of residence or place of business in India. It is only due to the retrospective amendment made by the Finance Act, 2010 that the position has become clear. If the income was not taxable in India it cannot be made taxable in view of the tax treaty. This is a fact that as argued by the learned AR the retrospective amendment brought by the Finance Act, 2010 was not in existence at the time when the assessee had made the payments. The assessee cannot be penalized for performing an impossible task of deducting TDS in accordance with the law which was brought into the statute book much after the point of time when the tax deduction obligation was to be discharged. (AY. 2010-11)
ACIT v. Ajit Ramakant Phatarpekar (2015) 154 ITD 144 / 119 DTR 27 / 170 TTJ 529 (Panji)(Trib.)
ACIT v. Neelam Ajit Phatarpekar (2015) 154 ITD 144 / 119 DTR 27 / 170 TTJ 529 (Panj.) (Trib.)

S.40(a)(ia) : Amount not deductible – Deduction at source – Paid or payable – Merilyn Shipping (2012) 136 ITD 23 (SB) cannot be followed but Question whether the second proviso to s. 40(a)(ia) is retrospective or not requires to be considered by the AO – Matter remanded.[S. 201(1)] 975

Though the issue as to whether disallowance u/s. 40(a)(ia) can be made only in respect of amounts that are "payable" as at the end of the year or whether it can also be made for amounts "paid" during the year has to be decided against the assessee (as the Special bench verdict in Merilyn Shipping and Transport Ltd. (2012) 136 ITD 23 (SB) has not been approved by some High Courts, the legal argument that the second proviso to section 40(a)(ia) of the Act (which was inserted by the Finance Act, 2012 w.e.f 01.04.2013 to provide that the disallowance u/s. 40(a)(ia) of the Act would not be made if the assessee is not deemed to be an assessee in default under the first proviso to section 201(1) of the Act) is retrospective in nature as it has been introduced to eliminate unintended consequences which may cause undue hardships to the taxpayers requires to be restored to the file of the Assessing Officer for consideration.(ITA No. 1372/PN/2013, dated 18.03.2015) (AY. 2010-11)

ACIT v. Bhavook Chandraprakash Tripathi (Pune) (Trib.); www. itatonline.org

S.40(a)(ia) : Amounts not deductible – Deduction at source – Interest – Recipient had no taxable income – Form No. 15G/15H, obtained late – Disallowance was not justified. 976

Where assessee was aware that recipients had no taxable income, just because their declarations in Form 15G/H were obtained late, assessee could not be fastened with consequences that arose for non-deduction of TDS u/s. 40(a)(ia) while making payment of interest.(AY. 2005-06)

Capital Pharma v. ITO (2015) 152 ITD 497 (Bang.)(Trib.)

S.40(a)(ia) : Amounts not deductible – Deduction at source – Commission – Director – Perquisite – No disallowance can be made. [S. 17(1)(iv), 192, 194H] 977

Commission paid to directors for managing affairs of company and not for selling any goods or article of company partakes of character of salary, said commission will partake of character of salary in view of the prov. of s. 17(1)(iv). Therefore, provisions of section 194H are not applicable in respect of for such payment. Hence, invocation of prov. of s. 40(a)(ia) to disallow same was not justified. (AY. 2010-11)

Nashik Metals (P.) Ltd. v. ITO (2015) 152 ITD 467 (Pune)(Trib.)

S.40(a)(ia) : Amounts not deductible – Deduction at source – Fees for managerial – Benefit against S. 40(a)(ia) disallowance conferred in *CIT v. Kotak Securities (2012) 340 ITR 333 (Bom.)(HC)*, has to be extended to cases where ROI was filed pre-delivery of the verdict – No disallowance can be made. [S.194J] 978

The disallowance under section 40(a)(ia) of the Act in respect of payments made to Bombay Stock Exchange is covered in favour of the assessee and against the Revenue except that the transaction charges have been considered to be subject to TDS by the decision of Hon'ble Bombay High Court in the case of *CIT v. Kotak Securities Ltdin Income Tax appeal No.3111 of 2009 (2012) 340 ITR 333 (Bom)(HC)*. However, we find that the Hon'ble High Court has observed that section 194J was inserted w.e.f. 1-7-1995

and till assessment year 2005-06 both the Revenue and the assessee proceeded on the footing that section 194J was not applicable to the payment of transaction charges and accordingly during the periods from 1995 to 2005 neither the assessee has deducted tax at source nor the Revenue has raised any objection. The Hon'ble High Court further observed that in these circumstances if both the parties for nearly a decade proceeded on the footing that section 194J is not attracted, then in the assessment year in question, no fault can be found with the assessee in not deducting tax at source under section 194J of the Act and consequently, no action could be taken under section 40(a)(ia) of the Act. As the Return of income for the year under consideration was filed on 14-8-2009 and this decision of the Hon'ble was pronounced on 21-10-2011. Thus, the assessee had already filed the return of income and the time period for deducting tax at source was also lapsed. Considering these peculiar facts, in our considered opinion no disallowance on this account should be made for the year under consideration.(AY. 2008-09)
IDBI Capital Market Services Ltd. v. DCIT (2015) 42 ITR 379 (Mum.)(Trib.)

979 **S.40(a)(ia) : Amount not deductible – Deduction at source – Sub-contractor – Disallowance u/s. 40(a)(ia) could only be made in respect of sums remaining outstanding at end of year, plea raised by assessee was rejected.**
Assessee was engaged in business of civil construction and made payments to sub-contractors in respect of which no tax deductions were made. A.O. disallowed said payments u/s. 40(a)(ia). Assessee raised a plea that disallowance u/s. 40(a)(ia) could only be made in respect of sums remaining outstanding at end of year. In view of order passed by Gujarat High Court in case of *CIT v. Sikandar Khan N. Tanvar [2013] 357 ITR 312(Guj.)(HC)*, could not be accepted in the present case. (AY. 2008-09)
Sai Builders v. ITO (2015) 152 ITD 462 (Agra)(Trib.)

980 **S.40(a)(ia) : Amounts not deductible – Deduction at source – Disallowance cannot be made if the assessee has not claimed a deduction.**
Payment has not been claimed as a revenue expenditure while computing the income chargeable under the head 'Profits and gains of business or profession' in this year and therefore the same would not fall for consideration in section 40(a)(i) of the Act. (2014) 362 ITR 174 (Guj). (AY. 2009-10)
Gera Development Pvt. Ltd. v. JCIT (2015) 169 TTJ 181 / 70 SOT 418 (Pune)(Trib.)

981 **S.40(a)(ib) : Amounts not deductible – Deduction at source – Securities transaction tax – Merely collecting the securities transaction tax – No disallowance can be made.**
Assessee-broker raised bill in respect of brokerage on its client which included Security Transaction Tax (STT) collected by him on behalf of client. Assessee claimed said STT. Assessing Officer disallowed said claim by invoking section 40(a)(ib). Tribunal allowed the claim of assessee. On appeal by revenue dismissing the appeal the Court held that since assessee was merely collecting tax, section 40(a)(ib) did not apply, therefore, disallowance made by Assessing Officer was rightly deleted by Tribunal.
CIT v. HSBC Securities & Capital Markets (India) (P.) Ltd. (2015) / 379 ITR 146 / 234 Taxman 341 (Bom.)(HC)

S.40(b)(v) : Amounts not deductible – Working partner – Remuneration – Provision in partnership deed for payment of salary at percentage share of profits multiplied by "allocable profits" is valid and entitles claim for deduction.[S.28(v), 155] 982

The Assessee firm was initially constituted with Smt. Manju Vaish, Smt. Kali Vohra and Mr. Vinay Vaish and was carrying on the profession of law in New Delhi and Mumbai. With effect from 1st April, 2006, Smt. Manju Vaish and Smt. Kali Vohra retired from the partnership and Mr. Ajay Vohra and Mr. Bomi F. Daruwala joined the partnership. A fresh retirement-cum-partnership deed was executed on 22nd June, 2008 and made effective from 1st April 2006. 4. Clause 6(a) of the said deed provided that each Partner shall be entitled to an annual salary equivalent to his percentage share of profits multiplied by "Allocable Profits". It was stated that "Allocable Profits shall be calculated as per the provisions of Section 40(b)(v)(1) of the Income-tax Act, 1961. The monthly salary of a Partner shall be equivalent to annual salary divided by 12. Such salary shall be deemed to accrue from day-to-day and may be drawn out in arrears and the salary so paid shall be treated as working expenses of the partnership before the profits thereof are ascertained." Subsequently on 1st August, 2009 a supplementary deed of partnership was executed between Mr. Ajay Vohra, Mr. Vinay Vaish and Mr. Bomi F. Daruwala whereby Clause 6 was substituted as follows: "Mr. Ajay Vohra Mr. Vinay Vaish and Mr. Bomi F. Daruwala shall be paid with effect from 1st April, 2009 a monthly salary of ₹ 26,50,000, ₹ 10,00,000 and ₹ 13,50,000 respectively. Such salary shall be deemed to accrue from day to day and may be drawn out in arrears and the salary so paid shall be treated as working expenses of the partnership before the profits thereof are ascertained." The AO held that since the partnership deed "neither specified the amount of salary to be paid to each of the working partners nor has laid down a specific method of computation thereof" and has only mentioned "allocable profit" which has not been defined in the partnership deed, Section 40(b)(v) of the Act would not apply and the remuneration to the partners, not being in terms of Section 40(b)(v) of the Act, was disallowed. This was upheld by the CIT(A) but reversed by the ITAT. The ITAT came to the conclusion that the term "allocable profit" should be understood by applying the common meaning which would be "profits available for allocation". Explanation 3 to Section 40(b)(v) of the Act defines the term "book profit" as the "net profit before remuneration". The ITAT, therefore, concluded that "a plain reading of Clause 6(a) leads us to a conclusion that the term 'allocable profits' was used to mean 'book profits' as used in Section 40(b)(v) of the Act or otherwise the reference to the section in the Clause has no meaning. When the partners have understood and meant that the word "allocable profits" to mean surplus/book profits, prior to calculation of partners' remuneration, and when such an understanding is manifest in its actions, we do not see any reason why the Revenue authorities should not understand this term in the same sense."

On appeal by the department to the High Court HELD dismissing the appeal:

(1) Clause 6(a) of the partnership deed dated 20th June, 2008 clearly indicates the methodology and the manner of computing the remuneration of partners. The remuneration of the partners has been computed in terms thereof. Under Section 28(v) of the Act, any salary or remuneration by whatever name called received by partners of a firm would be chargeable to tax under the head profits and gains of business or

profession. The proviso to Section 28 (v) states that where such salary has been allowed to be deducted under Section 40(b)(v), the income shall be adjusted to the extent of the amount not so allowed to be deducted. Further Section 155(1A) of the Act states that where in respect of a completed assessment of a partner in a firm, it is found on the assessment or reassessment of the firm that any remuneration to any partner is not deductible under Section 40(b), the AO may amend the order of the assessment of the partner with a view to adjusting the income of the partner to the extent of the amount not so deductible.(AY.2009-10)
CIT v. Vaish Associates (2015) 126 DTR 102 / 280 CTR 605 / 235 Taxman 308 (Delhi)(HC)

983 **S.40(c) : Amounts not deductible – Company – Payments to directors – Film production – Amounts paid as professional charges to directors for directing and producing film – Amounts not paid in their capacity as members of board of directors – No disallowance can be made.**
On reference held that the disallowance made by the Income-tax Officer under section 40(c) was not justified. The amounts paid to the two individuals were not paid in their capacity as members of the board of directors but as professional charges for directing and producing a film. The Revenue was, therefore, not justified in disallowing the claim, the character of the remuneration mode being different. (AY. 1981-82)
CIT v. Rupam Pictures P. Ltd. (2015) 374 ITR 450 (Bom.)(HC)

Section 40A : Expenses or payments not deductible in certain circumstances.

984 **S.40A(2) : Expenses or payments not deductible – Excessive or unreasonable – Disallowance of part of commission was held to be justified.[S.40A(2)(b)]**
Commission paid to interested party which was found to be excessive hence disallowance of part of commission was held to be justified. (AY. 1999-2000)
CIT v. Gujarat Foils Ltd. (2015) 377 ITR 324 (Guj.)(HC)

985 **S.40A(2) : Expenses or payments not deductible – Excessive or unreasonable – Both the companies are assessed at maximum marginal rate – Disallowance was held to be not justified. [S.37(1)]**
Assessing Officer disallowed the estimated rent by invoking the provision of section 40A(2) of the Act. Tribunal deleted the disallowances. On appeal by revenue dismissing the appeal of revenue the Court held that the assessee company as well as parent company, both were assessed to tax at maximum marginal rate and, therefore, it could not be said that service charge was paid to G at unreasonable rate to evade tax. Since revenue could not point out that assessee evaded payment of tax, invocation of section 40A(2) was not valid.
PCIT v. Gujarat Gas Financial Services Ltd. (2015) 233 Taxman 532 (Guj.)(HC)

986 **S.40A(2) : Expenses or payments not deductible – Excessive or unreasonable – Sale of rice lesser than its purchase price – Addition cannot be made if the parties are not related.**
Assessee sold rice bran at a price lesser than its purchase price. Lower authorities confirmed the difference as additional income of assessee. On appeal allowing the

appeal of assessee the Court held that; The Apex Court in the case of *CIT v. Calcutta Discount Co. Ltd.* [1973] 91 ITR 8 has held that 'where a trader transfers his goods to another trader at a price less than the market price and the transaction is a *bona fide* one, the taxing authority cannot take into account the market price of those goods, ignoring the real price fetched to ascertain the profit from the transaction. An assessee can so arrange his affairs as to minimize his tax burden. Similarly, the Gujarat High Court in the case of *CIT v. Keshavlal Chandulal [1966] 59 ITR 120* has observed that 'where a person disposes off his goods at a lesser value than their market price, or at a concessional price, there is nothing in the income tax law which compels him to sell at a price which is the price realizable in the market.

The only exception in this rule is, if the goods fall under section 40(A)(2) where there exists a relationship as set out in the said provision between the parties. It is not the case of the department that though the shops are adjoining each other, they are related in any manner. That provision is not invoked. In the light of the aforesaid statement of law, the authorities were not justified in adding the income, taking the difference between the price at which the rice bran is purchased and rice bran is sold. (AY. 2004-05)

A. Khadar Basha v. ACIT (2015) 232 Taxman 434 (Karn.)(HC)

S.40A(2) : Expenses or payments not deductible – Excessive or unreasonable – Purchasing wind mills – Comparable cases showing payment not inflated – No evidence to establish that price of wind mills paid by assessee not actual price – No documentary evidence that money came back to assessee from concern to whom commission paid – No disallowance could be made. [S. 37(1), 40(A)(2)(b)] 987

Held, the Tribunal considered the statement of comparable cases made by the assessee and concluded that the payment made by the assessee was certainly not inflated. It considered the fact that setting up of wind mills was a specialised task and concluded that the Assessing Officer had no evidence on record to establish that the price of wind mills paid by the assessee was not the actual price or that the price was inflated. It found that the Assessing Officer had proceeded on the basis of a presumption that the cost of each wind mill was inflated by ₹ 1 crore and it had not been proved by documentary evidence that such money came back to the assessee from the concern to whom commission was paid. The Tribunal found that there was no excessive payment. The Assessing Officer had not disputed the fact that the assessee paid lease rent of ₹ 5,51,788 to the W group on account of the wind mills taken on lease and the contention of the Assessing Officer that lease rents were unreasonable was not based on any cogent material but only on assumption and presumption. In fact, the lease rents were fixed in accordance with the formula provided by the Indian Renewable Energy Development, a Government of India company which provided support to electricity projects. Thus, no disallowance could be made on ground of excessive and unreasonable payments.(AY. 2002-03 to 2006-07)

CIT v. Karma Energy Ltd. (2015) 375 ITR 264 / 232 Taxman 496 (Bom.)(HC)

S.40A(2) : Expenses or payments not deductible – Excessive or unreasonable – Payment to sister concern – Question of fact. [S.260A] 988

The assessee paid conversion of pig iron and cast iron scrap to sister concern. Assessing Officer disallowed certain amount by observing that the payment was excessive, which

was confirmed by Tribunal. On appeal by assessee, High Court also dismissed the appeal holding that the question of fact. (AY.1994-95)
Prakash Engineering Works v. CIT (2015) 373 ITR 246 / 229 Taxman 528 (Cal.)(HC)

989 **S.40A(2) : Expenses or payments not deductible – Excessive or unreasonable – Royalty to its sister concerns and received on job training – Disallowance was unjustified.**
Assessee company paid royalty to its sister concerns. On payment of royalty assessee had received 'on job' training with stated aim of improving its efficiency and capability for growth of its business. Tribunal held that since Assessing Officer did not establish that expenses were unreasonable and excessive, disallowance made by Assessing Officer was unjustified. (AY. 2009-10)
Dy. CIT v. International Institute of Planning & Management (P.) Ltd. (2015) 41 ITR 733 (2016) 157 ITD 579 (Delhi)(Trib.)

990 **S.40A(2) : Expenses or payments not deductible – Excessive or unreasonable – Advertisement expenses to its sister concerns, since there was no variance in rates for assessee as compared to outsiders, disallowance made by Assessing Officer was unjustified.**
Assessee company paid advertisement expenses to its sister concerns. Assessing Officer by invoking section 40A(2) disallowed same. Tribunal held that since there was no evidence that there was a variance in rates for assessee as compared to outsiders, disallowance made by Assessing Officer was unjustified. (AY. 2009-10)
Dy. CIT v. International Institute of Planning & Management (P.) Ltd. (2015) 41 ITR 733 (2016) 157 ITD 579 (Delhi)(Trib.)

991 **S.40(A)(2) : Amounts not deductible excess or un reasonable – Payment to son – Held to be allowable.**
Allowing the appeal of assessee the Tribunal held that the Salary paid to son not disallowable for want for qualification if due to his efforts receipts of business has increased. (AY. 2008-09)
Shiv Kumar v. ACIT (2015) 41 ITR 124 / (2016) 156 ITD 660 (Chd.)(Trib.)

992 **S.40A(2) : Expenses or payments not deductible – Excessive or unreasonable – Payment of incentives to directors – AO to examine payments each year – Financial and operational results justify payments – No attempt to evade tax – Disallowance deleted.**
The assessee was in the business of providing educational consultancy and assisting the students in overseas education. The assessee paid incentives to three of its directors. The assessee had also claimed depreciation on the vehicles which were purchased in the name of director though used for the purpose of the business. The AO and CIT(A) following the earlier year order for A.Y 2007-08, disallowed the payments made to directors under Section 40A(2)(a) of the Act. On appeal to Tribunal, it was held that the question whether the payment was excessive or unreasonable was to be examined every year and one should not mechanically follow the decision taken on the very same issue in the preceding years. All the directors were in charge of the entire operations of the assessee and the assessee derived benefit from the payment made to the directors as the financial or operational results of the company were growing every year. These results

justified the payments made to the directors. Both the assessee and the directors suffered equal rate of tax and thus there was no attempt to evade tax. Hence the disallowance under Section 40A(2)(a) of the Act was to be deleted. (AY. 2008-09 to 2010-11)
Edwise Consultants P. Ltd. v. DCIT (2015) 44 ITR 236 (Mum.)(Trib.)

S.40A(2) : Amounts not deductible – Excessive or unreasonable – Remuneration to directors – Disallowance was held to be not justified. 993
Tribunal held that salaries of ₹ 11 lakhs each to directors was held to be reasonable considering that in earlier years remuneration of ₹ 9 lakhs to each directors was held to be reasonable and allowed. Disallowance of ₹ 50000 per month by invoking provisions of section 40A(2) was deleted.(AY. 2010-11)
DCIT v. Mohindra Precision Tools (P) Ltd. (2015) 168 TTJ 26 (UO)(Chd.)(Trib.)

S.40A(2) : Expenses or payments not deductible – Excessive or unreasonable – Royalty and advertisement expenses – No evidence that expenditure was excessive or unreasonable – Disallowance was held to be not valid. 994
Tribunal held that as there was no evidence that expenditure was excessive or unreasonable, disallowance was held to be not valid. (AY. 2009-10)
Dy. CIT v. International Institute of Planning and Management P. Ltd. (2015) 41 ITR 733 / (2016) 157 ITD 579 (Delhi)(Trib.)

S.40A(A)(2) : Expenses or payments not deductible – Excessive or unreasonable – Administrative support services fee – *Ad hoc* disallowance – Disallowance was not justified. 995
Company rendering services to assessee not in category of persons enumerated under section 40A(2)(b). Failure to point out any particular expenditure excessive or unreasonable. AO cannot make an *ad hoc* disallowance. (AY. 2008-09)
Cisco Systems Capital (India) P. Ltd. v. Add. CIT (2015) 37 ITR 343 (Bang.)(Trib.)

S.40A(3) : Expenses or payments not deductible – Cash payments exceeding prescribed limits – Assessment on estimate basis no disallowance can be made. 996
Dismissing the appeal of revenue the Court held that where the assessable income was arrived at by applying a percentage rate, the exercise would take care of everything and there is no need for the Assessing Officer to make a scrutiny of the amount incurred on purchases by the assessee for the purposes of disallowance under section 40A(3) of the Act.(AY. 2002-03, 2003-04, 2004-05)
CIT v. Amman Steel and Allied Industries (2015) 377 ITR 568 (Mad.)(HC)

S.40A(3) : Expenses or payments not deductible – Cash payments exceeding prescribed limits – Film artist – Costumes, makeup at different places – Deletion of expenses was held to be justified. [S.260A] 997
Assessee was a leading film artist and claimed professional expenditure. Assessing Officer disallowed some of expenses claimed by assessee in excess of ₹ 20,000 in terms of section 40A(3) and other expenses claimed were disallowed for want of evidence. However, Commissioner (Appeals) held that incurring of expenditure by assessee at different places where shooting took place could not be ruled out and there was

reasonableness in claim of assessee insofar as expenses on costumes, makeup, wig material, travelling expenses etc. Tribunal confirmed order of Commissioner (Appeals). Dismissing the appeal of revenue the Court held that since issue involved was a pure question of fact, appeal against order of Tribunal was to be dismissed.(AY. 2007-08, 2008-09)
CIT v. R.S. Suriya (2015) 232 Taxman 126 (Mad.)(HC)

998 **S.40A(3) : Expenses of payments not deductible – Cash payments exceeding prescribed limits – Amendment of aggregation of payments in a single day is applicable w.e.f. 1st April, 2009.**
During the year under consideration, the assessee made various purchases of ₹ 1,38,43,525/- from two parties in respect of which payments were made in cash. The assessee was required to make payments in cash for the reason that the assessee was new in business and had a small capital base of ₹ 10 lakhs, therefore, distributors were not ready to extend the credit even for a single or two days.
The AO and CIT(A) disallowed the said payment u/s. 40A(3). However, the Tribunal deleted the addition so made.
The Revenue carried the matter to the Delhi High Court and the Hon'ble High Court concurred with the view of the Tribunal on the ground that there are several mitigating factors to show and establish commercial expediency and reasons for making the purchases in cash, which have not been disputed. Further, amendment to Section 40A(3) relating to "aggregation" of payments made to a person in a single day is not applicable as the same is effective from 1 April 2009 i.e. AY. 2009-10 onwards.
CIT v. Hitesh Bansal (2015) 113 DTR 433 (Delhi)(HC)

999 **S.40A(3) : Expenses or payments not deductible – Cash payments exceeding prescribed limits – Fish purchased from fisherman/headman of fisher, no disallowance could be made even if payment in cash exceeded Rs. 20,000. [R. 6DD]**
The assessee was a 100 per cent Export Oriented Unit engaged in the export of fish. Out of total purchase of fish the assessee procured fish from fisherman/headman of fisher against cash payment of ₹ 1.40 crore.
The Assessing Officer disallowed the payment under section 40A(3) on ground that the assessee failed to produce identity of sellers and genuineness of purchases. On appeal, the First Appellate Authority enhanced the addition by disallowing 20 per cent of the entire expenditure. On appeal, the Tribunal deleted the addition. On appeal, dismissing the appeal the Court held that; the assessee has purchased the fish from the fisherman or the headman of the fisher and once the purchase is made of fish from the aforesaid persons, no disallowance under sub-section (3) shall be made, even if any portion in a sum exceeding twenty thousand rupees is made to a person in a day, otherwise than by a crossed cheque drawn on a bank or an crossed bank draft in the cases of bank draft. Therefore, the order passed by the Tribunal holding that section 40A(3) is not attracted to the facts of this case, is proper and cannot be found fault with.
CIT v. Blue Water Foods & Exports (P.) Ltd. (2015) 231 Taxman 377 (Karn.)(HC)

S.40A(3) : Expenses or payments not deductible – Cash payments exceeding prescribed limits – No disallowance can be made if cash payment exceeding prescribed limit directly deposited in bank account of supplier. [R.6DD] 1000

The assessee is in the business of retail trading of poultry feeds. The Assessing Officer observed that the assessee has made cash payments in excess of ₹ 20,000 to the suppliers from whom it purchased poultry feeds. The Assessing Officer therefore, made disallowance invoking section 40A(3) read with rule 6DD of the Act. On appeal, the CIT(A) confirmed the action of the Assessing Officer. On appeal, the Appellate Tribunal held that since the genuinely of the payments made to the suppliers is not doubted by the revenue, the provisions of section 40A(3) cannot apply. It is observed that the assessee had taken enough precautions from his side to ensure that the payee don't escape from the ambit of taxation on these receipts by directly depositing the cash in the bank account of the payee. Thus, the disallowance under section 40A(3) of the Act is unjustified. (AY. 2008-09)

Rampada Panda v. ITO (2015) 44 ITR 691 / (2016) 156 ITD 784 (Kol.)(Trib.)

S.40A(3) : Expenses or payments not deductible – Cash payments exceeding prescribed limits – No material is brought on record by the AO – Disallowance is held to be not justified. 1001

Assessing Officer made disallowance under section 40A(3) in case of assessee. No material was brought on record for quantification of probable cash expenditure which would be hit by mischief of section 40A(3). Moreover, tax audit report did not list out cases which attracted provisions of section 40A(3). Said disallowance could not be sustained.(AY.1999-2000)

Amitabh Bachchan Corpn. Ltd. v. Dy. CIT (2015) 68 SOT 217 (URO)(Mum.)(Trib.)

S.40A(3) : Expenses or payments not deductible – Cash payments exceeding prescribed limits – Amendment w.e.f. 1st April, 1996 restricting the disallowance at 20 per cent being substantive in nature, it cannot be applied retrospectively.[S.158B(b)] 1002

Dismissing the appeal of assessee the Court held that, amendment made in section 40(A)(3) w.e.f 1st April, 1996 restricting disallowance to 20% being substantive in nature, it cannot be applied retrospectively and therefore, the benefit of this amendment cannot be allowed over the entire block period beginning from 1st April, 1986 and ending on 13th September, 1996, simply because the date of amendment falls within the aforesaid block period.[BP.1-41986 TO 13-9-1996)

M.G. Pictures (Madras) Ltd. v. ACIT (2015) 373 ITR 39 / 278 CTR 105 / 231 Taxman 241 (SC)

S.40A(3) : Expenses or payments not deductible – Cash payments exceeding prescribed limits – Amendment made in section 40A(3) by Finance Act, 2008 was prospective in-operation, Assessing Officer was not justified in levying taxes on basis of amended provision. 1003

Dismissing the appeal of revenue the Court held that In the instant case, the proviso 40A(3) prior to amendment only prohibited incurring of expenditure in respect of which a payment is made in a sum exceeding twenty thousand rupees otherwise than by an

account payee cheque drawn on a bank or account payee bank draft was not allowed of the deduction, when the law was amended on 1-4-2009 by Finance Act, 2008, when the word 'aggregate of payments' made to a person in a day was inserted. It means till the date even if such payment is made by virtue of the earlier provision, the assessee would not be denied the benefit of deduction. When the assessee was enjoying the benefit till the date of amendment, by this amendment tax cannot be levied retrospectively, it would cause great hardship. Therefore, the authority were not justified in holding that the said provision is retrospective and levying taxes on the basis of the said amended provision. In that view, certainly it was not clarificatory in nature. Therefore, the first substantial question of law is answered in favour of the assessee and against the revenue.(AY. 2005-06)

A.N. Swarna Prasad v. Addl. CIT (2015) 230 Taxman 536 (Karn.)(HC)

1004 **S.40A(3) : Expenses or payments not deductible – Cash payments exceeding prescribed limits – Arrack contractor – Disallowance was held to be justified. [R.6DDJ]**

Assessee, an arrack contractor, paid a certain sum in cash to bottlers appointed by Government and claimed that bottling agents demanded for cash payment. Assessing Authority held that assessee being a regular customer of bottling agent, payment should have been made in accordance with section 40A(3) and, therefore, he disallowed cash payment under section 40A(3). However, Tribunal held that rule 14 of Rules permits cash transactions in regard to arrack trade between Government and persons like assessee and, thus, assessee's case fell under exception in rule 6DD(j). On appeal by revenue, allowing the appeal the Court held that since rule 14 does not apply to purchase of liquor but it applies only to sale of liquor by assessee to its customers, said payment did not fall within section 6DD(j) so as to get exemption from application of section 40A(3). (AY. 1988-89)

CIT v. Panduranga Enterprises (2015) 230 Taxman 631 (Karn.)(HC)

1005 **S.40A(3) : Expenses or payments not deductible – Cash payments exceeding prescribed limits – Where income of assessee is computed by applying gross profit rate, section 40A(3) need not be invoked [S. 145].**

Where income of assessee is computed by applying gross profit rate, section 40A(3) need not be invoked.

CIT v. Gobind Ram (2015) 229 Taxman 491 (P&H)(HC)

1006 **S.40A(3) : Expenses or payments not deductible – Cash payments exceeding prescribed limits – Octroi duty – No disallowance can be made. [R.6DD(b)]**

Octroi duty paid by assessee to Municipal Corporation on goods transported within municipal limits did not come under provisions of section 40A(3), read with rule 6DD(b) and, therefore, impugned disallowance made in respect of said payment deserved to be deleted. (AY. 1988-89)

CIT v. Arvind Mills Ltd. (2014) 52 taxmann.com 475 / (2015) 228 Taxman 358 (Mag.) (Guj.)(HC)

S.40A(3) : Expenses or payment not deductible – Cash payments exceeding prescribed limits – Payment for purchase of land on Sunday – Exceptional circumstances – Covered under rule 6DD(j) – Disallowance not proper. [R. 6DD(j)] 1007

The assessee proposed to purchase land and fixed the date for registration of sale deed on March 28, 2010. The assessee had made the payment on the date of registration, which was a Sunday. The Assessing Officer disallowed the cash payment under section 40A(3) of the Income-tax Act, 1961, on the view that though the assessee had plenty of time before March 28, 2010, the payment had been made on Sunday and the assessee had not shown any exceptional circumstances why it was necessary to make the payment on Sunday. The Commissioner (Appeals) confirmed the order of the Assessing Officer. On appeal:

Held, allowing the appeal, that admittedly, it was realised later on that March 28, 2010 was Sunday and in order to execute the sale deed, the assessee paid cash on that date itself. When an agreement provided for a payment on or before a particular date, it was not necessary that just to meet the technical requirement of income-tax provisions, payment should be made earlier. The payment made on March 28, 2010, which fell on a Sunday was covered by the exception provided under rule 6DD(j) of the Income-tax Rules, 1962. The disallowance was to be deleted. (AY. 2010-11)

Hi Tech Land Developers and Builders v. Addl. CIT (2015) 38 ITR 355 / 69 SOT 245 (Chd.)(Trib.)

S.40A(3) : Expenses or payments not deductible – Cash payments exceeding prescribed limits – No bank account at place of purchase – Genuineness of purchases was not doubted – Disallowance was held to be not justified. 1008

The assessee, engaged in wholesale trade of iron and steel, purchased goods and made payment in cash. The Assessing Officer made addition on the ground that the payments exceeded ₹ 20,000, in contravention of provisions of section 40A(3) of the Income-tax Act, 1961. The Commissioner (Appeals) confirmed the order of the Assessing Officer. On appeal :

Held, allowing the appeal, that it was submitted that the assessee had no bank account at the place of purchase and the cash payments were made on the demand of the seller. The genuineness of the purchases had not been doubted by the Assessing Officer. The disallowance of expenses under section 40A(3) was not justified. (AY. 2008-09)

Radha Shyam Panda v. ITO (2015) 37 ITR 386 (Cuttack)(Trib.)

S.40A(5) : Expenses or payments not deductible – Company – Limit – Expenses on motor car – Rule relating to computation of such benefit or perquisite in hands of employee not relevant. [R.3] 1009

Court held that to compute the disallowance in respect of the perquisite value on account of motor car, rule 3 of the Income-tax Rules, 1962, relating to computation of the perquisite value in the hands of the employee was not justified. *CIT v. British Bank of Middle East [2001] 251 ITR 217 (SC)* followed. Question was decided against the assessee. (AY. 1986-87, 1987-88)

CIT v. Dharamsi Morarji Chemicals Co. Ltd. (2015) 373 ITR 545 (Bom.)(HC)

1010 **S.40A(5) : Expenses or payments not deductible – Company – Limit – Premium for group insurance policy – Not salary or perquisite – No disallowance could be made.**
That the Tribunal held that the premium of group insurance should not be considered as salary or perquisites for disallowance under section 40A(5). If the Tribunal had found that the earlier decisions and orders rendered in the case of the very assessee were applicable on facts and deserved to be followed then the question could not be termed as substantial question of law. Therefore, the Tribunal was right in law in confirming the order of the Commissioner (Appeals) that the premium of group insurance policy should not be considered as salary or perquisite for disallowance under section 40A(5). (AY. 1986-87, 1987-88)
CIT v. Dharamsi Morarji Chemicals Co. Ltd. (2015) 373 ITR 545 (Bom.)(HC)

1011 **S.40A(9) : Expenses or payments not deductible – Contribution to medical benefit scheme by assessee to its retired employees – Payment not deductible. [S. 36]**
The assessee contributed to the medical benefit scheme for the benefit of its retired employees. This amount was disallowed by the Assessing Officer. However, the Commissioner (Appeals) set aside the order of the Assessing Officer and allowed the deduction. The Tribunal held that the assessee was entitled to claim deduction of the contribution made by it. On appeal:
Held, allowing the appeal, that section 40A of the Income-tax Act, 1961, which starts with the non obstante clause. Prior to its amendment by the Finance Act, 2011, as per sub-section (9) introduced by the Finance Act, 1984, with effect from April 1, 1980, deduction of payments for the purposes and the extent provided alone was permitted. The assessee did not have a case that the contribution made by it to the pension fund was payment which was permitted under section 36. Thus, in view of section 40A(9), the payment made by the assessee could not have been allowed to be deducted and its disallowance by the Assessing Officer was perfectly in line with the statutory provisions. (AY.2006-07)
CIT v. State Bank of Travancore (2015) 378 ITR 219 / (2016) 130 DTR 399 (Ker.)(HC)

1012 **S.40A(9) : Amounts not deductible – Contribution to employees' welfare trust, etc. – No disallowance can be made if contribution is made before due date of filing of return.**
If contributions to employees welfare trust are made before due date of filing return, no disallowance is to be made. (AY.2006-07)
Dy. CIT v. Unique International (P.) Ltd. (2015) 68 SOT 73 (URO)(Kol.)(Trib.)

Section 41 : Profits chargeable to tax.

1013 **S.41(1) : Profits chargeable taxation – Remission or cessation of trading liability – Sales Tax Tribunal declining to grant credit of payment made to SICOM and notice of demand issued – No cessation – Sales tax cannot be taxed.**
On appeals by the Department.
Dismissing the appeals, the court held, that the Sales Tax Tribunal had declined to grant credit to the assessee of payment which was made to the State Industrial and Investment Corporation of Maharashtra Limited of Maharashtra and a notice of demand was issued under the Bombay Sales Tax Act, 1959, to the assessee. Clearly, the assessee

had not been granted the benefit of the cessation for the assessment years in question, and one of the requirements for the applicability of section 41(1)(a) of the Act had not been fulfilled. (AY. 2000-01, 2001-02)
CIT v. SI Group India Ltd. (2015) 379 ITR 326 / (2016) 283 CTR 237 / 238 Taxman 326 (SC)
Editorial : Decision in S. I. Group India Ltd. v. ACIT [2010] 326 ITR 117 (Bom) is affirmed.

S.41(1) : Profits chargeable tax – Remission or cessation of trading liability – Expenditure incurred to earn income is said to be allowable in arriving at business income. 1014
Allowing the appeal of assessee the Court held that Once income on written back balances is assessed as business income by virtue of section 41(1), expenditure incurred to earn said income has to be allowed as deduction in arriving at business income.(AY. 2002-03)
Karnataka Instrade Corporation Ltd. v. ACIT (2015) 235 Taxman 374 (Karn.)(HC)

S.41(1) : Profits chargeable to tax – Remission or cessation of trading liability – Waiver of loan was held to be not taxable. 1015
Dismissing the appeal of revenue the Court held that waiver of sums by creditors including part of principal. Principal waived not debited into profit and loss account in earlier years or claimed as deduction was held to be not taxable. (AY. 2007-08)
CIT v. Pasupati Spinning Weaving Mills Ltd. (2015) 378 ITR 80 (Delhi)(HC)

S.41(1) : Profits chargeable to tax – Remission or cessation of trading liability – Amounts shown for several years as due to sundry creditors – Amounts not written off during relevant previous year – Genuineness of credits not doubted – Amount not assessable. 1016
Dismissing the appeal of revenue the Court held that the sundry creditors mentioned in the balance-sheet of the assessee were shown as sundry creditors for several years before the relevant assessment year and at no point of time earlier had the Assessing Officer doubted the creditworthiness or identity of the creditors. There was no remission or cessation of the liability during the previous year relevant to the assessment year under consideration. The deletion of the addition was justified.(AY. 2007-08)
PCIT v. Matruprasad C. Pandey (2015) 377 ITR 363 / 59 taxmann.com 428 (Guj.)(HC)

S.41(1) : Profits chargeable to tax – Remission or cessation of trading liability – Amount claimed to be loan – Forfeiture of loan – Amount not assessable. 1017
Court held that the Tribunal has given the finding that in the assessee's books of account for 1993-94, the amount of ₹ 10.65 crores was shown to be a loan from SFT. They were loans and not trading receipts or loss from expenditure – the other instances attracting section 41(1). The forfeiture of the loan did not constitute income chargeable to tax in the assessment year 1996-97. (AY. 1996-97)
CIT v. Velocient Technologies Ltd. (2015) 376 ITR 131 / 280 CTR 142 / 60 taxmann.com 353 (Delhi)(HC)

1018 **S.41(1) : Profits chargeable to tax – Remission or cessation of trading liability – Credit balances written off were not exempt from taxation when proper records were not submitted before lower authorities to prove that the amounts were already offered to tax in earlier years.**
The assessee wrote of unclaimed credit balances in its books of account but excluded the same while computing its taxable income. The same was disallowed by the AO. The CIT(A) and Tribunal gave relief to the assessee on the basis that that the credit balances occurred due to wrong accounting by the assessee in its books and that they were already included in the sales turnover of earlier years. The HC set aside the order of the Tribunal since the Tribunal had assumed that the amounts were verified by the CIT(A) whereas, no records were actually submitted by the assessee to the CIT(A). Issue restored to the AO for fresh adjudication. (AY. 1999-2000)
CIT v. McDowell & Co. Ltd. (2015) 116 DTR 75 (Karn.)(HC)

1019 **S.41(1) : Profits chargeable to tax – Remission or cessation of trading liability – Sales tax liability – Not liable to tax.**
Cessation of sales tax liability was not liable to tax under section 41(1). Followed *CIT v. Sulzer India Ltd. (2014) 369 ITR 717 (Bom.)(HC)*.(AY. 2003-04)
CIT v. Colgate Palmolive (I) Ltd. (2015) 370 ITR 728 (Bom.)(HC)

1020 **S.41(1) : Profits chargeable to tax – Remission or cessation of trading liability – Agreement not prescribing time limit beyond which assessee would be free from discharging liability – Liability existed in books of debtor and creditor – Cannot be treated as income. [Limitation Act, 1963, s. 18]**
Assessee is in agreement with M/s. Airtime Marketing & Sales India Pvt. Ltd. (AMSIPL). As per agreement, AMSIPL is responsible for generation of revenue to the assessee on a profit sharing basis and the assessee had agreed to pay the expenses incurred by AMSIPL in case of positive revenue generation. AO invoked 41(1) on the basis that assessee had not paid the liabilities in line with the agreement and since more than three years has lapsed, outstanding liabilities were barred by limitation and it ceased to exist. CIT(A) deleted the addition. On appeal, ITAT held that since profits were not generated company could not pay to the creditor and creditor could also not enforce the payment, till profits being generated. However, the agreement does not prescribe any time limit beyond which the appellant will be free from discharge the liability to the said party and, therefore, it is not correct to assume that such liability has seized to exist. Such liability remained unpaid does not imply that it has seized to exist in view of Limitation Act, 1963. The aforesaid liability exist in the books of account of both the debtor and the creditor. Also, Hon'ble Supreme Court in case of *Mahabir Cold Storage v. CIT [1991] 188 ITR 91 (SC)* held that the entries in the books of account of the assessee would amount to an acknowledgment of the liability within the meaning of section 18 of the Limitation Act, 1963, and extend the period of limitation for the discharge of the liability as debt. (AY. 2007-08 to 2009-10)
DCIT v. Hitz FM Radio India Ltd. (2015) 44 ITR 318 (Delhi)(Trib.)

S.41(1) : Profits chargeable to tax – Remission or cessation of trading liability – Amount continued to be shown as creditors in the Balance Sheet – Liability has not ceased to exist – No addition to be made. 1021

The books of the assessee showed certain creditors who were having opening balances and there were no purchases during the year under consideration. The Assessing Officer made an addition u/s. 41(1) mentioning that the liability is not existing at present. It was held that as per Explanation 1 to section 41(1), if the assessee has written back the liability in his accounts then it will be considered that even by unilateral act of the assessee, there is remission or cessation of the liability. But in the assessee's case, the assessee has not written back the liability in his accounts. In the light of these provisions of section 41(1) and the judgment of Hon'ble Supreme Court in the case of Kesaria Tea Co. [2002] 254 ITR 434 (SC) and another judgment of Hon'ble Supreme Court rendered in the case of *CIT v. Sugauli Sugar 236 ITR 518*, the addition made by the Assessing Officer was held to be not sustainable.(AY.2009-10)

ITO v. Sheikh Abdul Farid (2015) 170 TTJ 49 (UO) / 40 ITR 337 (Luck.)(Trib.)

S.41(1) : Profits chargeable to tax – Remission or cessation of trading liability – Cash credits – Old unclaimed liabilities which are not written back by the assessee can neither be assessed as "cash credits" u/s. 68 nor assessed u/s. 41(1) as "remission or cessation of liability". [S.68] 1022

The assessee claimed that addition u/s. 68 of the Act could not be made because the credits in question did not relate to the previous year relevant to AY 2009-10 and therefore the provisions of section 68 will not be attracted. On the question of cessation of liability, it was assessee submitted that there is no evidence brought on record to show that liability of the assessee vis-à-vis creditors has ceased to exist. HELD by the Tribunal:

(i) In Shri Vardhaman Overseas Ltd. 343 ITR 408 (Del.) it has clearly laid down that neither section 41(1) nor section 68 of the Act can be applied. On the applicability of section 68, we are of the view that those provisions will not apply as the balances shown in the creditors account do not arise out of any transaction during the previous year relevant to AY 2009-10. The provisions of sec. 68 are clear inasmuch as they refer to "sum found credited in the books of account of an assessee maintained for any previous year". Since the credit entries in question do not relate to previous year relevant to AY 2009-10, the same cannot be brought to tax u/s. 68 of the Act. The proper course in such cases for the Revenue would be to find out the year in which the credits in question were credited in the books of account and thereafter make an enquiry in that year and make an addition in that year, if other conditions for applicability of section 68 are satisfied.

(ii) As far as applicability of section 41(1) of the Act is concerned, Explanation 1 which was inserted w.e.f. 1-4-1997 is not attracted to the present case since there was no writing off of the liability to pay the sundry creditors in the assessee's accounts. The question has to be considered *de hors* Explanation 1 to Section 41(1). In order to invoke clause (a) of Sec.41(1) of the Act, it must be first established that the assessee had obtained some benefit in respect of the trading liability which was earlier allowed as a deduction. There is no dispute in the present case that the amounts due to the sundry creditors had been allowed in

the earlier assessment years as purchase price in computing the business income of the assessee. The second question is whether by not paying them for a period of four years and above the assessee had obtained some benefit in respect of the trading liability allowed in the earlier years. The words "remission" and "cessation" are legal terms and have to be interpreted accordingly. In the present case, there is nothing on record to show that there was either remission or cessation of liability of the assessee. In fact, there is no reference either in the order of the AO or CIT(A) to the expression "remission or cessation of liability". In such circumstances, we are of the view that the provisions of section 41(1) of the Act could not be invoked by the Revenue. In fact the decision of the Hon'ble Delhi High Court in the case of Vardhaman overseas Ltd. (supra) clearly supports the plea of the Assessee in this regard. (ITA No.1078/Bang/2014, dated 07.08.2015) (AY. 2009-10)

Glen Williams v. ACIT (Bang.)(Trib.); www.itatonline.org

1023 **S.41(1) : Profits chargeable to tax – Remission or cessation of trading liability – Lenders confirmed – Additions cannot be made.**

As regards addition on account of unsecured loans, the authorities below failed to take note of the fact that lender had confirmed the balances due to assessee and assessee was continuously making efforts to repatriate the dues to foreign company. In fact, a part of amount of loans was repatriated also and therefore, there was no case for making additions under section 41(1). Accordingly the impugned addition under section 41(1) was not warranted. (AY. 2009-10)

UEM India (P.) Ltd. v. ACIT (2015) 67 SOT 215 (URO)(Delhi)(Trib.)

1024 **S.41(1) : Profits chargeable to tax – Remission or cessation of trading liability – Unclaimed liabilities are deemed to have been remitted/ceased and are taxable in the year of discovery by AO.**

The assessee has not written back the amount payable as liabilities. The AO assessed the said liability being not proved to be an existing liability. On appeal by assessee dismissing the appeal of assessee the Tribunal held that. The deeming provision of section 41(1)(a), applicable in the instant case, is *qua* the benefit by way of cessation or remission of a trade liability in respect of an expenses of business or profession, as the income of business or profession for the year of such cessation or remission. Our second observation is that the cessation or remission of liability is a matter of fact, and which would therefore require being proved. The onus to establish that the conditions of taxability stand satisfied is always on the Revenue. In the present case, the Revenue states of the liabilities continuing to outstand in the assessee's books from 3 to 25 years. Surely, the same raises considerable doubts as to the existence of the liability/s. True, they stand not written back and continue to outstanding the assessee's books, but that is precisely the reason for the same being questioned by the Revenue, or entertaining doubts about the same. The doubt can by no means be considered as not valid, being in accord with the common practice and, thus, discharging the onus that law places on the Revenue. The accounting entries or the treatment that the assessee accords to an asset or liability in its books is not determinative of the matter. Again, the presumption

would only be of the same representing the true state of affairs, but the inordinate delay in discharging the same raises considerable and valid doubt as to the existence of those liabilities as at the relevant year-end, i.e., as a fact. The onus on the Revenue, thus, gets discharged and shifts to the assessee, who is in effect only being called upon to show that the position as stated in its accounts reflects the true and correct position. A trading liability would normally get settled within a period of one or two months of its arising, while in the instant case years and years have passed. The same leads to the question: Why were the same not paid in the normal course and, rather, not paid at all? Is the matter disputed – if so, to what extent, and which shall again have to be demonstrated. In fact, after the lapse of considerable time, it becomes doubtful if the creditor exists, who may have moved to a different place; discontinued business, etc. No material or evidence or even explanation is forthcoming from the assessee. The only inference under the circumstances is that the liability no longer exists. Per contra, the assessee has obtained a benefit by way of remission or as the case may be cessation of liability. An inference of fact is again only a finding of fact, drawn in consistence and in harmony with in the conspectus of the facts and circumstances of the case. The next question that arises is as to the year of taxability, and which is the year of remission or cessation of liability. The assessee having claimed it as a liability for the immediately preceding year as well, and which stood accepted by the Revenue, would preclude the assessee from contending that the liability was not existing, or was in fact not a liability even as at the end of the immediately preceding year. That is, it is not open for the assessee to turn back and say that you accepted my lie for the preceding year/s and, therefore, you are bound by it. The only consequence in law is that the cessation or remission has occurred during the relevant previous year. We are in this regard, with respect, unable to agree with the Hon'ble High Court in the case of Bhogilal Ramjibhai Atara (supra) that the law is not clueless in this regard; the said decision having been rendered without considering the decision by the said court in Hides & Leather Products Pvt. Ltd. [1975] 101 ITR 61 (Guj.). It needs to be appreciated that when the knowledge of the facts is in the possession of a particular person, it is he alone who can, and whom the law contemplates to exhibit it, in the absence of which an adverse inference, as applicable under the circumstances, shall obtain. Appeal of assessee was dismissed. (AY. 2007-08)
Natural Gas Company Pvt. Ltd. v. DCIT (2015) 171 TTJ 278 / 121 DTR 86 / 70 SOT 1 / 44 ITR 208 (Trib.)(Mum.)

S.41(1) : Profits chargeable to tax – Remission or cessation of trading liability – Applying commonsense approach, unclaimed liabilities are assessable as income even if not credited to P&L A/c. [S. 4] 1025

If an amount is received in course of trading transaction, even though it is not taxable in the year of receipt as being of revenue character, the amount changes its character when the amount becomes the assessee's own money because of limitation or by any other statutory or contractual right. When such a thing happens, commonsense demands that the amount should be treated as income of the assessee. Fact that amount is not credited to the P&L A/c & is shown as a liability makes no difference if creditor has written off the debt (ITA No. 1763/Mum/2012, dt. 18-2-2015) (AY. 2003-04)
Genre Export Pvt. Ltd. v. ITO (Mum.)(Trib.); www.itatonline.org

1026 **S.41(1) : Profits chargeable to tax – Remission or cessation of trading liability – Failure to establish genuineness of old liabilities means that there is a remission/ cessation of such liabilities – Addition was held to be justified. [S. 68]**

The assessee failed to furnish the details in respect of sundry creditors amounting to ₹ 23,34,721/-. Admittedly, these credits continued to be carried forward year after year. In the normal course everybody would ordinarily claim the dues and usually they take steps to recover the dues if it is a genuine liability. In this case, the liability remains to be recovered year after year. For invoking provisions of section 68 of the Act, if any sum is to be found credited in the books of the assessee maintained during the previous year, only then it would be possible to make addition under section 68 of the Income-tax Act. In the case of carried forward credit, which is from earlier year, provisions of section 68 cannot be applied. In the present case, the liabilities outstanding in the books of account of the assessee for the assessment year under consideration and only the provisions of the section 41(1) of the Act could be applied. In the present case the assessee failed to establish the actual existence of the impugned disputed amount in the books of account of the assessee. The assessee has drawn its balance sheet based on its books of account, in which the above amount, were being claimed as liabilities due, to various parties, as at the end of the accounting year under dispute. However, the assessee failed to establish the genuineness of these liabilities by producing supporting evidence. Simply the liabilities being reflected against certain names in the books of account would not establish the genuineness of liabilities. Addition was held to be justified. (AY. 2007-08)

Bharat Dana Bera v. ITO (2015) 39 ITR 632 / 153 ITD 421 / 169 TTJ 721 (Mum.)(Trib.)

1027 **S.41(2) : Profits chargeable to tax – Balancing charge – Set off of unabsorbed depreciation has to be allowed though no business was carried on during the relevant year. [S. 32(2)]**

Allowing the appeal of assessee the Court held that where amount realized by assessee by sale of building, plant and machinery was treated as income arising out of profits and gains from business by virtue of sub-section (2) of section 41, notwithstanding fact that assessee was not carrying on any business during relevant assessment year, provisions contained in sub-section (2) of section 32 would become applicable and, consequently set-off had to be given for unabsorbed depreciation allowances of previous year brought forward in terms of said provision. (AY. 2002-03)

Karnataka Instrade Corporation Ltd. v. ACIT (2015) 235 Taxman 374 (Karn.)(HC)

Section 42 : Special provision for deductions in the case of business for prospecting, etc., for mineral oil.

1028 **S.42 : Business of prospecting etc. – Mineral oils – Production Sharing Contract entered into with the Govt. – Conditions not satisfied – Not entitled to claim legitimate expectation – Assessee not entitled to seek direction from court to read such provision in to contract – Extraordinary remedy of writ under Article 226 or 32 of the Constitution cannot be invoked in pure contractual matters. ore. [Constitution of India Articles 32, 226, 229]**

(i) First and foremost aspect which has to be kept in mind while answering this issue is that the Income Tax Authorities while making assessment of income of any

assessee have to apply the provisions of the Income-tax Act and make assessment accordingly. Translating this as general proposition contextually, what we intend to convey is that the Assessing Officer is supposed to focus on section 42 of the Act on the basis of which he is to decide as to whether deductions mentioned in the said provision are admissible to the assessee who is claiming those deductions. In other words, the Assessing Officer is supposed to find out as to whether the assessee fulfils the eligibility conditions in the said provision to be entitled to such deductions. We have already reproduced the language of section 42, which deals with special provisions of deductions in the case of business for prospecting, etc. for mineral oil. Since, the appellant herein, in its income tax returns for the assessment year in question, i.e., Assessment Year 2005-06, had claimed the deductions mentioned in Sections 42(1)(b) and (c) of the Act, we should take note of the nature of these deductions. Section 42(1)(b) provides for deductions of expenditure incurred in respect of drilling or exploration activities or services or in respect of physical assets used in that connection, except for those assets on which allowance for depreciation is admissible under Section 32. Section 42(1)(c) speaks of allowances pertaining to the depletion of mineral oil in the mining area. In order to be eligible to the deductions, certain conditions are stipulated in this very section which have to be satisfied by the assessees.

(ii) From the nature of allowances specified in this provision, it is clear that such allowances are otherwise inadmissible on general principles, for example allowances relating to diminution or exhaustion of wasting capital assets or allowances in respect of expenditure which would be regarded as on capital account on the ground that it brings an asset of enduring benefit into existence or constitutes initial expenditure incurred in setting up the profit earning machinery in motion. It is for this reason this Section itself clarifies that the provisions of this Act would be deemed to have been modified to the extent necessary to give effect to the terms of the agreement, as otherwise, the other provisions of the Act specifically deny such deductions. A fortiorari, the PSC entered into between the parties becomes an independent accounting regime and its provisions prevail over generally accepted principles of accounting that are used for ascertaining taxable income (See *Commissioner of Income Tax, Dehradun & Anr. v. Enron Oil and Gas India Limited (2010) 327 ITR 626*). Thus, by virtue of this Section, it is the PSC which governs the field as without it, such deductions are not permissible under the Act. If PSC also does not contain any stipulation providing for such allowances, the Assessing Officer would be unable to give the benefit of these deductions to the assesee.

(iii) This Court held in *CIT v. Enron Expat Service Inc. (2010) 327 ITR 626* that the mere fact that the assessee had offered to pay tax under Section 44(BB) of the Act in some of the earlier years will not operate as an estoppel to claim the benefit of Double Taxation Avoidance Agreement (DTAA), where the assessee operates under the same PSC which was before the Court. While holding so, the Court had followed its earlier judgment in the case of Enron Oil and Gas India Limited (2008) 15 SCC 33 (Supra).

(iv) In the present case, it is an admitted fact that conditions mentioned in Section 42 of the Act are not fulfilled. In the two PSCs, no provision is made for making

admissible the aforesaid allowances to the assessee. It is obvious that the Assessing Officer could not have granted these allowances/deductions to the assessee in the absence of such stipulations, a mandatory requirement, in the PSCs. (AY. 2001-02 to 2005-06)

Joshi Technologies International Inc v. UOI (2015) 374 ITR 322 / 119 DTR 313 / 277 CTR 409 / 232 Taxman 201 (SC)

Editorial: Joshi Technologies International Inc v. UOI (2013) 353 ITR 86 / 268 CTR 41/ 102 DTR 51 (Delhi)(HC) is affirmed.

Section 43 : Definitions of certain terms relevant to income from profits and gains of business or profession.

1029 **S.43(1) : Actual cost – Written down value – Subsidy – Block of assets – Provision is prospective – Reduction of subsidy from written down value was not permissible. [S. 2(11), 43(6), (43(1), Expln. 10]**

Assessee constructed building and installed machinery in 1993-94 which are forming part of block of assets. Assessee received Subsidy in 2000-01. Assessing officer held that subsidy having been given against investments in fixed capital assets, in view of the provisions of Explanation 10 to section 43(1), the proportionate cost of assets was required to be reduced to the extent of subsidy received because this cost has been met by the State Government in the form of subsidy. Order of Assessing Officer was confirmed by the appellate authorities. On appeal by assessee allowing the appeal the Court held that provision requiring exclusion of subsidy from cost not in force at time of computation of actual cost. Subsidy received much after determination of actual cost by reduction of subsidy from written down value not permissible. (AY. 2000-01)

Banco Products (I) Ltd. v. Dy. CIT (2015) 379 ITR 1 / (2016) 131 DTR 201 / 286 CTR 326 (Guj.)(HC)

1030 **S.43(1) : Actual cost – Depreciation – Disallowance of depreciation on enhanced cost by invoking Explanation 3 to section 43 was held to be not justified. [S. 43(3)]**

Assessee-company acquired running business of EMP at a slump sale. Assessing Officer found that assessee enhanced value of assets as WDV of assets shown in books of seller and, therefore, disallowed excess depreciation. Dismissing the appeal of revnue the Court held that where at time of acquisition of assets, assessee had no income to reduce its tax liability by way of said transaction, Assessing Officer was in error in invoking Explanation 3 to section 43 for disallowance of excess depreciation. (AY. 1998-99, 1999-2000, 2001-02 & 2002-03)

CIT v. Sandvik Chokshi Ltd. (2015) 230 Taxman 546 (Guj.)(HC)

CIT v. Sandvik Chokshi Ltd. (2015) 230 Taxman 319 (Guj.)(HC)

1031 **S.43(1) : Actual cost – Depreciation – Determination of actual cost of running undertaking – Valuation on the basis of surveyor.**

Assessee had acquired a running undertaking with all the assets and liabilities was acquired by assessee for ₹ 6 crores or so. Assessee appointed a surveyor who computed and valued the fixed assets to be transferred at ₹ 3.5 crores. Held that actual cost of

assets for depreciation was rightly taken as ₹ 3.5 crores. To hold it to the contrary would be ignoring the information and material which formed the very basis of transfer relied by assessee. (AY. 1990-91, 1991-92)
De Nora India Ltd. v. CIT (2015) 370 ITR 391 / 114 DTR 89 / 274 CTR 34 (Delhi)(HC)

S.43(1) : Actual cost – Depreciation – Purchase of second hand wind mill a few days before close of previous year 2008-09 – Question of determination of "actual cost" arises only for assessment year 2009-10 – Depreciation for 2010-11 to be re-worked on written down value determined for assessment year 2009-10 – Matter remanded.[S. 32] 1032
The assessee purchased a second hand wind mill on March 23, 2009 and claimed depreciation for the assessment year 2010-11. As the seller had already claimed almost full depreciation on the wind mill, the Assessing Officer invoked the provisions of Explanation 3 to section 43(1) of the Income-tax Act, 1961. He determined the cost of the wind mill and after computing depreciation, disallowed the excess. The Commissioner (Appeals) held that the provisions of Explanation 3 to section 43(1) of the Act could not be applied, but determined the cost of wind mill. On appeal by the Department and cross objection by the assessee:
Held, that as the assessee had purchased the wind mill on March 23, 2009, the question of determination of "actual cost" should arise only for the assessment year 2009-10. The assessee had also claimed depreciation for the assessment year 2009-10, and the Assessing Officer had restricted the allowance, against which the assessee had preferred an appeal which was pending before the Commissioner (Appeals). Hence, the issue would depend upon the outcome of the identical disallowance made for the assessment year 2009-10 and the amount determined by the Commissioner (Appeals) for the assessment year 2010-11 was liable to be set aside. Therefore, the issue was restored to the Assessing Officer to re-work the amount of depreciation on the written down value determined for the assessment year 2009-10 after the receipt of order of the Commissioner (Appeals). Matter remanded.(AY. 2010-11)
ITO v. V. Sabithamani (Smt.) (2015) 38 ITR 8 / 69 SOT 154 (Mad.)(Trib.)

S.43(3) : Plant – Shuttering material – Contractor – Cost of plant does not exceed ₹5000 – Not entitled to 100 per cent depreciation. [S.32] 1033
The question before the High Court was whether Tribunal was justified in holding that the assessee was entitled to claim 100 per cent depreciation on the centering/shuttering material. Allowing the appeal of revenue the Court held that Shuttering material though is a plant, every individual article/unit/component of shuttering material cannot be treated as plant and, thus, assessee, a contractor, was not entitled to claim 100 per cent depreciation on centering/shuttering material.
CIT v. S. Vijaya Kumar (2015) 376 ITR 226 / 233 Taxman 132 / 278 CTR 265 (FB)(AP)(HC)

S.43(4) : Scientific research – Expenditure for acquiring rights in scientific research is excluded. 1034
It was held that where scientific research is carried out by somebody else and assessee incurs expenditure for acquiring rights in said scientific research, it is such expenditure which is sought to be excluded under section 43(4)(ii). (AY. 2009-10, 2010-11)
Resil Chemicals (P.) Ltd. v. Dy. CIT (2015) 67 SOT 189 (URO)(Bang.)(Trib.)

1035 **S.43(5) : Speculative transaction – Hedging Transactions – Shares – Held to be business loss and not speculative.[S.28(i), 73]**

Assessee entered into three transactions of sale and purchase of 2850 shares of account between 27/7/1990 to 29/8/1990. Assesee entered into transaction for the purpose of hedging. Assessee suffered loss by reason of the price of the shares continuing to rise. Assessee contended that assessee having hedged by those transactions, suffered a loss by reason of the price of the shares continuing to rise. Since the transactions came within the exception provided for, those could not be said to be speculative transactions. The HC allowed appeal in favour of assessee and held that proviso (b) of S.43(5) does not require an inquiry into the result of the transactions but that it should have entered into for guarding against loss in the holding of stocks and shares. Undisputed facts in the case contained certain ingredients of hedging. Result of those transactions however was gain in the holding of shares of ₹ 14 lakhs, the value of which increased in the holding period of the assessee in the shares in that period. Therefore when ultimately the assessee sold those shares at greater values, it was denied the windfall profit which would have made if and not hedged at all. Therefore loss of ₹ 14.82 lakhs was allowable as business loss. (AY.1991-92)

Maud Tea & Seed Co. Ltd. v. CIT (2015) 370 ITR 603 / 273 CTR 590 / 113 DTR 353 / 232 Taxman 244 (Cal.)(HC)

1036 **S.43(5) : Speculative transaction – Business loss – Contract by member of stock exchange in the nature of jobbing and arbitrage – Not speculative – Loss can be set off against business income. [S.28(i), 73]**

The assessee was a share broker and a member of both the National Stock Exchange and the Bangalore Stock Exchange. The transactions in the nature of jobbing and arbitrage were done to guard against loss which could have arisen in the ordinary course of the assessee's business as a member. Held, the Tribunal was justified in setting aside the order passed by the authorities and allowing the claim of set off of loss on these transactions against business income.)(AY. 2001-02, 2003-04)

CIT v. First Securities P. Ltd. (2015) 370 ITR 72 / 230 Taxman 463 / 121 DTR 279 (Karn.) (HC)

1037 **S.43(5) : Speculative transaction – Forward market order in order to hedge against possible loss – Fluctuations in the currency – Not speculative in nature.[S.80HHC]**

The assessee firm was engaged in the business of manufacturing and trading/export of diamonds. It booked certain foreign exchange against the standing export orders/import liabilities. All those foreign exchange transactions were done with the permission of the Reserve Bank of India. The contracts were booked in the forward market in order to hedge against the possible losses accruing in view of the fluctuations in the currency.

The assessee filed its return claiming deduction under section 80HHC.

The AO rejected assessee's claim taking a view that transaction entered into by assessee fell within definition of 'speculative transaction' attracting proviso (a) to section 43(5).

The Tribunal, however, allowed assessee's claim.

On revenue's appeal:

It is undisputed that once the main business is identified, if some incidental activities or transactions or dealing in foreign exchange is undertaken but that is also related to

some extent to the main business activity, then, it could not be said that the assessee is in speculative business or speculative dealings is ordinarily a part of his business. Appeal of revenue was dismissed. (AY. 2003-04)
CIT v. Vishindas Holaram (2015) 229 Taxman 30 (Bom.)(HC)

S.43(5) : Speculative transaction – Forex forward contract – Forex derivatives – Pure foreign exchange hedging transactions cannot be treated as speculative transactions. 1038
Dismissing the appeal of revenue the Tribunal held that It is clear that the forward contract in question was purely hedging transactions entered into by the assessee to safeguard against loss arising out of fluctuation in foreign currency. Such transactions have been held in the following cases to be not speculative transactions falling within the ambit of S.43(5) of the Act, *CIT v. Soorajmull Nagarmull (1981) 5 Taxman 289 (Cal.), CIT v. Badridas Gauridu (P) Ltd., (2004) 134 Taxman 376 (Bom.), CIT v. Friends and Friends Shipping Pvt. Ltd., Tax Appeal No.251 of 2010 dated 23-8-2011* and *CIT v. Panchmahal Steel Ltd.* Tax Appeal No.131 of 2013 dated 28-3-2013 by the Hon'ble Gujarat High Court.(ITA No. 267/Kol/2013, dated 07.102.15) (AY. 2009-10)
ITO v. LGW Limited (Kol.)(Trib.); www.itatonline.org

S.43(5): Speculation loss – Loss incurred in oil trading in NBOT was a speculative loss – Loss arising in NBOT being genuine claim was to be allowed. [S.28(i)]. 1039
Where loss arising out of trading in NBOT being genuine, claim of speculation loss was to be allowed. Where transactions were not settled by assessee on actual delivery, loss incurred by assessee in oil trading in NBOT was a speculative loss within meaning of section 43(5) (AY. 2006-07 to 2007-08)
ITO v. Shanti Commodities (2015) 171 TTJ 641 / (2016) 156 ITD 34 (Pune)(Trib.)

S.43(5) : Speculative transaction – Hedge transactions – Foreign currency swap option – Speculative in nature. 1040
It was held that where assessee engaged in trading of steel tubes, pipes, PVC, etc., entered into 'foreign currency swap option', provision for loss shown by assessee pertained to those foreign currency transactions, against which no actual delivery of foreign exchange was made, were not hedging transactions, but same were speculative in nature and, therefore, assessee's case was not covered by proviso (a) to section 43(5). (AY. 2008-09)
Shankara Infrastructure Materials Ltd. v. ACIT (2015) 67 SOT 210 (URO)(Bang.)(Trib.)

S.43(5) : Speculative transaction – Business loss – Forex derivative contracts – Loss suffered on account of forex derivative contracts (Exotic Cross Currency Option Contracts) cannot be treated as speculative loss to the extent that the derivative transactions are not more than the total export turnover of the assessee. If the derivative transaction is in excess of export turnover, the loss in respect of that portion of excess transactions has to be considered as speculative loss because the excess derivative transaction has no proximity with export turnover. [S.28(i), 73] 1041
The assessee was engaged in the business of manufacturing and export of hosiery garments. During the course of export, the assessee entered into derivative contract. The assessee incurred loss in this transaction. The assessee claimed it as business loss.

According to the Assessing Officer this loss was not business loss and it is a speculative loss and this transaction is speculative in nature as such the loss incurred on this transaction cannot be set off against business income of the assessee. On appeal by the assessee HELD:

(i) The derivative transaction cannot fall under sec. 73. Explanation to sec. 73 creates a deeming fiction by which among the assessee, who is a company, as indicated in the said Explanation dealing with the transaction of share and suffer loss, such loss should be treated to be speculative transaction within the meaning of sec. 73 of the Act, notwithstanding the fact that the definition of speculative transaction mentioned in sec.43(5) of the Act, the transaction is not of that nature as there has been actual delivery of the scrips of share. As per the definition of sec. 43(5), trading of shares which is done by taking delivery does not come under the purview of the said section. Similarly, as per clause (d) of sec. 43(5), derivative transaction in shares is also not speculation transaction as defined in the said section. Therefore, both profit/loss from all the share delivery transactions and derivative transactions are having the same meaning, so far as sec. 43(5) of the Act is concerned. Again, in view of the fact that both delivery transactions and derivative transactions are non-speculative as far as sec. 43(5) is concerned, it follows that both will have the same treatment as far as application of Explanation to sec.73 is concerned. Therefore, aggregation of the share trading profit and loss from derivative transactions should be done before the Explanation to sec. 73 is applied. The above view has been taken by Special Bench of this Tribunal, Mumbai Bench, in the case of *CIT v. Concord Commercial Pvt. Ltd. (2005) 95 ITD 117 (Mum.)(SB).*

(ii) From the above, it is concluded that both trading of shares and derivative transactions are not coming under the purview of Section 43(5) of the Act which provides definition of "speculative transaction" exclusively for purposes of sections 28 to 41 of the Act. Again, the fact that both delivery based transaction in shares and derivative transactions are non-speculative as far as section 43(5) is concerned goes to confirm that both will have same treatment as regards application of the Explanation to Section 73 is concerned, which creates a deeming fiction. Now, before application of the said Explanation, aggregation of the business profit/ loss is to be worked out irrespective of the fact, whether it is from share delivery transaction or derivative transaction.

(iii) However, we make it clear that total transaction considered for determining this business loss from derivative transactions cannot be more than the total export turnover of the assessee for the assessment year under consideration and if the derivative transaction is in excess of export turnover, then that loss suffered in respect of that portion of excess transactions to be considered as speculative loss only as that excess derivative transaction has no proximity with export turnover and the Assessing Officer is directed to compute accordingly.(AY. 2009-10 & 2010-11)

Majestic Exports v. JCIT (2015) 172 TTJ 504 / 123 DTR 59 (Chennai)(Trib.)

S.43(5) : Speculative transaction – Transaction of call/put options in foreign currency are "derivatives" and loss suffered therein is not a "speculation" loss. 1042

Proviso (d) to s. 43(5) excludes the transaction from the definition of speculative transaction in respect of trading of derivatives referred to in section 2(ac) of the Securities Contract (Regulation) Act, 1956 carried in recognized stock exchange. Under section 2(ac) of the Securities Contract (Regulation) Act, 1956, derivatives also includes securities. In *Rajshree Sugar & Chemicals Ltd. v. Axis Bank Ltd., AIR 2011 (Mad) 144*, the term "derivative" has been defined to include foreign currency as an underlying security of the derivative. In August 2008 SEBI permitted exchange traded currency derivative. Accordingly, there remain no iota of doubt that the transaction of the assessee cannot be treated as speculative transaction. A perusal of the contract note shows that the assessee has either entered into call option or put option and on the settlement day the transaction has been settled by delivery, either the assessee has paid US dollar on the settlement day or has taken delivery of US dollar. To sum up, the "derivatives" include foreign currency and call option/put option, are transactions of derivative markets and cannot be termed as speculative in nature. (AY. 2009-10).

IVF Advisors Private Limited v. ACIT (2015) 39 ITR 541 / 68 SOT 222 (URO)(Mum.)(Trib.)

S.43(5) : Speculative transaction – Loss from trading in derivatives is not a speculation loss and can be set-off against normal business profits. [S. 28(i), 43(5)(d), 73] 1043

The assessee suffered a business loss in shares amounting to ₹ 95,06,474/- on derivatives which was treated by the AO as speculative in nature. The assessee also earned profit of ₹ 74,72,122/- on account of trading in commodity futures. The said profit was also considered by the AO as speculative in nature but without bringing any material on record as to how the same was speculative in nature. The assessee earned the profit relating to delivery based share trading, trading in commodities and earning commission on booking of flats. Profit earned from those activities by the assessee cannot be considered as speculative in nature. Now question arises as to whether the loss suffered by the assessee on derivative was to be treated as a speculative loss or to be set off against the regular business profit. Explanation to clause (d) of Sub-section (5) to Section 43 of the Act provides that eligible transaction in respect of trading in derivatives would not be deemed to be speculative transaction. In the present case, it is an admitted fact that the assessee was engaged in the business of dealing in shares & securities and has incurred loss from dealing in derivatives (shares futures). It is not the case of the AO that the share futures in which the assessee was dealing were not recorded in recognized Stock Exchange, the loss incurred by the assessee was also not disputed by the AO. We, therefore, by keeping in view the provisions contained in clause (d) to sub-section (5) of Section 43 of the Act, are of the view that the learned CIT(A) was fully justified in directing the AO for not treating the loss incurred by the assessee on derivatives and the profit earned by trading of the commodity as speculative in nature, For the aforesaid view, we are also fortified by the decision of the ITAT Mumbai 'B' Bench in the case of *R.B.K. Securities (P) Ltd. v. ITO reported in 118 TTJ 465*. Appeal of revenue was dismissed. (ITA No. 2181/Del/2012, dated 27.05.2015) (AY. 2007-08)

ITO v. Emperor International Ltd. (2015) 171 TTJ 409 / 121 DTR 195 / 70 SOT 504 (Delhi) (Trib.)

1044 **S.43(5) : Speculation loss – Loss on sale of shares, even if a speculation loss, can be set-off against the gains on sale of shares.[S.73]**
Even if the loss claimed by the assessee relating to share transactions as well as loss resulting on valuation of closing stock is treated as speculation loss, the same is entitled to be set-off against the profit on sale of shares in view of DLF Commercial Developers Ltd. 261 CTR (Del.) 127. (ITA No. 2138/Mum/2010, dt. 7-8-2015) (2006-07)
DCIT v. Envision Investment & Finance Pvt. Ltd. (Mum.)(Trib.); www.itatonline.org

1045 **S.43(6) : Written down value – Assets acquired under the scheme of demerger – Only WDV of the transferred assets of the demerged company as per the accounts maintained under the Act constitutes the WDV of the block of assets of the resulting company.**
In view of the Explanation 2B to S.43(6) as amended by Finance Act, 2000, w.e.f. 1st April, 2000 only the WDV of the transferred assets of the demerged company as per the accounts maintained under the IT Act constitutes the WDV of the block of assets of the resulting company. The amendment of Explanation 2B made by the Finance Act, 2003 w.e.f. 1st April, 2004 omitting the words 'as appearing in the books of account' has merely removed the ambiguity and, therefore, it is curative and clarificatory nature. (AY. 2003-04, 2004-05)
Godrej & Boyce Mfg. Co. Ltd. v. ACIT (2015) 167 TTJ 724 / 153 ITD 676 (Mum.)(Trib.)

Section 43A : Special provisions consequential to changes in rate of exchange of currency.

1046 **S.43A : Rate of exchange – Foreign currency – Business loss – Matter was set aside. [S.28(i)]**
Assessee had taken foreign currency loan and claimed loss on foreign exchange fluctuation as business loss. Assessing Officer disallowed said loss holding that it was a contingent and notional loss. It was held by ITAT that matter was not determined in context of present law after substitution of section 43A with effect from assessment year 2003-04. Further, it was not ascertained as to whether loan was repaid and losses incurred by assessee on foreign exchange fluctuation was not a contingent liability. Hence that matter was to be decided afresh. (AY. 2009-10)
DCIT v. Madras Engineering Industries (P.) Ltd. (2014) 34 ITR 703 / (2015) 67 SOT 152 (URO)(Chennai)(Trib.)

1047 **S.43A : Rate of exchange – Foreign currency – Notional basis – Credited to capital account had to be reduced from taxable income.**
Foreign exchange fluctuation gain derived by assessee on notional basis, which was credited on capital account had to be reduced from taxable income. (AY. 2009-10, 2010-11)
Vodafone East Ltd v. Add. CIT (2015) 43 ITR 551 / (2016) 156 ITD 337 (Kol.)(Trib.)

Section 43B : Certain deductions to be only on actual payment.

S.43B : Deductions on actual payment – "Vend fee" paid by the assessee to the Government, even if of the nature of "privilege fee" falls within the expression "fee by whatever name called" – Provisions of section 43B is attracted – Appeal of revenue is allowed. 1048

(i) A reading of Section 43B after it was substituted by the Finance Act, 1988 with effect from 1-4-1989 shows that sub-clause (a) in section 43B has been considerably widened by the amendment by the addition of the words "by whatever name called". It is clear, therefore, that to attract this section any sum that is payable whether it is called tax, duty, cess or fee or called by some other name, becomes a deduction allowable under the said Section provided that in the previous year, relevant to the assessment year, such sum should be actually paid by the assessee.

(ii) Even if the vend fee that is paid by the respondent to the State does not directly fall within the expression 'fee' contained in Section 43B(a), it would be a 'fee' by 'whatever name called', that is even if the vend fee is called a 'privilege' as has been held by the High Court in the judgment under appeal. Order of High Court is set aside. (AY. 1990-91)

CIT v. Travancore Sugar & Chemicals Ltd. (2015) 374 ITR 585 / 277 CTR 333 / 119 DTR 273 / 231 Taxman 867 (SC)

Editorial: From the judgment of Kerala High Court in CIT v. Trvancore Sugars & Chemicals Ltd. ITA No. 180 of 1999 dated 7-3-2003

S.43B : Deductions on actual payment – Air travel tax – No charge claimed or made in profit and loss account – Amount taken to balance-sheet on liabilities side – No disallowance can be made. 1049

Court held that the Tribunal was right in affirming the order of the Commissioner (Appeals). Therefore, the payment on account of air travel tax could not be disallowed under section 43B. (AY. 1995-96 to 1999-2000)

CIT v. Jet Lite (India) Ltd. (2015) 379 ITR 185 / (2016) 236 Taxman 453 / 282 CTR 113 (Delhi)(HC)

S.43B : Deductions on actual payment – Collecting electricity duty from its consumers and paying same to State Government – Disallowance cannot be made. [Bengal Electricity Act, 1935, S. 5(1)] 1050

Assessee is a licensee of supplying electricity to State. Assessee was collecting electricity duty from its consumers and paying same to State Government. Assessing Officer as well as Tribunal held that the nature of electricity duty was of trading receipt, and it was liability of assessee to pay electricity duty to Government, since assessee failed to do so, Tribunal made disallowance under section 43B. On appeal allowing the appeal the Court held that assessee had not collected electricity duty for its own consumption. If licensee collected electricity duty, but did not pay same to Government, statute provided separate mechanism for Government to recover same from licensee. Moreover, Bengal Electricity Duty Act, 1935 governing terms and conditions of assessee business,

ruled out applicability of rule 43B therefore impugned disallowance was to be deleted in accordance of provisions of Bengal Electricity Act, 1935.(AY. 1986-87, 1987-88, 1989-90)
CESC Ltd. v. CIT (2015) 235 Taxman 6 / 280 CTR 501 (Cal.)(HC)

1051 **S.43B : Deductions on actual payment – Conversion of interest amount into loan would not be deemed to be actual payment – Disallowance was held to be justified.**
Allowing the appeal of revenue the Court held that in view of Explanation 3C appended to section 43B with retrospective effect from 1-4-1989, conversion of interest amount into loan would not be deemed to be regarded as actually paid within meaning of section 43B and, same was to be disallowed. (AY. 1994-95)
CIT v. Pennar Profiles Ltd. (2015) 376 ITR 355 / 234 Taxman 450 / 278 CTR 38 (AP)(HC)

1052 **S.43B : Deductions on actual payment – Contingent liability upon uncertain facts – Held not allowable as deduction.**
Assessee was manufacturing and trading industrial hard oils, edible oils and soaps, etc. It entered into an agreement with overseas processors for purchase of imported palm sterline fatty acid. As per said agreement, any liability arising after purchase of imported materials in respect of customs duty, excise duty, penalty, sales tax, etc., was to be paid by assessee and to be included as landed cost of imported material. Accordingly, assessee claimed said landed cost as deduction in current year. Assessing Officer disallowed the claim which was affirmed by Tribunal. On appeal by assessee; Dismissing the appeal the Court held that since liability in respect of customs duty, excise duty, penalty, sales tax, etc., was contingent upon uncertain fact, deduction claimed by assessee was not permissible.
Oswal Agro Mills Ltd. v. CIT (2015) 370 ITR 676 / 234 Taxman 404 (Delhi)(HC)

1053 **S.43B : Deductions on actual payment – Superannuation fund – Scheme of company not providing for payment by employee – Disallowance cannot be made.**
Dismissing the appeal of revenue the Court held that the Employees' Superannuation Scheme of the assessee envisaged the payment of contribution by the employer and not by the employee. There was no question of employee's contribution under the Scheme. Thus, the application of section 43B to disallow the delayed contribution by the assessee to the superannuation fund for the months of February and March, 2001, did not arise. The order of the Commissioner (Appeals), as affirmed by the Tribunal, did not call for any interference. The court declined to frame a question. (AY. 2001-02)
CIT v. Modi Rubber Ltd. (2015) 378 ITR 128 (Delhi)(HC)

1054 **S.43B : Deductions on actual payment – Provident Fund and Employees State Insurance (ESI) – Deduction available only if contributions paid within due dates prescribed in respective statutes – Disallowance was held to be justified. [S.2(24)(x), 36(1)(va)]**
Allowing the appeal of revenue the Court held that since the assessee had admittedly not paid the remittance of the employees' contribution to the provident fund and ESI within the dates prescribed under the respective Acts, the assessee was not entitled to deduction under section 43B of the amounts deducted thereunder for and on behalf of the employees. (AY. 2010-11)
CIT v. Merchem Ltd. (2015) 378 ITR 443 / 235 Taxman 291 / 280 CTR 381 (Ker.)(HC)

S.43B : Deductions on actual payment – Service tax – Paid before due date of filing of return – No disallowance can be made. [S. 37(1)] 1055

When services were rendered, liability to pay service tax in respect of consideration would arise only upon receipt of such consideration and not otherwise. Where it was found that before end of year, amount on which service tax was payable had not been received from parties to whom services were rendered, claim of service tax paid could not be disallowed. (AY. 2007-08)

CIT v. Ovira Logistics (P.) Ltd. (2015) 377 ITR 129 / 232 Taxman 240 / 119 DTR 269 (Bom.)(HC)

S.43B : Deductions on actual payment – Loan – Interest – One-time settlement – Either interest amount has to be allowed or sum waived by bank has to be reduced by amount of interest paid. 1056

Held, if out of the total sum of ₹ 257.08 lakhs which had been offered to tax by the assessee in its return, the unpaid interest of ₹ 193.96 lakhs was deducted then the waived principal sum would come to ₹ 62.58 lakhs (i.e. 441.30 minus 378.72). Either it was the interest which was to be waived, or the waived principal of ₹ 257.08 lakhs had to be reduced by the interest of ₹ 193.96 lakhs which was not permitted for deduction under section 43B. In either case, the amount of deduction, as well as the amount which is subjected to tax, would come to the same. Either the interest had to be allowed for deduction under section 43B or the sum offered for tax (as waived by the bank) had to be reduced by the amount of interest paid. (AY 2007-08)

CIT v. KLN Agrotechs (P) Ltd. (2015) 375 ITR 301 / 127 DTR 413 / 281 CTR 605 (Karn.)(HC)

Editorial: Order in KLN Agrotechs P. Ltd. v. ITO (2013) 27 ITR 648 (Bang) (Trib.) is affirmed.

S.43B : Deductions on actual payment – Loan availed of by assessee for one year – Interest not payable – No question of disallowance of claim. 1057

Held dismissing the appeal of revenue held that by the plain language of the provisions of section 43B and given the factual and admitted position, the Tribunal had not erred in the view that it had taken. The view taken was neither perverse nor vitiated by any error of law apparent on the face of the record.(AY.2003-04, 2006-07)

CIT v. Hindustan Construction Co. Ltd. (2015) 374 ITR 101 / 233 Taxman 446 (Bom.)(HC)

S.43B : Deductions on actual payment – Banking company – Income by way of interest from security – Whether accrued – Consistent finding by Tribunal – No question of law arises. [S. 43B(d), 260A] 1058

Dismissing the appeal, the Courts held that the Tribunal had applied and followed its order in the case of the very assessee for assessment year 2000-01. In such circumstances, the question of law projected as substantial could not be entertained. A pure factual finding could not be reappreciated and reappraised. That finding had been consistently rendered by the Tribunal for prior assessment years in the case of the very assessee. If the Tribunal followed and applied it on the same facts for a subsequent assessment year, that exercise undertaken by the Tribunal could not be termed as perverse or vitiated by any error of law, apparent on the face of record. (AY. 2003-04)

CIT v. Indusind Bank Ltd. (2015) 373 ITR 160 (Bom.)(HC)

1059 **S.43B : Deductions on actual payment – Contributions to Provident Fund and Employees' State Insurance – Provision that contribution should be paid before due date for filing return applicable to contribution by employees also.[S. 139(1)]**
Held, dismissing the appeal, that the employees' contribution made to the Provident Fund and Employees' State Insurance by the assessee on or before the due date for filing the return under section 139(1) of the Income-tax Act, 1961, would be eligible for the benefit conferred under section 43B(b).
CIT v. Magus Customers Dialog P. Ltd. (2015) 371 ITR 242 / 231 Taxman 379 (Karn.)(HC)

1060 **S.43B : Deductions on actual payment – Conversion of outstanding interest into a loan does not amount to an "actual payment" of the interest and so deduction for the interest cannot be claimed – Appeal of revenue was allowed. [S.43B, Explanation 3C]**
The High Court had to consider the question: "Whether the funding of the interest amount by way of a term loan amounts to actual payment as contemplated by section 43B of the Income-tax Act, 1961?" HELD by the High Court:
Explanation 3C to s. 43B was inserted for removal of doubts and it was declared that deduction of any sum, being interest payable under clause (d) of Section 43B of the Act, shall be allowed if such interest has been actually paid and any interest referred to in that clause, which has been converted into a loan or borrowing, shall not be deemed to have been actually paid. Thus, the doubt stands removed in view of Explanation 3C. This provision was considered by the Madhya Pradesh High Court in *Eicher Motors Limited v. Commissioner of Income Tax* to hold that in view of the Explanation 3C appended to Section 43B with retrospective effect from 01.04.1989, conversion of interest amount into loan would not be deemed to be regarded as actually paid amount within the meaning of Section 43B of the Act. Explanation 3C squarely covers the issue raised in this appeal, as it negates the assessee's contention that interest which has been converted into a loan is deemed to be "actually paid". In light of the insertion of this explanation, which, as mentioned earlier, was not present at the time the impugned order was passed, the assessee cannot claim deduction under Section 43B of the Act.) (AY.1996-97)
CIT v. M. M. Aqua Technologies Ltd. (2015) 376 ITR 498 / 120 DTR 300 / 278 CTR 30 / 233 Taxman 397 (Delhi)(HC)

1061 **S.43B : Deductions on actual payment – Provision for leave encashment – Assessee claiming deduction based on jurisdictional High Court hearing for which appeal pending before Supreme Court – AO to pass order after Supreme Court Decision – Matter remanded.**
Assessee claimed deduction of provision made for leave encashment. Such claim was made on the basis of jurisdictional High Court. AO disallowed the same on the contention that the decision of High Court has been challenged in Supreme Court by way SLP; decision of which is pending. CIT(A) allowed the deduction on the basis of High Court decision. On appeal, ITAT remanded the matter to AO to pass orders based on the outcome of the appeal on the merits in the Supreme Court in the interest of justice and fair play. Though, it held that Supreme Court did not stay the High Court decision and accordingly, decision of High Court was applicable. (AY. 2008-09)
DCIT v. Woodlands Medical Centre Ltd. (2015) 44 ITR 312 (Kol.)(Trib.)

S.43B : Deductions on actual payment – Interest – Assessee had taken loan from financial institutions, payment of interest by way of issue of equity shares to these institutions did amount to actual payment – No disallowance can be made. 1062

The assessee had taken loan from the financial institutions. The initial rate of interest was 17.75 per cent. Since the assessee was in the initial stage of business, it had suffered loss. It had re-negotiated the rate of interest which was reduced to 14 per cent from financial year 2002-03. Accordingly revised liability towards interest was worked, and these financial institutions agreed to get paid for this amount of interest by way of equity shares of the assessee to the extent of debt liability. The Assessing Officer did not allow the claim of the assessee on the ground that the alleged payment in the shape of issuance of equity shares of the assessee to these financial institutions, did not amount to actual payment as per section 43B, and therefore, the assessee could not claim deduction. CIT(A) confirmed the addition. On appeal Tribunal held that Explanation 3C only prohibits an assessee for recognising the actual payment of interest by converting it interest into loan or borrowings. In other words, if an assessee has interest liability, and he converts the interest liability in further loan, then that will not amount to payment of interest under section 43B as per Explanation 3C. If an assessee has issued equity shares, which anyone can acquire, and it has a trading value, it would not construe that interest liability has been converted into loan. The financial institutions can independently trade those equity. Therefore, the assessee has made payment of interest liability in money's worth. It has not negotiated in such a way that its interest liability has been ceased. Accordingly the addition was deleted. (AY. 2006-07)

Marwar Hotel Ltd. v. ACIT (2015) 155 ITD 655 / (2016) 176 TTJ 753 / 131 DTR 340 (Ahd.) (Trib.)

S.43B : Deductions on actual payment – Method of accounting – VAT – Taxes collected by the assessee, which remain unpaid, have to be added to the income, even if the same are not debited to the P&L A/c and claimed as a deduction. [S.145A, Maharashtra Value Added Tax Act, 2002] 1063

The assessee collected VAT but did not pay it over to the Government. The assessee claimed that a disallowance u/s. 43B cannot be made as the amount of VAT was not routed through the Profit & Loss Account and no deduction had been claimed. The assessee also claimed that under the Maharashtra Value Added Tax Act, 2002, the sale price shall not include the tax paid or payable to a seller in respect of such sale and hence, there was no requirement for the assessee to recognize the VAT account in its Profit & Loss Account. AO disallowed the claim. On appeal dismissing the claim, taxes collected by the assessee, which remain unpaid, have to be added to the income even if the same are not debited to the P&L A/c and claimed as a deduction. (AY. 2009-10)

Munaf Ibrahim Memon v. ITO (2016) 176 TTJ 256 / 135 DTR 215 (Pune)(Trib.)

S.43B : Deductions on actual payment – Provision for leave salary – Contractual liability which could not be disallowed. [S.43B(f)] 1064

Provision for leave salary is not a statutory liability but only a contractual liability which is payable only if employees resign or retire from services and such amount could not be disallowed under section 43B(f).(AY. 2003-04, 2005-06)

Aditya Birla Nuvo Ltd. v. ACIT (2015) 68 SOT 403 (Mum.)(Trib.)

1065 **S.43B : Deductions on actual payment – Conversion of outstanding interest into a loan does not constitute "actual payment" of the interest so as to qualify for deduction. [S.43B(e)]**

On perusing Section 43B(e), it is seen that interest on any loan or advance from a schedule bank, in accordance with terms and conditions of the agreement governing such loans or advance, would be allowed as deduction in the previous year in which sum is actually paid by the assessee. We further find that Explanation 3D has been inserted by Finance Act, 2006 with retrospective effect from 1-4-1997 and the Explanation 3D states that for the removal of doubt it is declared that the deduction, being interest payable, shall be allowed if such interest has been actually paid and any interest referred to in clause (e) which has been converted into a loan or advance shall not be deemed to have been actually paid. In the present case, it is an undisputed fact that a portion of interest has been converted into loan pursuant to the CDR package approved by the Bankers of the assessee. Considering the express provision of the Act read along with Explanation 3D and in view of the aforesaid facts, we are of the view that the AO was right in disallowing the claim of assessee. Before us, learned A.R. has also relied on the decision of Karnataka High Court in the case of *Vinir Engineering Pvt. Ltd. v. DCIT reported in 313 ITR 154*. We are of the view that the ratio of the aforesaid decision would not be applicable to the facts of the present case more so when in that case, the interest was payable to a Finance Corporation and not to a Scheduled Bank and the issue of disallowance was also not with respect to Section 43B(e) of the Act. (AY. 2005-06 to 2007-08)

DCIT v. Jyoti Ltd. (Ahd.)(Trib.); www.itatonline.org

1066 **S.43B : Deductions on actual payment – Electricity Board collecting electricity duty and surcharge from customers – Electricity duty not remitted to Government within stipulated time under Kerala Electricity Duty Act – Provisions is applicable – Surcharge – Disallowance is not justified.**

The assessee paid electricity duty and surcharge to the Government under the Kerala Electricity Duty Act, 1963. The Assessing Officer disallowed the payments in view of section 43B of the Act on the ground that the amount had not been remitted to the Government within the time stipulated under the 1963 Act. The Commissioner (Appeals) allowed the claim. On appeal by the Department :

Held, that the provisions of section 43B are applicable to the electricity duty payable to the Government. Accordingly, the disallowance made by the Assessing Officer was justified. However, electricity surcharge collected from the special category of consumers in terms of section 3 of the Kerala State Electricity Surcharge (Levy and Collection) Act, 1989 and stands on the same footing as under section 4(1) of the Kerala State Electricity Duty Act, 1963. Therefore, in terms of the decision of the Kerala High Court, the provisions of section 43B were not applicable. The order of the Commissioner (Appeals) on the issue of deletion of electricity surcharge was to be confirmed. (AY. 2008-09)

ACIT v. Kerala State Electricity Board (2015) 38 ITR 458 / 70 SOT 587 (Cochin)(Trib.)

S.43B : Deductions on actual payment – Employer's contribution to Employees Provident Fund paid before due date for filing return – Allowable. 1067
Held, dismissing the appeal, that the assessee paid the provident fund deducted on account of employees contribution before due date for filing of return under section 139(1) of the Act. The details were available in the written submission of the assessee. (AY. 2006-07 to 2010-11)
Dy. CIT v. Selvel Advertising P. Ltd. (2015) 37 ITR 611 (Kol.)(Trib.)

S.43B : Deductions on actual payment – EPF and ESIC contribution made before due date of filing return was held to be allowable. [S. 2(24)(x), 36(1)(va)] 1068
Following the decision by the jurisdictional High Court in *CIT v. Hindustan Organics Chemicals Ltd. (2014) 270 CTR 478 (Bom.)(HC)* the Tribunal allowed the assessee's claim; it being admitted that the impugned payments were made well before the due date of the filing the return of income for the relevant year. Further, the fact that some of the impugned payments, admittedly made after the due dates under the relevant statutes, are outside the grace period allowed by the administrative or legal injunction (for the purpose of levy of interest, penalty, etc.), even as stated by the AO in his order, would be in this view of the matter of no consequence. (AY.2008-09) (ITA No. 5487/Mum/2012, dt. 08.12.2014)
ITO v. Indore Steel and Iron Mills Ltd. (Mum.)(Trib.) www.itatonline.org

Section 43D : Special provision in case of income of public financial institutions, public companies, etc.

S.43D : Public financial institutions – Income by way of interest – Unrealised lease rent on non-performing assets was not covered – Deduction is not available. [Rule 6EA] 1069
Section applies only to such bad and doubtful debts as prescribed under rule 6EA; since unrealised lease rent on non-performing assets was not covered in said rule, hence, deduction was not allowable. Appeals of revenue was allowed. (AY. 1998-99 to 2003-04)
CIT v. Karnataka Bank Ltd. (2015) 232 Taxman 578 (Karn.)(HC)

S.43D : Public financial institutions – Accrual – Interest on NPAs and Stick Loans, even if accrued as per the mercantile system of accounting, is not taxable as per prudential norms.[S.2(24), 4, 5, 145, RBI Act, S. 45Q] 1070
The assessee, a co-operative bank, claimed that the interest on sticky advances was not chargeable to tax. This was rejected by the AO on the ground that Section 43D of The Income-tax Act applied only to Scheduled Banks and not to co-operative banks. The Assessing Officer has also held that CBDT Circular No.F201/81/84 ITAII dated 09.10.1984 is applicable only to banking companies and not to non-scheduled banks and co-operative banks. This was reversed by the ITAT. On appeal by the department to the High Court HELD dismissing the appeal:
The assessee herein being a Co-operative Bank also governed by the Reserve Bank of India and thus the directions with regard to the prudential norms issued by the Reserve Bank of India are equally applicable to the Co-operative banks. The provisions of Section 45Q of Reserve Bank of India Act has an overriding effect vis-à-vis income

recognition principle under the Companies Act. Hence, Section 45Q of the RBI Act shall have overriding effect over the income recognition principle followed by co-operative banks. Hence, the Assessing Officer has to follow the Reserve Bank of India Directions, 1998. In UCO Bank the Supreme Court considered the nature of CBDT circular and held that the Board has power, *inter alia*, to tone down the rigour of the law and ensure a fair enforcement of its provisions, by issuing circular in exercise of its statutory powers under section 119 of act which are binding on the authorities in the administration of the Act, it is a beneficial power given to the Board for proper administration of fiscal law so that undue hardship may not be caused to the assessee and the fiscal laws may be correctly applied. Further a similar issue was raised about interest accrued on a 'sticky' loan which was not recovered by the assessee bank for the last three years and transferred to the suspense account, would or would not be included in the income of the assessee for the particular assessment year. (AY. 2007-08 to 2009-10)
CIT v. Deogiri Nagari Sahakari Bank Ltd. (2015) 379 ITR 24 / 128 DTR 209 (Bom.)(HC)
CIT v. Peoples Co-operative Bank Ltd. (2015) 379 ITR 24 / 128 DTR 209 (Bom.)(HC)
CIT v. Nanded District Central Co-operative Bank Ltd. (2015) 379 ITR 24 / 128 DTR 209 (Bom.)(HC)
CIT v. Vasantdada Nagari Sahkari Bank Ltd. (2015) 379 ITR 24 / 128 DTR 209 (Bom.)(HC)

Section 44AD : Special provision for computing profits and gains of business on presumptive basis.

1071 **S.44AD : Civil construction – Best judgment assessment – Though gross receipts of assessee were in excess of ₹ 40 lakh – Estimation at 8% was held to be justified.[S.144]**
Assessee filed his return declaring income at rate of 8 per cent on gross receipts. Assessing Officer allowed expenses to extent of 75 per cent and computed gross profit at rate of 25 per cent. Tribunal, however, assessed income at rate of 8 per cent on gross receipts. Since Assessing Officer had computed gross projects at rate of 25 per cent without any justification, Tribunal was justified in adopting gross profit rate of 8 per cent as mentioned in section 44AD even though gross receipts of assessee were in excess of ₹ 40 lakh.
CIT v. Lovish Oberoi (2015) 229 Taxman 197 (Delhi)(HC)

1072 **S.44AD : Presumptive taxation – Construction business – No books of account – Estimate of net profit at rate of 11 per cent was held to be justified.**
The assessee was engaged in construction business. The Department conducted a search and seizure operation in the business and residential premises of the assessee and seized a trial balance signed by the assessee.
The assessee filed returns on presumption basis under section 44AD of the Act, declaring income at 8 per cent for the assessment year 1995-96 and at 5.6 per cent for the assessment year 1997-98. The Assessing Officer held that the investments were shown in the name of bogus creditors and added all the amounts as undisclosed income of the assessee for the broken period of April 1, 2000 to April 20, 2000. The Commissioner (Appeals) estimated the profit at 8.5 per cent allowing partial relief to the assessee. On appeals by both the assessee and the Department; Tribunal held that the

Commissioner (Appeals) was justified in making estimation of profit however failure by Department to prove assessee showed bogus creditors. Receipts shown by assessee for cheques book entry for sundry creditors, net profit to be determined at rate of 11 per cent. [BP. 1-4-1990-20-6-2000)
M.C. Puri v. ACIT (2015) 39 ITR 433 (Chd.)(Trib.)

Section 44AE : Special provision for computing profits and gains of business of plying, hiring or leasing goods carriages.

S.44AE : Transportation charges – Showing income from tanker more than income deemed to be shown under section 44AE after claiming depreciation – Disallowance of 50 per cent of total expenses based on consumption of diesel alone not justified. [S.145(3)] 1073
The assessee ran a petrol pump and operated a tanker for transportation of the petroleum products from the refinery to its village. The transportation charges were reimbursed by the petroleum company. Against reimbursement of transportation charges the assessee claimed expenses. The Assessing Officer disallowed 50 per cent of such expenses on the ground that the expenses for diesel consumption were on the higher side. The Commissioner (Appeals) sustained the order of the Assessing Officer. On appeal :
Held, allowing the appeal, that admittedly, the books of account maintained for the tanker were not rejected in terms of section 145(3) of the Income-tax Act, 1961. The Assessing Officer disallowed 50 per cent of the total expenses without any basis and the Commissioner (Appeals) worked out the expenses on the basis of consumption of diesel but ignored the other expenses such as salaries to the driver and cleaner, repairs and maintenance and depreciation. The expenditure claimed was much less than the reimbursement made by the company and after claiming depreciation the assessee had shown the income from tanker which was more than the income deemed to be shown under section 44AE of the Act. The orders of the authorities were not sustainable. (AY. 2003-04)
Pushpak Auto Centre v. ITO (2015) 154 ITD 588 / 168 TTJ 17 / 38 ITR 447 (Delhi)(Trib.)

Section 44B : Special provision for computing profits and gains of shipping business in the case of non-residents.

S.44B : Shipping business – Non-resident – Shipping – Income from international shipping – No Article in Double Taxation Avoidance Agreement between India and Switzerland dealing with profits from shipping – Assessee covered by residuary Article 22 allocating taxing rights to country of residence – Assessee's shipping income not taxable in India – Interest on refund of tax – Taxable under Article 11 – Advance tax – Interest – Failure by payer to deduct tax at source – Interest cannot be imposed on assessee – DTAA – India-Switzerland. [S. 9(i), 234B, ART. 7, 11, 22] 1074
The assessee was incorporated in Switzerland and was engaged in the business of operation of ships in international seas. The assessee showed its shipping income in India at nil, on the ground that, after the amendment of the Double Taxation Avoidance Agreement between India and Switzerland (DTAA), Article 22 would apply and no

shipping income could be held to be taxable in India. The Assessing Officer held that Article 7 of the DTAA specifically excluded profits from the operation of the ships in international traffic from the business profits of the enterprise of the Contracting State and therefore, the shipping income would be taxable in India under section 44B of the Act. The Commissioner (Appeals) confirmed this. On appeal :

Held, allowing the appeal, that the items of income not dealt with in the other Articles of the DTAA were covered in the residuary Article 22 and their taxability was governed by Article 22, allocating taxing rights to the country of residence. There was no Article for the DTAA dealing with profits of shipping which was applicable to the assessee. Therefore, applying Article 22 of the DTAA, the shipping income was not taxable in India.

Held also, that interest received from Department on refund was taxable under article 11, i.e. at 10 per cent and not under Article 7 of the DTAA.

Held further, that no interest under section 234B of the Act could be imposed on the payee assessee when the duty to pay tax at source was cast on the payer. (AY. 2005-06 to 2009-10)

MSC Mediterranean Shipping Company, S.A. v. Dy. CIT (IT) (2015) 154 ITD 478 / 38 ITR 758 (Mum.)(Trib.)

Section 44BB : Special provision for computing profits and gains in connection with the business of exploration, etc., of mineral oils.

1075 **S.44BB : Mineral oils – Computation – The "pith and substance" test has to be applied to determine the dominant purpose of each agreement. If the dominant purpose is mining, the income is assessable only u/s. 44BB and not as "fees for technical services" [S.9(1)(vii), 44D]**

The Supreme Court had to consider the following question: "Whether the amounts paid by the ONGC to the non-resident assessees /foreign companies for providing various services in connection with prospecting, extraction or production of mineral oil is chargeable to tax as "fees for technical services" under Section 44D read with Explanation 2 to Section 9(1)(vii) of the Income Tax Act or will such payments be taxable on a presumptive basis under Section 44BB of the Act"? HELD by the Supreme Court:

(i) The Income-tax Act does not define the expressions "mines" or "minerals". The said expressions are found defined and explained in the Mines Act, 1952 and the Oil Fields (Development and Regulation) Act, 1948. While construing the somewhat *pari materia* expressions appearing in the Mines and Minerals (Development and Regulation) Act 1957 regard must be had to the provisions of Entries 53 and 54 of List I and Entry 22 of List II of the 7th Schedule to the Constitution to understand the exclusion of mineral oils from the definition of minerals in section 3(a) of the 1957 Act. Regard must also be had to the fact that mineral oils is separately defined in Section 3(b) of the 1957 Act to include natural gas and petroleum in respect of which Parliament has exclusive jurisdiction under Entry 53 of List I of the 7th Schedule and had enacted an earlier legislation i.e. Oil Fields (Regulation and Development) Act, 1948. Reading Sections 2(j) and 2(jj) of the Mines Act, 1952

which define mines and minerals and the provisions of the Oil Fields (Regulation and Development) Act, 1948 specifically relating to prospecting and exploration of mineral oils, exhaustively referred to earlier, it is abundantly clear that drilling operations for the purpose of production of petroleum would clearly amount to a mining activity or a mining operation. Viewed thus, it is the proximity of the works contemplated under an agreement, executed with a non-resident assessee or a foreign company, with mining activity or mining operations that would be crucial for the determination of the question whether the payments made under such an agreement to the non-resident assessee or the foreign company is to be assessed under section 44BB or section 44D of the Act.

(ii) The test of pith and substance of the agreement commends to us as reasonable for acceptance. Equally important is the fact that the CBDT had accepted the said test and had in fact issued a circular as far back as 22-10-1990 to the effect that mining operations and the expressions "mining projects" or "like projects" occurring in Explanation 2 to section 9(1) of the Act would cover rendering of service like imparting of training and carrying out drilling operations for exploration of and extraction of oil and natural gas and hence payments made under such agreement to a non-resident/foreign company would be chargeable to tax under the provisions of Section 44BB and not section 44D of the Act. We do not see how any other view can be taken if the works or services mentioned under a particular agreement is directly associated or inextricably connected with prospecting, extraction or production of mineral oil. Keeping in mind the above provision, we have looked into each of the contracts involved in the present group of cases and find that the brief description of the works covered under each of the said contracts as culled out by the appellants and placed before the Court is correct.

(iii) The above facts would indicate that the pith and substance of each of the contracts/agreements is inextricably connected with prospecting, extraction or production of mineral oil. The dominant purpose of each of such agreement is for prospecting, extraction or production of mineral oils though there may be certain ancillary works contemplated thereunder. If that be so, we will have no hesitation in holding that the payments made by ONGC and received by the non-resident assessees or foreign companies under the said contracts is more appropriately assessable under the provisions of Section 44BB and not Section 44D of the Act. (AY.1985-86, 1986-87)

Oil & Natural Gas Corporation Limited v. CIT (2015) 376 ITR 306 / 121 DTR 289 / 278 CTR 153 / 233 Taxman 495 (SC)

S.44BB : Mineral oils – Computation – Service tax & Customs duty collected by assessee from clients is not includible in gross receipt while computing income. 1076

Service tax & Customs duty collected by assessee from clients is not includible in gross receipt while computing income. (AY.2008-09)

DIT v. Mitechell Drilling Internation Pvt. Ltd. (2015) 234 Taxman 818 / (2016) 380 ITR 130 (Delhi)(HC)

1077 **S.44BB: Mineral oils – Non-resident – Presumptive tax – Scope of section – Provision not applicable to interest on refund of tax.**

That the amount of interest paid by the Income-tax Department was not paid to it on account of the provision of services and facilities in connection with, or supply of plant and machinery on hire used or to be used in the prospecting for, or extraction or production of mineral oils. Hence, section 44BB was not applicable.

B.J. Services Co. Middle East Ltd. v. ACIT (2015) 234 Taxman 604 / (2016) 380 ITR 138 (Uttarakhand)(HC)

1078 **S.44BB : Mineral oils – Non-resident – Computation – Mobilization/demoblization fee received by assessee on account of services provided/vessel operated outside India were to be included in calculating aggregate amount referred to in sub-section (2) of section 44BB [S.5(2)]**

Assessee, a Norway based company, was engaged in activities relating to acquisition of 3D seismic data under contracts with 'R' Ltd. and ONGC. Income of assessee was assessed under section 44BB. In course of appellate proceedings, Tribunal held that mobilization/demoblization fee received by assessee on account of services provided/ vessel operated outside India were to be included in calculating aggregate amount referred to in sub-section (2) of section 44BB. Dismissing the appeal the court held that since assessee did not claim benefit of sub-section (3) of section 44BB, amount of mobilisation advance received outside India was rightly included for purpose of calculating income in terms of sub-section (2) of section 44BB in such a situation, provisions contained in section 5(2) would not stand on way of authorities insisting on amount of mobilization advance received by assessee outside India being included.

Fugro Geoteam AS v. Addl. DIT (2015) 376 ITR 529 / 231 Taxman 307 (Uttarakhand)(HC)

Editorial: Refer, Fugro Geoteam AS v. Add. CIT (IT) (2015) 37 ITR 46 (Delhi)(Trib.)

1079 **S.44BB : Mineral oils – Computation – Inclusion of term 'section 44DA' in proviso to section 44BB(1) by Finance Act, 2010 with effect from 1-4-2011 is prospective because it would bring substantial changes in taxability of assessee. [S.44DA]**

Section 44DA was introduced for FTS and royalty, in cases of non-residents having PE then it was a substantive amendment because earlier such royalty and FTS were covered by section 44BB where the tax impost was low. It cannot be held that insertion of section 44DA to proviso to section 44BB is to be as only clarificatory in nature and in order to make all the provisions relating to royalty/ FTS workable, harmonious construction was to be placed.

Section 44BB has been couched in such a manner so as to encompass within its ambit all services connected with oil exploration within its ambit. If a non-resident is engaged in the business of providing services or facilities in connection with or supplying plant or machinery on hire used, or to be used, in the prospecting for extraction or production of mineral oil then 10% of the aggregate of the amounts specified in sub-section (2) is deemed to be the profits and gains of such business chargeable to tax under the head "Profits and Gains of business or profession".

Amendment cannot be held to be retrospective particularly because it brings substantial change in the taxability of Assessee. Amendment to the taxing statute if results in

higher tax burden on Assessee then it is prospective in nature and not retrospective. (AY. 2006-07, 2008-09)
Baker Hughes Asia Pacific Ltd. v. ADIT (IT) (2014) 151 ITD 79 / 34 ITR 192 / (2015) 167 TTJ 304 (Delhi)(Trib.)

S.44BB : Mineral oils – Computation – Assessment – Revised figures of contract receipts – AO was directed to determine the correct receipts from contracts. [S. 143] 1080
The assessee revised the figures of receipts from two contracts during the assessment proceedings. The Assessing Officer rejected the assessee's claim against receipts from ONGC on technical ground and did not go into the question of correct receipts. The Assessing Officer refused to accept the downward revision of receipts from the contract and accepted upward revision of receipts from the contract. The Tribunal set aside the order and directed the Assessing Officer to determine the correct receipts from the contract and thereafter apply section 44BB. (AY. 2010-11)
ADIT v. Global Geophysical Services Ltd. (2015) 168 TTJ 265 / 68 SOT 86 (URO) / 54 taxmann.com 166 (Delhi)(Trib.)

Section 44C : Deduction of head office expenditure in the case of non-residents.

S.44C : Non-resident – Head office expenditure – Licence fee and management charges – Disallowance was held to be not justified. 1081
Tribunal held that licence fees and management charges do not fall in the nature of head office expenses under section 44C and accordingly, the disallowance made by the Assessing Officer and partly confirmed by the CIT(A) was held to be not justified. (AY. 2005-06)
ACIT v. Lloyd's Register Asia (India Branch Office) (2015) 174 TTJ 165 (Mum.)(Trib.)

Section 45 : Capital gains.

S.45 : Capital gains – Business income – Sale of shares – Shown as investment in earlier years – Assessable as capital gains. [S. 28(i)] 1082
Assessee is engaged in development of software as well as manufacture, sale and maintenance of equipments. Assessee had purchased 50,000 shares during 1992-93. Same was sold during current year and long-term capital gain was declared. Assessing Officer denied benefit of long-term capital gains and held that it should be treated as business income. Commissioner (Appeals) noticed that in balance sheets of earlier years, assessee had shown value of shares at ₹ 50 lakhs year after year and diminution/increase in valuation was neither claimed nor allowed-Commissioner (Appeals) accordingly held that income earned on sale of equity shares was to be treated as capital gain and not business income of assessee. Tribunal has upheld the order of Commissioner (Appeals). On appeal dismissing the appeal of revenue upheld the order of Tribunal. (AY. 2004-05)
CIT v. HMA Data Systems (P.) Ltd. (2015) 235 Taxman 238 (Karn.)(HC)

1083 **S.45 : Capital gains – Business income – Borrowed money investment in shares – Portfolio management scheme – Assessable as capital gains. [S.28(i)]**
Assessee-company engaged in business of finance and films, took a loan and had invested borrowed funds in shares through Portfolio Management Scheme of 'M'. Assessing Officer held income/profits earned on sale and purchase of shares, as business income. Appellate authorities held same as Capital gains. On appeal by revenue dismissing the appeal the Court held that where funds lying with assessee was always be invested in shares for earning higher returns either directly or through professionally managed Portfolio Management Scheme and by doing so, it would not mean that assessee was carrying on business of investment in shares therefore Tribunal was justified in ascertaining profit from sale of shares, as capital gains. (AY. 2006-07, 2008-09)
CIT v. Kapur Investments (P.) Ltd. (2015) 234 Taxman 149 / 122 DTR 311 (Karn.)(HC)

1084 **S.45 : Capital gains – Capital loss – Forfeiture of application money – Investor – Capital loss. [S.28(i)]**
Assessee, an investor, paid application money for subscribing to preferential equity warrants of a company. Consequently, there was fall in trading price of said warrants. Assessee did not deposit balance and claimed loss on account of forefeiture of application money as revenue loss. Lower authorities held the loss as capital loss. On appeal dismissing the appeal the Court held that since subscription was made as investment, and not as stock-in-trade, said loss would be capital loss. (AY. 1998-99)
Dynamic Foundations (P.) Ltd. v. CIT (2015) 232 Taxman 501 (Cal.)(HC)

1085 **S.45 : Capital gains – Transfer – Accrual of income – Subsequent to cancellation of agreement of sale of land – Income has not accrued to assessee in real sense – No hypothetical income could be brought to tax. [S. 2(47), 139, 145]**
Assessee filed its return declaring income on account of sale of land/FSI to its associates/ sister concerns. Subsequently, assessee-company filed revised return declaring nil income and claimed that income declared in original return in respect of sale of land/ FSI stood withdrawn due to cancellation of sale agreements. Assessing Officer was of view that action of assessee in filing revised return was not *bona fide* and taxed income from sale of land/FSI. Tribunal allowed the claim of assessee. On appeal by revenue dismissing the appeal the Court held that it was found that agreements were cancelled, properties reverted to assessee which were duly reflected in balance sheet and assets of assessee. There were revised accounts which were also scrutinised and were found to be in order and meeting accounting principles. Since income had not accrued to assessee in real sense, original return represented wrong statement which was corrected by assessee by filing a revised return, no hypothetical income of assessee could have been brought to tax. (AY. 2007-08)
CIT v. Lok Housing & Constructions Ltd. (2015) 232 Taxman 159 (Bom.)(HC)

1086 **S.45 : Capital gains – Business income – Borrowed money – Income from sale of shares – Portfolio management services – Income assessable as capital gains and not as business income. [S.28(i)]**
Dismissing the appeal of revenue the Court held that merely because assessee has invested funds in shares through portfolio management service or it has invested

borrowed funds in the purchase of shares, it does not mean that the assessee is carrying on business of investment in shares; findings arrived by the Tribunal that the income from the sale of shares by the assessee is assessable as capital gains and not as business income being conformity with the guidelines issued by Circular No.4 of 2007 dated 15th June, 2007, no substantial question of law arises. (AY.2006-07, 2008-09)
CIT v. Kapur Investment (P) Ltd. (2015) 122 DTR 311 / 234 Taxman 149 (Karn.)(HC)

S.45 : Capital gains – Business income – Transactions in shares – Non-banking financial company – Frequency of transaction not conclusive test – Evidence to show some transactions were business, some investment and some speculation – No fault found with evidence – Concurrent finding that transactions not business activity – Possible view.[S.28(i)] 1087

The frequency of transactions in shares alone cannot show that the intention of the investor was not to make an investment. The Legislature has not made any distinction on the basis of frequency of transactions. The benefit of short-term capital gains can be availed of, for any period of retention of shares up to 12 months. Although a ceiling has been provided, there is no indication as regards the floor, which can be as little as one day. The question essentially is a question of fact.
The Revenue had not been able to find fault from the evidence adduced. The mere fact that there were 1,000 transactions in a year or the mere fact that the majority of the income was from the share dealing or that the managing director of the assessee was also a managing director of a firm of share brokers could not have any decisive value. The Commissioner (Appeals) and the Tribunal had concurrently held against the views of the Assessing Officer. On the basis of the submissions made on behalf of the Revenue, it was not possible to say that the view entertained by the Commissioner (Appeals) or the Tribunal was not a possible view. Therefore, the decision of the Tribunal could not be said to be perverse. No fruitful purpose was likely to be served by remanding the matter.(AY. 2005-06, 2006-07)
CIT v. Merlin Holding P. Ltd. (2015) 375 ITR 118 (Cal.) (HC)

S.45 : Capital gains – Business income – Transactions in shares – Assessee showing shares declared as either long-term or short-term capital gains in investment portfolio – Shares valued at cost and on shareholding in stock-in-trade valued either at market rate or cost – Concurrent finding that transactions not business activity – View taken is not perverse. [S.28(i)] 1088

The total number of the assessee's transactions of purchases as well as sales was 220 and the ratio between purchase and sale was 59:41. The holding period in respect of 77 sale transactions was more than 12 months and in respect of 13 transactions it was less than 12 months.
Held, the Assessing Officer had laid stress on motive. No direct evidence as regards motive is possible. Motive can be inferred from the conduct of the person concerned but that is bound to remain an inference, which may or may not be correct. The Revenue was unable to find fault with the claim of the assessee. The Revenue was also not in a position to support the view of the Assessing Officer. The views expressed both by the Commissioner (Appeals) and the Tribunal for reasons expressed therein were a possible

view. It was, therefore, not open to the Revenue to contend that the view taken by the Tribunal was perverse. (AY. 2007-08)
CIT v. H K Financers Pvt. Ltd. (2015) 375 ITR 577 / 234 Taxman 43 (Cal.)(HC)

1089 **S.45 : Capital gains – Leasehold rights is a capital asset – Lease of less than 10 years there is no transfer – Not liable to capital gains tax. [S. 2(14), 2(47), 50, 50B, 269UA(f), Transfer of Property Act, 1882, S. 105]**
Allowing the appeal of assessee the Court held that leasehold right is a capital asset. However, in the present case, where the question arises in the context of the next question whether the lease deed results in a transfer of a 'capital asset', the answer will have to be found from a careful reading of the clauses of the lease agreement itself. While *de hors* the context, it might be possible in theory for a leasehold right to be construed as a capital asset since the words used in Section 2(14)(a) are indeed of a wide amplitude, in the context of the present case, where under the lease agreement dated 24th February 1994 what is given to SGL is a limited right to hold and possess the facilities leased to it for a limited period of ten years, with further restriction on sub-letting it or transferring any right or interest therein to anyone without the permission of the lessor and with the lease agreement making it explicit that at the end of the lease period the facilities leased it SGL would revert to the Assessee, it is difficult to hold that the leasehold rights given to the Assessee under the lease agreement is a 'capital asset'. Consequently, question is answered by holding that the leasehold right, given to SGL for a period of ten years, of the plant and machinery along with land and building, is not a 'capital asset' within the meaning of Section 2(14)(a) of the Act. As the period of lease being less than 12 years there is no transfer. The mere fact that the Assessee may have applied under Section 230A of the Act to seek permission of the Department cannot be held against it as far as the correct legal position is concerned. In other words the fact that certain columns in the concerned form were filled by the Assessee to imply that there was a transfer of leasehold/ownership rights cannot be read to constitute a waiver by the Assessee of the legal defences that flow from a correct interpretation of the clauses of the lease agreement and from a correct reading of Section 2(47) with Section 45 of the Act. The Court is also unable to agree with the contention of the learned counsel for the Revenue that the lease of the plant and machinery can be separated from the lease of the land and buildings and the former transaction held to be valid and the latter a sham transaction. The last question that requires to be addressed whether there could be said to be any capital gains under Section 45 of the Act? In light of the above discussion, the question will have to be answered in favour of the Assessee and against the Revenue. The Court is of the view that the transaction in question was nothing more than a transaction of lease and has been acted upon by the parties as such. This was not a device adopted by the Assessee for tax avoidance. (AY.1994-95)
Teletube Electronics Ltd v. CIT (2015) 379 ITR 300 / 235 Taxman 111 / 281 CTR 121 (Delhi)(HC)

S.45 : Capital gains – Business income – Investment in shares – Gains from sale of shares assessable as short-term capital gains and not as business profits explained. [Ss.28(i), 48] 1090

Judgement of CIT(A) and Tribunal that assessee is an investor and not a trader on the basis of the following facts cannot be faulted:

(a) Assessee has been an investor in shares and has consistently treated its entire investment in shares as "investment in shares" & not "stock-in-trade";
(b) The income earned on sale of shares was offered as short term capital gains even when losses were suffered in a particular year;
(c) dealing in 35 scrips, involving 59 transactions for the entire year could not be considered for high volume so as to be classified as trading income;
(d) the assessee earned 75% of the income as short-term capital gains by holding shares for more than nine months;
(e) no transfer in shares was done by the assessee for over 75% of working days during the year;
(f) 56% of the Short-term capital gains during the year resulted from shares held during the earlier assessment year as a part of the opening investment on 1st April 2007.
(g) the assessee had not resorted to churning of shares or repetitive transactions in shares of the same company.
(h) for the earlier Assessment Years i.e. AY 2005-06 and AY 2006-07, the Assessing Officer had, in the proceedings under Section 143(3) of the Act, accepted the stand of the respondent assessee and taxed the profit earned on purchase and sale of shares as short-term capital gains;
(i) dividend income earned was over ₹ 8.50 lakhs;
(j) the assessee had not borrowed any funds but has used her own funds for the purpose of investment in shares;
(k) all transactions were delivery based transactions; and
(l) the speculation loss to which the Assessing Officer has made reference was in fact not so, but happened as a result of punching error.

On consideration of the above facts, the CIT(A) and Tribunal rightly concluded that compliance on the part of the assessee in terms of Instruction No.1827 dated 31st August, 1989 issued by the Central Board of Direct Taxes laying down the tests for distinguishing the shares held in stock-in-trade and shares held as an investment, the shares held by the assessee was investment and held the income to be treated as short term capital gains. (AY. 2008-09)

CIT v. Datta Mahendra Shah (Smt.) (2015) 378 ITR 304 / 235 Taxman 1 (Bom.)(HC)

S.45 : Capital gains – Business income – Share investment – Principle of consistency – No borrowings – Value and frequency of transactions is not conclusive – Assessable as capital gains. [S.28(i)] 1091

Dismissing the appeal of revenue, the Court held that Share scrips traded only amounts held by assessee and no borrowings. Dividend amounting to 4 per cent of value of investment earned by assessee. Value and frequency of transactions is not conclusive. Similar income for past and subsequent periods accepted as short-term capital gains. No

distinctive material to differentiate assessee's activities for assessment year in question. Principle of consistency. Investment in shares assessable as short-term capital gains and not business income. (AY 2006-07)
CIT v. Amit Jain (2015) 374 ITR 550 (Delhi)(HC)

1092 **S.45 : Capital gains – Accrual – Transfer – Joint development agreement – Entering into a joint development agreement with an irrevocable power of attorney in favour of the developer does not results in a "transfer" for purposes of capital gains – Not liable to pay capital gains tax – For the purposes of taxability, the income is not hypothetical and it has really accrued to the assessee. [S. 2(47)(v), 2(47)(vi), 48, Transfer of Property Act, 1882, S.53A]**

Tribunal has held that the joint development with an irrevocable power of attorney in favour of the developer results in a transfer and liable to pay capital gains tax. Against the judgment of the ITAT Chandigarh Bench in *Charanjit Singh Atwal v. ITO [2013] 144 ITD 528*, the High Court had to consider the following issues relating to the taxability of capital gains pursuant to a Joint Development Assessment (JDA) with a developer coupled with an irrevocable general power of attorney:

(i) The scope and legislative intent of Section 2(47)(ii), (v) and (vi) of the Act;
(ii) The essential ingredients for applicability of Section 53A of 1882 Act;
(iii) The meaning to be assigned to the term "possession"?
(iv) Whether in the facts and circumstances, any taxable capital gains arises from the transaction entered by the assessee?

HELD by the High Court revering the Tribunal:

(i) Clause (vi) of Section 2(47) of the Act, as explained by CBDT in its circular No.495 dated 23.9.1987, makes it clear that it was intended to cover those cases of transfer of ownership where the prospective buyer becomes owner of the property by becoming a member of a company, co-operative society etc. In the present case, JDA was executed between the society and the developers and there was no transaction involving the developer becoming member of a co-operative society/ company etc. in terms of Section 2(47)(vi) of the Act. The surrender of right to obtain plot by the members was for facilitating the society to enter into the JDA with the developers. There was no change in the membership of the society as contemplated under Section 2(47)(vi) of the Act. Equally Clause (ii) of Section 2(47) of the Act has no applicability in as much as there was no extinguishment of any rights of the assessee in the capital asset at the time of execution of JDA in the absence of any registered conveyance deed in favour of the transferee in view of judgments in *Alapati Venkataramiah v. CIT, (1965) 57 ITR 185 (SC)* and *Additional CIT v. Mercury General Corporation (P) Limited, (1982) 133 ITR 525 (Delhi);*
(ii) Section 53A of 1882 Act has been bodily transposed into Section 2(47)(v) of the Act and the effect of it would be that Section 53A of 1882 Act shall be taken to be an integral part of Section 2(47)(v) of the Act. In other words, the legal requirements of Section 53A of 1882 Act are required to be fulfilled so as to attract the provisions of Section 2(47)(v) of the Act. Section 53-A of Act is clear to the effect that the person claiming benefit under it, must have "taken possession of the property". This can happen, if the transferee was delivered physical possession of the property. It can also happen when a symbolical delivery of possession was

effected, such as by attornment of the existing lease over such property. Where the contemplated transfer relates to an undivided share, Section 53-A takes a different colour. The reason is that, there cannot be delivery of possession of property by a co-owner, of an undivided property, or the corresponding taking possession of such property by the transferee;

(iii) The concept of possession to be defined is an enormous task to be precisely elaborated. "Possession" is a word of open texture. It is an abstract notion. It implies a right to enjoy which is attached to the right to property. It is not purely a legal concept but is a matter of fact. The issue of ownership depends on rule of law whereas possession is a question dependent upon fact without reference to law. To put it differently, ownership is strictly a legal concept and possession is both a legal and a non-legal or pre-legal concept. The test for determining whether any person is in possession of anything is to see whether it is under his general control. He should be actually holding, using and enjoying it, without interference on the part of others. It would have to be ascertained in each case independently whether a transferee has been delivered possession in furtherance of the contract in order to fall under Section 53A of the 1882 Act and thus amenable to tax by virtue of Section 2(47)(v) read with Section 45 of the Act;

(iv) On facts, perusal of the JDA dated 25-2-2007 read with sale deeds dated 2.3.007 and 25.4.2007 in respect of 3.08 acres and 4.62 acres respectively would reveal that the parties had agreed for *pro rata* transfer of land. No possession had been given by the transferor to the transferee of the entire land in part performance of JDA dated 25.2.2007 so as to fall within the domain of section 53A of 1882 Act. The possession delivered, if at all, was as a licencee for the development of the property and not in the capacity of a transferee. Further section 53A of 1882 Act, by incorporation, stood embodied in section 2(47)(v) of the Act and all the essential ingredients of Section 53A of 1882 Act were required to be fulfilled. In the absence of registration of JDA dated 25.2.2007 having been executed after 24.9.2001, the agreement does not fall under Section 53A of 1882 Act and consequently section 2(47)(v) of the Act does not apply;

(v) Viewed from another angle, it cannot be said that any income chargeable to capital gains tax in respect of remaining land had accrued or arisen to the assessee in the facts of the case. In *Commissioner of Income Tax, Bombay City v. Messrs Shoorji Vallabhdas & Co. (1962) 46 ITR 144 (SC)* it was observed that income tax is a levy on income and where no income results either under accrual system or on the basis of receipt, no income tax is exigible. In *CIT v. Excel Industries Limited (2013) 358 ITR 295 (SC)* held that income tax cannot be levied on hypothetical income. Income accrues when it becomes due but it must also be accompanied by a corresponding liability of the other party to pay the amount. Only then can it be said that for the purposes of taxability, the income is not hypothetical and it has really accrued to the assessee. (AY. 2007-08)

C. S. Atwal v. CIT (2015) 378 ITR 244 / 279 CTR 330 / 234 Taxman 69 (P&H)(HC)

Editorial: Order of Tribunal in Charanjit Singh Atwal v. ITO (2013) 144 ITD 528 (Chd.)(Trib.) is reversed.

1093 **S.45 : Capital gains – Business income – Dealing in Mutual fund units – Intention to be looked in to – Matter remanded.[S.28(i)]**
In order to determine the characterization of profit on sale of units of mutual fund as 'Capital Gains' or 'Business Income' the actual intention of the assessee and the manner in which transactions took place has to be looked at. Where the Tribunal did not look into these parameters, the matter was remanded for fresh consideration.)(AY. 2005-06)
CIT v. Central News Agency (2015) 373 ITR 399 / 119 DTR 194 (Delhi)(HC)

1094 **S.45 : Capital gains – Business income – Sale of shares – Assessable as capital gains. [S. 28(i)]**
Assessee ayurvedic doctor, income derived by him on sale of share was to be assessed under capital gains, and not under head Business income.(AY. 2005-06)
A.N. Swarna Prasad v. Addl. CIT (2015) 230 Taxman 536 (Karn.)(HC)

1095 **S.45 : Capital gains – Business income – Investment in shares – Change of portfolio from stock in trade to investment – Tribunal has not gone in to number of transaction and other relevant criteria – Matter remanded. [S. 28(i)]**
In assessment year 2005-06, the appellant-assessee changed the nature of its portfolio from shares held as stock-in-trade to that of shares held as an investment. The income of sale of such shares was claimed as short-term capital gains. During the year under consideration, the Assessing Officer did not deal with the facts, but simply followed his predecessor's order for the year related to assessment years 2005-06 and 2006-07 to hold that the transactions relating to shares treated by the appellant-assessee as short-term capital gains should be taxed under the head 'profits and gains of Business of Profession'. On appeal:
The Tribunal in the impugned order has referred to the facts relating to assessment year 2005-06. This was the first year, in which the assessee changed the nature of its portfolio from shares held as stock-in-trade to that of shares held as an investment. With regard to other assessment years, the Tribunal has not discussed the factual matrix or gone into the question of number of transactions relating to sale and purchase, the period for which shares were held and other relevant criteria, which have been elucidated in Circular No. 4 of 2007 dated 15-6-2007. The Commissioner (Appeals) also did not go in depth and detail and preferred to rely upon the earlier orders. In the first appellate order relating to assessment year 2007-08, reference was made to transactions in shares of 8 companies, which were held for a period ranging from 6 days to 97 days, but the assessee states that there were other shares too, which were held for longer period. For the assessment year 2008-09, there is no discussion and elucidation. It is clearly noticeable that the impugned order passed by the Tribunal does not refer to the factual matrix relating to the assessment years 2007-08 and 2008-09.
It was noticed from records that the assessee had declared long-term capital gains and, therefore, the stand of the assessee is that he was an investor as well as trader in shares. In view of the aforesaid factual position, it is held that the Tribunal has not dealt with the contentions raised after examining and ascertaining the facts in detail. The factual position can vary and can be materially different. Thus, the impugned order of the Tribunal is set aside and matter is remanded back for disposal afresh.(AY. 2007-08, 2008-09)
Acee Enterprises v. CIT (2015) 229 Taxman 409 (Delhi)(HC)

S.45 : Capital gains – Restrictive covenant – Independent and district assets – Share purchase – Where the agreement between the parties (for sale of shares) indicates that the lump-sum consideration was in respect of two or more promises (i.e. sale of shares & non-compete covenant), it is liable to be bifurcated and apportioned between each of the assets – Assessee is entitled to apportionment towards price of shares and price of restrictive covenants – Appeals of revenue was dismissed. [S.4, 17, 28(ii)(c)] 1096

The High Court had to consider whether, although the agreement for sale of shares did not bifurcate the consideration towards the various covenants in the agreement, the assessee was entitled to bifurcate the same and apportion a part thereof towards the negative covenants and claim that the same is not taxable. HELD by the High Court:

(i) It is difficult to understand how the mere fact that the parties have not apportioned the consideration between the two assets which were being dealt with by this agreement can make any difference to the rights of the parties. The position might have been different if the market value of the shares could not be ascertained. Then it might be said that it is difficult to put a proper value upon the shares and to put a proper value for the consideration. But when the market value is available and when it is known for what price these shares could be purchased or sold, there is no difficulty whatsoever in the apportionment.

(ii) The value to be ascribed to each transaction must obviously depend upon the evidence and the facts in each case. The tax of whatever nature, must be levied on the basis of the true value of the asset of the transaction and not merely on the basis of the value ascribed to it by the assessee. Indeed, the view to the contrary could cause severe prejudice to the revenue itself. To accept the contention would enable assessees to ascribe artificial values to assets enabling them to avoid tax.

(iii) The agreement indicated two distinct assets, namely, the negative covenant and the shares are independent and distinct assets. It was possible to have a separate and independent agreement in respect of each of them. The agreement in terms of the negative covenant contained in Clause 5.5 did not flow out of the agreement to sell the shares. Each of these agreements could have been arrived at independent of the others. Each of the agreements could have been arrived at without and even in the absence of the other. The negative covenant could have been agreed to by the members of the Saboo group without having sold their shares and the members of the Saboo group could have sold their shares without agreeing to the negative covenants. It was therefore not only permissible but necessary to apportion the consideration towards each of the assets provided of course it is possible to ascertain a value of each of the assets.

(iv) The observations in *Vodafone International Holdings BV v. Union of India (2012) 6 SCC 613* cannot be read in isolation. Moreover, even these observations do not support Ms. Dhugga's submission that merely because the written agreement entered into between the parties does not bifurcate the consideration and apportion the same, the authorities and/or the assessees are precluded from doing so. Indeed, the issue, as it arises before us, was not considered by the Supreme Court. The Supreme Court considered the aspect in an entirely different context. The Supreme Court did not hold that even if it had come to the conclusion that the case concerns sale of share and other assets, there could be no bifurcation and apportionment of the consideration stipulated merely because the Share

Purchase Agreement did not itself bifurcate the consideration *qua* the independent components. Our view is, therefore, not inconsistent with the judgment in Vodafone's case (supra). As we noted earlier, this is the view of a Bench of three learned Judges of the Supreme Court in *Commissioner of Income Tax, Madras v. Best and Co. (Private) Ltd. 1966 Income Tax Reports (60) 11*, which dealt with the very point in issue before us. We are, therefore, in any event bound by the judgment in *CIT v. Best and Co. P. Ltd. (supra).* (AY.1994-95)

CIT v. Usha Saboo (Smt) (2015) 374 ITR 695 / 121 DTR 1 / 278 CTR 57 (P&H)(HC)
CIT v. Pallabi Saboo (2015) 374 ITR 695 (P&H)(HC)
CIT v. Shri R.K. Saboo (2015) 374 ITR 695 (P&H)(HC)
CIT v. Anuradha Saboo (2015) 374 ITR 695 (P&H)(HC)
CIT v. Jai Vardhan Saboo (2015) 374 ITR 695 (P&H)(HC)
CIT v. Yaswardhan Saboo (2015) 374 ITR .695(P&H)(HC)

1097 **S.45 : Capital gains – Business – Transactions in shares – Held to be investment – Question of fact. [S. 28(i), 260A]**

The Assessing Officer held that the transaction in shares undertaken by the assessee was in the nature of a business transaction and not investment. The Commissioner (Appeals), after discussing the reasons as to why the transaction was in the nature of an investment held that the transaction was really in the nature of an investment. The Tribunal agreed with the Commissioner (Appeals). On appeal: Held, dismissing the appeal, that the view taken by the Tribunal was also based on evidence and was a possible view. There was, as such, no reason to interfere.

CIT v. Bajranglal Chowdhury (2015) 371 ITR 17 / 232 Taxman 246 (Cal.)(HC)

1098 **S.45 : Capital gains – Transfer – Capital gains are levied in the year in which the possession of the asset and all other rights are transferred and not in the year in which the title of the asset gets transferred. [S. 2(47), Transfer of Property Act, 1953 S.53A]**

The assessee entered into an agreement with the builder on 24-06-1999 to develop his land. After obtaining the map, the assessee entered into a supplementary agreement in which the possession of the land and all other rights excluding title were transferred. On 30-4-2005, the project was completed and the assessee handed over the title to the builder. The AO held that since the title of land was handed over in FY 2005-06, the assessee was liable to pay capital gain in the relevant assessment year only. The CIT(A) upheld the order of the AO. On further appeal, the Tribunal reversed the order of the CIT(A). On the Revenue's further appeal, the Court held that under the terms and conditions of the agreement dated 24-6-1999, the transfer was effective from that day and not in AY 2006-07 and therefore confirms the order passed by the Tribunal. (AY. 2006-07)

CIT v. Ziauddin Ahmad (2015) 115 DTR 7 /229 Taxman 281 / (2016) 283 CTR 223 (All) (HC)

1099 **S.45 : Capital gains – Non-compete fee – Sale of shares – Controlling interest – Assessable as capital gains and not as business income.[S.28(ii), 48]**

Assessee along with his family members held shares in a company. The assessee sold shares with controlling interest to another company and entered into separate non-

compete agreement with the company, as an individual received in an exorbitant amount for the same. The assessee claimed entire non-compete fee of ₹ 6.60 crores as a capital receipt and hence not eligible to tax. The AO invoked s. (28)(ii) of the IT Act and held that ₹ 6.60 crores was ostensibily paid as non-compete fees and it was nothing but a colourable device and the tax treatment should not be accepted. CIT(A) upheld the findings of AO and dismissed it. Tribunal reversed the findings of AO & CIT(A) and held in favour of assessee. On further Revenues appeal in High Court, Hon'ble Court held that a case wherein the sale consideration for transfer of shares was artificially and deceitfully bifurcated under a sham agreement documentation, which was unreal and not true record of the intention, amount received by the assessee was treated as consideration for sale of shares, taxable as capital gains, rather than a payment taxable u/s 28(ii).(AY.1995-96)
CIT v. Shiv Raj Gupta (2015) 372 ITR 337 / 273 CTR 353 (Delhi)(HC)

S.45 : Capital gains – Salary – Perquisites – Stock option – Amount received by assessee on redemption of Stock Appreciation Rights received under ESOP was to be taxed as capital gain and not as perquisite under section 17(2)(iii). [S. 17(2)(iii)] 1100
The Assessing Officer made addition to assessee's income in respect of amount received on redemption of Stock Appreciation Rights received under ESOP as a perquisite under section 17(2)(iii). The Tribunal opined that stock options were capital assets and gain therefrom was liable to capital gain tax.
On revenue's appeal:
In the case of *CIT v. Infosys Technologies Ltd. [2008] 297 ITR 167 / 166 Taxman 204* it is held by the Supreme Court that the revenue had erred in treating amount being difference in market value of shares on the date of exercise of option and total amount 'paid' by employees consequent upon exercise of the said options as perquisite value as during the lock-in period there was no cash inflow to employees to foresee future market value of shares and the benefit if any which arose on date when option stood exercised was only a notional benefit whose value was unascertainable.
In view of the above, the Tribunal was correct in treating the amount received on redemption of Stock Appreciation Rights as capital gain as against treated as perquisite under section 17(2)(iii) and in treating the amount received on exercising the option of Employee's Stock Option Plan (EOSP) as long term capital gains instead of treating the same as short term capital gains. However, the Tribunal was not justified in holding that capital gain arose to the assessee on redemption of Stock Appreciation Rights which were having no cost of acquisition. (AY. 1998-99, 2002-03)
CIT v. Bharat V. Patel (2015) 229 Taxman 236 (Guj.)(HC)

S.45 : Capital gains – Part consideration was received by partners – Partner admitting receipt of consideration of ₹ 65 lakhs the same is assessable in the assessment of firm. [S.48] 1101
Assessee-firm sold joint property and declared sale consideration of ₹ 45 lakhs in sale deed. However, it was found that cheque was issued for ₹ 50 lakhs. Further, prior to sale and subsequent to sale, cheques had been issued to partners of assessees-firm. There was no material on record to show that it was paid back. One of partners

admitted receipt of ₹ 65 lakh. Further, market value of said property as on date of sale was ₹ 62.38 lakhs. Sale consideration was to be considered as ₹ 65 lakhs. (AY. 2001-02)
Sri Saleswara Industries Mahajanahalli v. ITO (2015) 229 Taxman 195 (Karn.)(HC)

1102 **S.45 : Capital gains – Capital asset – Agricultural income – Stadium land-in absence of documentary proof produced by assessees same would not be treated as agricultural and therefore, capital gain tax was to be leviable. [S. 2(14)(iii)]**
Assessees claimed exemption of capital gains arising on sale of land on ground that said land was an agricultural land. Court held that none of assessees had declared any agricultural income in their return. Said land was also described by assessees in conveyance deed as stadium land, further immediately after land was handed over to purchaser, he constructed a commercial complex on said land, therefore in absence of documentary proof produced by assessees same would not be treated as agricultural and hence capital gain tax was to be leviable. (AY. 2008-09, 2009-10)
Kunhaysu v. CIT (2015) 228 Taxman 343 (Mag.)(Ker.)(HC)

1103 **S.45 : Capital gains – Long-term capital gains – Allottee put in possession prior to 1-4-1981 – Assessee entitled to adopt fair market value as on 1-4-1981 and benefit of indexation. [S.2(29B), 54F, Transfer of Property Act, 1882, S.53A]**
When a party is put in possession of property in part performance of an agreement as contemplated under section 53A of the Transfer of Property Act, 1882, the person who is in possession in such capacity has to be treated as the owner from the date on which he was put in possession. Assessee entitled to adopt fair market value as on 1-4-1981. (AY. 2001-02)
CIT v. Ved Prakash Rakhra (2012) 210 Taxman 605 / (2013) 256 CTR 285 / 82 DTR 234 / (2015) 370 ITR 762 (Karn.)(HC)

1104 **S.45 : Capital gains – Accrual – Real income – Tripartite agreement – Even if gains have accrued on execution of the development agreement, the subsequent modification/ supersession of the agreement means that gains are not taxable as per real income theory [S. 4,145]**
Dismissing the appeal of revenue, the Court held that, In *Chaturbhuj Dwarkadas Kapadia v. CIT (2003) 260 ITR 491 (Bom)(HC)*, the issue was to determine the year in which the property was transferred for the purpose of capital gains. In this case the issue is what is the consideration received for the transfer of an asset. No income is accrued or received of the value of 18000 sq.feet of constructed area under the development agreement because the said agreement was not acted upon as it came to be superseded/modified by the Tripartite agreement. This was the position when the return of income was filed. On the application of the real income theory, there would be neither accrual nor receipt of income to warrant bringing to tax to the constructed area of 18,000 sq.ft which has not been received by the assessee. (*CIT v. Shoorji Vallabhdas 46 ITR 144 (SC)* followed). Appeal of revenue was dismissed. (AY. 2007-08)
CIT v. Chemosyn Ltd. (2015) 371 ITR 427 / (2016) 236 Taxman 202 (Bom.)(HC)

S.45 : Capital gains – Family arrangement – Levy of capital gains tax was held to be not justified just because his name is mentioned in the society record. 1105

During the year assessee sold a property. Assessee's case was that pursuant to family arrangement arrived at between parties; said property belonged to his mother and wife. However, property document remained in name of assessee and not mutated in name of assessee's mother and wife in records of Development Authority, due to which assessee had to execute sale deed. Assessing Officer rejected assessee's explanation and added entire capital gain arising from sale of property to assessee's income. It was family arrangement had duly been approved by High Court. Even department had accepted family settlement in earlier years when rental income derived from said property was taxed in hands of assessee's mother and wife. The ITAT held that mere execution of a sale deed by assessee, receiving sale proceeds and depositing in his bank account would not make him liable for capital gains tax by conferring him ownership of property. Therefore, addition was to be deleted.(AY. 2006-07)

Kamal Bhandari v. ITO (2015) 155 ITD 680 / (2016) 136 DTR 271 (Kol.)(Trib.)

S.45 : Capital gains – Conversion of capital asset into stock-in-trade – Capital gains would be chargeable to tax in hands of assessee on pro rata basis as and when stock in trade in form of flats and bungalows comprised of built-up area and proportionate share in land was sold, while amount received over and above cost of such flats and bungalows would be chargeable to tax in hand of assessee as business income. [S.2(14), 28(i), 45(2)] 1106

Assessee-company purchased a land in year 2002, on 30-12-2005, it transferred said land to a developer by way of development agreement. In lieu of such transfer, assessee was given 27 per cent of built up area in form of flats/bungalows which were subsequently sold to various buyers. Income arising from transfer of land by way of development agreement and subsequent sale of flats and bungalows was computed as per provisions of s. 45(2) as capital gain. Since 27 per cent of built up area of project was received by assessee as consideration for transfer of 73 per cent of land area, cost of construction of this 27 per cent area could reasonably be taken as fair market value of 73 per cent of land area in order to compute capital gains arising to assessee on transfer of land by way of development agreement, which simultaneously resulted in conversion of capital asset into stock-in-trade. This capital gain would be chargeable to tax in hands of assessee-company on pro rata basis as and when stock-in-trade in form of flats and bungalows comprised of built up area and proportionate share in land was sold, while amount received over and above cost of such flats and bungalows would be chargeable to tax in hands of assessee-company as business income.(AY. 2008-09, 2009-10)

ACIT v. Medravathi Agro Farms (P.) Ltd. (2015) 155 ITD 905 (Hyd.)(Trib.)

S.45 : Capital gains – Business income – Intention at the time of acquisition of land was to hold the same as capital asset but subsequently land was transferred to developer as per development agreement, subsequent events mostly occurring after date of development agreement, cannot change nature and character of land into stock-in-trade – Transfer of land to developer was held to be liable as capital gains. [Ss.2(14), 28(i)] 1107

Assessee Company was incorporated with main object to carry on agricultural activities. In year 2002, it purchased agricultural land which was treated by it in books of account

as capital asset upto 30-12-2005. When said land was transferred to a developer company, MPL by way of development agreement, Profit arising on such transaction was offered as long-term capital gain. Assessing Officer held that transaction carried out by assessee-company was nothing but an adventure in nature of trade and profit arising out of such transaction was assessable as business income. The ITAT held that since intention of assessee-company was to acquire lands as capital asset, in order to carry on agricultural operations and subsequent events mostly occurring after date of development agreement, could not change nature and character of land into stock-in-trade, Therefore, profits arising from transfer of land as a result of development agreement was chargeable to tax as capital gain and not as business income. (AY. 2008-09, 2009-10)

ACIT v. Medravathi Agro Farms (P.) Ltd. (2015) 155 ITD 905 (Hyd.)(Trib.)

1108 **S.45 : Capital gains – Stock options – Holding shares for benefit of employees of settler – Assessee could not sell the shares in free market at fair market price – Shares are in nature of capital asset and income earned from transfer of those shares to employees was taxable as capital gains.[S. 28(i)]**

The assessee trust established for the welfare of the employees of settler-company and its subsidiaries for the subscription to the equity shares of the company, which was to be held by the assessee-trust exclusively for the benefit of the employees of the said company and its subsidiaries. The Assessing Officer observed that the impugned shares constituted business assets in the hands of the assessee and consequently income arising therefrom is to be assessed under the head income from business. On appeal, the Ld. CIT(A) upheld the action of the Assessing Officer. On appeal, the Appellate Tribunal held that the shares of settler-company, cannot be stock-in-trade of the settler-company. The assessee is like an extended arm or special purpose vehicle of the settler-company, created for the purpose of carrying out certain transactions on behalf of the settler-company, and therefore, the nature and character of shares held by the assessee-trust and resultant gain or loss arising from the transfer of these shares should also be same. Thus, the shares held by the assessee are capital asset in its hands and gain arising on the transfer of these shares shall be taxable under the head income from the capital gains. (AY. 2009-10)

Mahindra & Mahindra Employees' Stock Option Trust v. ADCIT (2015) 155 ITD 1046 / 174 TTJ 689 / 44 ITR 658 / 128 DTR 49 (Mum.)(Trib.)

1109 **S.45 : Capital gains – Transfer of title in land was distribution of capital assets of AOP on its dissolution- On facts it was held that not assessable as capital gains.[S. 2(31)(v), 2(47)]**

Assessee entered into a MOU for jointly developing property. Assessee agreed to provide land as capital contribution. However, owing to certain disputes, a settlement was arrived at amongst parties according to which assessee was to receive ₹ 14 crores for foregoing their rights and ₹ 6 crores for conveying property. While filing return, assessee declared long-term capital gain only on sum of ₹ 6 crores. The Assessing Officer considered entire sum of ₹ 20 crores as taxable under head capital gains. The Tribunal held that, since two parties had voluntarily combined for a common purpose and their main objectives were to produce profit, essential conditions for forming an AOP were

satisfied. Settlement deed practically put an end to AOP and transfer of title in land was nothing but distribution of capital assets of AOP on its dissolution, thus addition of ₹ 14 crores made under head capital gain was incorrect. (AY. 2005-06)
Ind Sing Developers (P.) Ltd. v. ACIT (2015) 155 ITD 543 (Bang.)(Trib.)

S.45 : Capital Loss – Long term capital loss – Loss in sale of shares – Purchase and sale of own group companies by off-market transaction – Loss was held to be non genuine, hence not allowable. [S. 2(29A), 2(29B)] 1110
Assessee Company acquired shares of its own group company at Rs. 40 per share and then sold same to its own group company at a throw away price of 10 paise per share and both transactions being off-market. Allowing the appeal of revenue, the Tribunal held that the entire transaction was not genuine and assessee was not entitled to claim long-term capital loss on sale of shares. (AY. 2009-10)
Dy. CIT v. Leading Line Merchant Traders (P.) Ltd. (2015) 155 ITD 614 (Delhi)(Trib.)

S.45 : Capital gains – Business income – Securities Transaction Tax (STT) – Sale of shares within a short span of time – Profit earned from delivery based sale of shares is capital gains.[S. 28(I)] 1111
Allowing the appeal of assessee the Tribunal held that the objects of introduction of Securities Transaction Tax (STT) was to end litigation on the issue of whether profit earned from delivery based sale of shares is capital gains or business profit. Merely because the assessee liquidates its investment within a short span of time, which had given better overall earning to the assessee, would not lead to the conclusion that the assessee had no intention to keep on the funds as investor in equity shares, but was actually intended to trade in shares. (ITA No. 3469/Mum/2012, dt. 18.02.2015) (AY. 2008-09)
Hema Hiren Dand v. JCIT (Mum.)(Trib.); www.itatonline.org

S.45 : Capital gains – Business income – Share investments – Borrowed money was not utilized – Shown as investment as capital asset – Assessable as capital gains and not as business income [S.28(i)] 1112
Assessee filed its return declaring profit arising from sale of shares as capital gain. Assessing Officer opined that having regard to volume of transactions, period of holding etc, amount in question was to be taxed as business income. CIT(A) allowed the claim of assessee. On appeal by revenue, dismissing the appeal the Tribunal held that the that assessee had not utilized borrowed funds for purchase of shares, there was also no dispute to fact that assessee had treated equity shares as investment, i.e., capital asset all along. Assessee had also valued shares at cost and thus given a particular treatment to shares held as investment. Appeal of revenue was dismissed. (AY. 2007-08)
ACIT v. Kinnary Sanghavi (Mrs.)(2015) 68 SOT 268 (URO)(Mum.)(Trib.)

S.45 : Capital gains – Business income – Share investments – Assessable as capital gains and not as business income.[S.28(i)] 1113
During relevant year, assessee filed her return declaring income arising from sale of shares as short-term capital gain. Assessing Officer brought said income to tax

as business income. CIT(A) allowed the claim of assessee. On appeal by revenue, dismissing the appeal the Tribunal held that It was noted that assessee had shown shares in question as investment in her books of account, moreover, assessee had valued said shares on cost basis only. It was also found that transactions in question were delivery based transactions, in aforesaid circumstances, income arising from sale of shares was to be taxed as short-term capital gain. (AY. 2006-07).
ACIT v. Geeta Bhatia (Ms.) (2015) 68 SOT 50 (URO)(Mum.)(Trib.)

1114 **S.45 : Capital gains – Immovable property – Possession was to be delivered on date of registration – No Transfer – Not liable to capital gain.[S. 2(47)(v), 45]**
Where assessee entered into an agreement for sale of property with a partnership firm in which possession of property to said firm was to be delivered on date of registration of sale deed and there was nothing to show that possession was ever delivered by assessee to purchaser in part performance of agreement for sale, there was no transfer within meaning of section 2(47)(v). (AY.2006-07)
Abdul Wahab v. Dy. CIT (2015) 68 SOT 326 (URO)(Bang.)(Trib.)

1115 **S.45 : Capital gains – Conversion of stock-in-trade into capital asset – Conversion of stock-in-trade of shares into investment – Huge transaction – Accepted as short term capital gains and not as business income.[S.28(i), 45(2)]**
In preceding year, noticing tax benefit with respect to capital gains tax in view of amendment made to Act, assessee converted stock-in-trade of shares into investment which had been accepted by revenue. During current assessment year, assessee sold shares. Assessing Officer accepted long-term capital gain for shares held for more than 12 months but did not accept short-term capital gain for shares held for less than 12 months on ground that said conversion was just to take advantage of differential rate of tax on short-term capital gain. It was held by ITAT that there was no frequent purchases and sale of shares. Further, assessing Officer had not brought on record any material which would indicate that intention of assessee was to carry on business in shares. Mere huge volume of sale consideration itself could not be determinative of fact whether assessee was trading in shares or made an investment in shares. Hence assessee's claim of short term capital gains was to be accepted. (AY. 2006-07, 2007-08)
Sukarma Finance Ltd. v. ACIT (2014) 163 TTJ 7 / (2015) 67 SOT 220 (Delhi)(Trib.)

1116 **S.45 : Capital gains – Business income – Investment in shares – Accepted as capital gains in preceding three assessment years – Principle of consistency to be followed – Income to be considered as capital gains.[S.28(i)]**
The assessee claimed income from sale of shares as capital gains. The Assessing Officer rejected the claim and treated it as business income. The Commissioner (Appeals) held that the income arising from transfer of shares was capital. On appeal: Held, dismissing the appeal, that in the preceding three consecutive assessment years, the profits from purchase and sale of shares were accepted as capital gains. Therefore, following the principle of consistency, the income accrued to the assessee from the purchase and sale of shares was to be treated as capital gains. (AY. 2007-08, 2008-09)
ITO v. Ashok Kumar (2015) 39 ITR 76 (Delhi)(Trib.)

S.45 : Capital gains – Income from other sources – Share transactions – No incriminating material found during search to indicate bogus long-term capital gains arising out of sale of shares – Assessment of sale proceeds as income without considering details of purchase of shares produced by assessee – Additions were deleted on merits. [S. 56, 132, 153A] 1117

Held, allowing the appeal, (i) that admittedly, the search operation did not reveal any incriminating material to doubt about the veracity of the long-term capital gains declared by the assessees. The Assessing Officer had fully relied upon the statement given by Narendra R. Shah to form the view that the assessees had introduced their unaccounted money by way of long-term capital gains. However, from the statement given by Narendra R. Shah, without corroboration from other independent evidences, it was not possible to presume that the purchases of shares by the assessees were bogus purchases especially in the absence of a link between Narendra R. Shah and Amizara Securities and Finance P. Ltd.

(ii) That the date of purchase of shares should be recognised as the date on which the broker had issued the contract notes, not the date on which the shares were credited to demat account. Admittedly, the assessees had opened the demat account only subsequent to the date of purchase of shares and there was no compulsion under any law that the shares should be held only in demat account form. The Assessing Officer did not address any evidence to show the purchase of shares in physical form was wrong.

(iii) That though the assessees had furnished the details of purchase of shares, the Assessing Officer had rejected without examining them. In addition, the authorities had assessed the sale proceeds arising on sale of other companies too as income from other sources. Thus the Assessing Officer had proceeded to assess the gross receipts realised on sale of shares as income from other sources only on presumptions and conjectures without bringing credible evidence on record to refute the claim of the assessees. There was no credible material with the Department to disprove the claim of long-term capital gains made by these assessees in their respective returns of income. Accordingly, the order of the Commissioner (Appeals) was to be set aside and the Assessing Officer was directed to delete the assessment of gross sale receipts as income from other sources in all the years under consideration. (AY. 2004-05 to 2006-07)

Vasantraj Birawat v. CIT (2015) 39 ITR 450 (Mum.)(Trib.)

S.45 : Capital gains – Business income – Share transactions – Consistency – Matter was remanded. [S.28(i)] 1118

Assessee company engaged in manufacturing of auto components earned a profit from purchase and sale of shares and showed same as short-term capital gain. Assessing Officer treated same as business income and Commissioner (Appeals) confirmed same. It was held that in view of assessee's own case for assessment year 2007-08 wherein identical issue was pending disposal, matter was to be restored to file of Commissioner (Appeals) for fresh adjudication. (AY. 2008-09)

Advik Hi Tech (P.) Ltd. v. ACIT (2015) 67 SOT 158 (URO)(Pune)(Trib.)

1119 **S.45 : Capita gains – Transfer – Capital asset in to stock-in-trade – Even if possession is handed over to the developer, there is no "transfer" if the developer has only paid an interest-free advance to the assessee to meet expenses – Capital gain will be chargeable in the year of sale. [S.2(47)(v), 2(47)(vi), 45(2), Transfer of Property Act, 1882, S.53A]**

As per project development agreement, the possession was given for construction/ development of project with certain conditions stipulated in the agreement. Whatever amount was received, it was simply interest free advance to meet certain expenses to be borne by the assessee in order to discharge certain responsibilities conferred upon it through the agreement. The said advance would be refundable at different phases stipulated in the agreement. The Assessing Officer has invoked the provisions of section 2(47)(v) of the Act and treated this handing over of the possession of vacant land to the second party i.e. M/s. Arif Industries Ltd. for the purpose of construction of residential/ commercial towers as a transfer of capital asset and computed the capital gain in the hands of the assessee. The provisions of section 2(47)(v) of the Act can only be invoked where absolute possession of capital asset was given to the buyer against certain consideration, but in the instant case no consideration was ever fixed for handing over the possession to the developer and whatever amount was received it was received as interest free advance to meet the expenses to be incurred in discharging certain responsibilities agreed upon in this agreement. Therefore, from any angle there is no transfer of asset as per provisions of section 2(47) of the Act and capital gain would only be chargeable in the years in which stock-in-trade would be sold.(AY. 2009-10)

ACIT v. Upper India paper Mills Co. Pvt. Ltd. (Lkw.)(Trib.); www.itatonline.org

Upper India Couper Paper Mills Company Pvt. Ltd. v. ACIT (Lkw.)(Trib.)www.itatonline.org

1120 **S.45 : Capital gains – Development agreement – Stock-in-trade – Short term capital gains – Business income – None can make profit by dealing himself – Valuation will be at cost or market value whichever is less – When right exercised in part or in full profit can be taxed – Additions confirmed by CIT(A) was deleted. [S. 2(14), 2(42B), 2(47)(v), 4, 5, 28(i), Transfer of Property Act, 1882, S.53A, 55A]**

The Tribunal held that anticipated business profits supposedly accruing to the assessee as a result of transfer of his land to the developer under a development agreement cannot be brought to tax until the assessee exercises his right in part or in full to sell his specified share of constructed area of the proposed housing project. Addition confirmed by the CIT(A) was deleted. (AY. 2010-11)

Dheeraj Amin v. ACIT (2015) 172 TTJ 228 / 123 DTR 8 (Bang.)(Trib.)

1121 **S.45 : Capital gains – Business income – Dealer and investor – Share broker – Shares held as investment could not be treated as business income.[S. 28(i)]**

The assessee is already having investment in shares as established by the fact of earning dividend income and long term capital gains on sale of shares. All these facts are taken into consideration, it is found that there is no reason for the AO to treat the short-term capital gains as business income of the assessee. The AO. was prompted by the difference in the rate of tax as the rate of tax for short-term capital gains earned out of sale of shares is 10 per cent and the rate of tax for business income is 30 per cent.

Tribunal held that short-term capital gains on sale of shares held as investment could not be treated as business income of assessee. (AY. 2007-08)
Chona Financial Services Ltd. v. ACIT (2015) 153 ITD 119 (Chennai)(Trib.)

S.45 : Capital gains – Business income – Investment in shares – A person can have two portfolios – He can be an investor and a trader at the same time – Investment was held to be assessable as short term capital gains.[S. 28i)] 1122
The assessee an individual was engaged in equity trading and offered that income under STCG and paid tax @10%, the AO while assessment made addition treating whole of these transactions being Business Income, the Appellate Authorities separated very frequent equity transactions and cases where few transaction of equity trading undertaken and in the light of CBDT circulars on Equity Trading and partly allowed the treatment of STCG. Order of CIT(A) was affirmed. (AY.2007-08)
ACIT v. Sanjay M. Jhaveri (2015) 168 TTJ 751 / 70 SOT 502 / 116 DTR 49 (Mum.)(Trib.)

S.45 : Capital gains – Transfer – Leasehold rights – Long term – Introduction of leasehold property as capital in consortium which effected in transferring the rights in the immovable property is assessable as long term capital gain.[S.2(47), 2(29B), 269UA] 1123
A property was allotted to the assessee by KIADB under a lease-cum-sale deed constituted bundle of rights and therefore, there was a transfer within meaning of S. 2(47) when the property was introduced as capital in the consortium formed by it with another company for the development of property. Further, the property was allotted on 10-1-2001, though the lease deed was registered on 2-9-2003, it clearly shows that the assessee held the property for more than three years and therefore, capital gain is assessable as long term capital gain for A.Y 2005-06.(AY. 2005-06)
Andhra Networks Ltd. v. DCIT (2015) 167 TTJ 496 / 68 SOT 304 / 114 DTR 275 (URO) (Hyd.)(Trib.)

S.45 : Capital gains – Short term gains – Business income – Investment in shares – Consistently showing the shares as investment – Assessment as short term gains was held to be justified.[S. 2(42C), 28(i), 48] 1124
Dismissing the appeal of revenue, the Tribunal held that, the assessee is Consistently showing the shares as investment hence the assessment as short term gains was held to be justified.(ITA No. 106/Del/2014, dated 10.03.2015) (AY. 2010-11)
DCIT v. Rajasthan Global Securities Ltd. (Delhi)(Trib.); www.itatonline.org

S.45 : Capital gains – Business income – Sale of shares – Principle of consistency – Assessable as capital gains.[S.28(i)] 1125
Dismissing the appeal of revenue the Tribunal held that though the principle of *res judicata* was not applicable to income tax proceedings but the principle of consistency requires that the view taken in one year should be followed in subsequent years unless the facts or the legal position justify departure therefrom. Therefore, the issue was decided in favour of the assessee. (ITA No. 1504/M/2012 dated 14-1-2015)(AY.2006-07)
ITO v. Ved Mitter N. Puri (Mum.)(Trib.); www.ctconline.org

1126 **S.45(2) : Capital gains – Conversion of a capital asset into stock-in-trade – On the basis of the evidence before lower authorities, it was clear that land was originally a capital asset and tax would be payable only in the year in which the Assessee ultimately sold the stock-in-trade. [S. 45]**

The Assessee, engaged in the business of developing property and following project completion method, claimed that no sale was made during the year. The AO found that premises were sold. However, portion of such premises was originally a capital asset which was later on converted into stock-in-trade. The HC upheld the order of the Tribunal holding that land was originally a capital asset of the Assessee, and setting aside the matter to the AO to decide the year of conversion of land into stock-in-trade since income would be chargeable only at the time when the Assessee ultimately sells the stock-in-trade. (AY. 2003-04)

CIT v. Saffire Hotels (P) Ltd. (2015) 377 ITR 523 / 276 CTR 219 / 116 DTR 385 / 234 Taxman 482 (Bom.)(HC)

1127 **S.45(4) : Capital gains – Transfer – Firm transformed into a company – Shares were issued – There was no physical distribution of assets or allocation of same to respective partners or even distributing monetary value thereof, section 45 would not be applied. [S.2(47), 45]**

The assessee was a firm constituted under the Partnership Act. The entire assets and liabilities of the assessee were made over to the company. The respective partners were issued shares by the company corresponding to the value of their share in the firm. The AO took the view that there was transfer of assets from the assessee to the private limited company and thereby the capital gains tax under section 45 became payable. On appeal, the Commissioner (Appeals) allowed the appeal. He took the view that section 45(4) did not get attracted to the facts of the case. On appeal by revenue the court held that where assessee firm transformed into a company and partners were issued only shares by company, and there was no physical distribution of assets or allocation of same to respective partners or even distributing monetary value thereof, section 45 would not be applied. (AY. 1993-94)

CIT v. United Fish Nets (2015) 372 ITR 67 / 276 CTR 264 / 117 DTR 231 / 228 Taxman 302 (AP)(HC)

1128 **S.45(4) : Capital gains – Distribution of capital asset – Dissolution of firm – Transfer – Firm – Partner – Transfer of legal title in name of firm is not essential – Firm is liable to capital gain tax. [S. 2(14)]**

Transfer of legal title in name of assessee-firm is not essential to hold that assessee-firm is owner of those assets if such assets are transferred by a partner of firm as capital and firm had been showing said landed building in balance sheet and claiming depreciation on same. On dissolution of firm, said property was taken over by said partner. Transaction was liable for capital gains. (AY. 2007-08)

M. Ahammedkutty v. ITO (2015) 67 SOT 353 (Cochin)(Trib.)

1129 **S.45(5) : Capital gains – Compensation – Deemed income – Matter remanded. [S.45]**

Assessee received certain sum as compensation. AO treated said compensation as deemed income by invoking section 45(5). On appeal Tribunal relied upon decision of

Apex Court in case of *CIT v. Hindustan Housing & Land Development Trust Ltd. [1986] 161 ITR 524* held that amount of compensation could not be brought within meaning of income under section 45(5). Since Apex Court in case of *CIT v. Ghanshyam (HUF) [2009] 315 ITR 1* distinguished its earlier decision which had been relied upon by Tribunal in impugned order, matter was to be remanded back.
CIT v. Ravjibhai Harkhabhai Savalia (2015) 229 Taxman 94 (Guj.)(HC)

Section 47 : Transactions not regarded as transfer.

S.47 : Capital gains – Transaction not regarded as transfer – Period of 12 months had to be reckoned from the date of acquisition of the fully convertible debentures – Assessable as long term capital gains and entitled exemption. [S.2 (42A), 45, 47(X), 49(2A), 54F] 1130
Assessee was allotted certain convertible debentures of a company and later on same were converted into equal number of shares. Assessee sold said shares. In the return filed he claimed the capital gain arising from sale of shares as exempt under section 54F. The Assessing Officer assessed the capital gain from sale of shares as short-term capital gain and disallowed the exemption under section 54F. The Commissioner (Appeals) partly allowed the appeal of the assessee observing that the period of 12 months had to be reckoned from the date of acquisition of the fully convertible debentures.
The Tribunal upheld the order of the Commissioner (Appeals). On appeal dismissing the appeal of revenue the Court held that while computing capital gains arising from sale of shares, it would be but logical to reckon date of acquisition of convertible debentures as date of acquisition of such shares. (AY. 2003-04)
CIT v. Naveen Bhatia (2015) 235 Taxman 178 (P&H)(HC)

S.47 : Capital gains – Sale of assets in favour of company – Liable to capital gain tax. [S.45, 47(xiii), 48] 1131
Assessee-firm sold its assets in favour of a company and consideration was paid to partners of firm in form of allotment of shares in transferee. Since said transaction did not fall into succession of firm much less there was any exercise of corporatization or demutualization which were essential to attract section 47(xiii), assessee was liable to pay capital gains tax.(AY.1988-89 to 1997-98)
Ana Labs v. Dy. CIT (2015) 371 ITR 295 / 229 Taxman 210 (AP)(HC)

S.47(xiii) : Capital gains – Transaction not regarded as transfer – Conversion of firm into company – Unregistered document asserting payment of cash by firm to partner on takeover – Document denied by firm – No verification done by AO – No material to establish payment of cash – Not a case of dissolution of firm – Conditions of section 47(xiii) fulfilled – No capital gains. [S.45(4)] 1132
Assessment of assessee was reopened on the ground that in process of takeover of the business of the firm by company, substantial amount was agreed to be paid to partner under an agreement dated 07.12.1998 and also capital gain tax arose under section 45(4) by way of distribution of capital asset on the dissolution of firm. Assessee had submitted that such an agreement was never entered into and such allegations are false. No cash payment as claimed under an agreement was ever paid. In fact, business

and management along with assets and liabilities were taken over by the company as per takeover agreement. AO, however, construed such takeover agreement dated 1-4-1999 to be false and sham and alleged that such document was subsequently made to evade capital gains tax liability u/s. 45(4) under the garb of claiming exemption u/s 47(xiii). AO also alleged that conditions of section 47(xiii) are not fulfilled. CIT(A) allowed the assessee's appeal. On appeal, ITAT dismissing the appeal held that it was specifically contended before AO that agreement dated 07.12.1998 was never entered into and signatures have been forged. Even after such serious allegations, AO did not make proper enquiry into the matter and did not refer the matter to the handwriting expert so as to verify the genuineness. Assessee was not at all shown the original agreement and even as confronted by AO, it appeared that even AO did not see the original agreement. It was necessary to bring the original agreement on record and verify its genuineness. Also, no adverse inference can be drawn against as it was not confronted to the assessee. Further, agreement dated 1-4-1999, was a registered document wherein assessee transferred the entire business to the company along with its assets and liabilities and in consideration to transfer company allotted shares to partners. Also, genuineness of this agreement was not disputed. Therefore, on the face of this registered agreement dated 1-4-1999 no reliance can be placed on an unregistered disputed agreement dt. 7-12-1998. Also, no evidence was brought on record to prove that any amount has been paid in cash. Facts of the case clearly support the findings of CIT(A) that there was a transfer of capital asset or intangible asset of the firm by the company as a result of succession and all the conditions of section 47(xiii) are fulfilled. Therefore, assessee was eligible for exemption u/s. 47(xiii) and no capital gains are chargeable u/s. 45(4) of the Act. (AY. 1999-00, 2000-01)

DCIT v. Oriental Dyeing and Finishing Mills (2015) 44 ITR 514 / (2016) 175 TTJ 430 / 129 DTR 161 (Chd.)(Trib.)

ITO v. Rajat Sood (2015) 44 ITR 514 / (2016) 175 TTJ 430 / 129 DTR 161 (Chd.)(Trib.)

Section 48 : Mode of computation

1133 **S.48 : Capital gains – Amount paid in discharge of mortgage created after acquiring property would not be deductible as expense while computing capital gains. [S.45]**

Dismissing the appeal the Court held that amount paid in discharge of mortgage created after acquiring property would not be deductible as expense while computing capital gains. (AY. 2005-06)

Sri Kanniah Photo Studio v. ITO (2015) 235 Taxman 58 / (2016) 131 DTR 258 (Mad.)(HC)

1134 **S.48 : Capital gains – Tripartite agreement value of flats allotted to be computed on the basis of construction cost – Cost of construction agreed by the parties cannot be substituted by Assessing Officer by adopting project cost. [S.45]**

Assessee-firm was in occupation of a premise. Under tripartite agreement between assessee-tenant, landlord and builder, landlord executed lease deed with regard to 18% of undivided share in property and proportionate super built area for a period of 65 years in favour of assessee-tenant. Thus, assessee received 22,100 sq. ft. of built up area in commercial complex. Assessee arrived at consideration at ₹ 1.76 crore by taking cost of construction at ₹ 800 per sq. ft. which was agreed upon between parties, however,

cost of construction at ₹ 800 per sq. ft. was substituted by Assessing Officer by project cost. On appeal, the Commissioner (Appeals) held that the cost of construction had been agreed upon between the parties at ₹ 800 per sq ft. and same being full value of consideration which was agreed to between parties and which was not rejected by the Assessing Officer by assigning reasons, same ought to have been accepted. The Commissioner (Appeals) found that the project cost include the payment of ₹ 1.40 crore to landlord as well as the amount paid to the assessee to vacate the premises. The Commissioner (Appeals) held that these amounts had nothing to do with the cost of construction. Order of Commissioner (Appeals) was affirmed by Tribunal. On appeal by revenue; dismissing the appeal of revenue the Court held that It was found that builder paid non-refundable amounts to landlord and tenant to acquire vacant possession of property, further, advertisement cost had been incurred by developer therefore these amounts could not be taken as part of cost of construction hence addition made by Assessing Officer on basis of project cost indicated by developer was liable to be deleted. (AY. 2005-06)

CIT v. Khivraj Motors (2015) 234 Taxman 843 / (2016) 380 215 / 133 DTR 145 (Karn.)(HC)

S.48 : Capital gains – Valuation as on 1-4-1981 based on valuation report of registered valuer – Assessing Officer cannot adopt the sale price of nearby property. [S. 45, 55] 1135

During relevant period, assessee sold a plot of land and treated it as a case of sale of long term capital asset. Assessee submitted valuation report of a registered valuer determining fair market value at ₹ 225 per sq. ft. as on 1-4-1981. However, Assessing Officer on basis of sale deeds of some nearby properties registered for such price in year 1981, adopted fair market value at ₹ 84 per sq.ft. and computed capital gains. On appeal allowing the appeal the Court held that;since assessee had provided reasons for determining ₹ 225 per sq. ft. as fair market value of property by producing relevant material, including valuation report of a registered valuer, Assessing Officer could not have arrived at 'fair market value' of property in question without taking into consideration material on record, including valuation report filed by assessee. (AY. 2004-05)

N. Govindaraju v. ITO (2015) 377 ITR 243 / 233 Taxman 376 / 280 CTR 316 (Karn.)(HC)

S.48 : Capital gains – Amount spent wholly and exclusively for purposes of transfer – Agreement for sale of shares – Separate agreement for obtaining higher price – Commission paid under separate agreement – Deductible.[S.45] 1136

The assessee was a major shareholder of DDL. An agreement entered into between the shareholders of DDL and MIFL for sale of the shares in DDL clearly set out the *pro rata* of charges chargeable by each of the shareholders depending upon their shareholding. Prior to entering into the agreement the assessee had written a letter agreeing to pay an additional amount in the event MIFL got him a good price for his shares. The assessee got 72 cents extra per share when compared to other shareholders. In terms of the letter the assessee paid the extra charges to MIFL and claimed deduction thereof from capital gains. The claim was rejected by the Assessing Officer but allowed by the Tribunal. On appeal to the High Court :

Held, dismissing the appeal, that the payment of the additional sum to MIFL as their charges was not in dispute. Therefore, this was the amount which the assessee incurred

as expenditure for sale of shares. That was the amount which is wholly and exclusively incurred by the assessee in connection with such transfer. It was deductible while computing capital gains. (AY.2005-06)
CIT v. Venkata Rajendran (2015) 373 ITR 424 / 232 Taxman 660 (Karn.)(HC)

1137 **S.48 : Capital gains – Cost of acquisition – Computation – Valuation was accepted by other co-owners – Held to be justified.[S.45, 55]**
Dismissing the appeal of assessee the Court held that; with reference to the assessment year 1990-91 the District Valuation Officer's report relied upon the sale of a similar property. The appellate authorities had not treated the report as binding but only as relevant evidence. In case the assessees felt and wanted to rely upon other sale instances, they could have produced the evidence before the Assessing Officer or before the Appellate Authorities including the Tribunal. Noticeably, no attempt was made to challenge the sale instance and the computation made by the Assessing Officer by filing other contemporaneous sale deeds. No other transaction was relied upon. The valuation or estimation has to be fair and reasonable and not based upon surmise and conjecture. The property was owned by several assessees. The other co-owners had accepted the valuation report. The assessment based on the District Valuation Officer's report was justified. (AY. 1990-91)
Prabhu Dayal Rangwala v. CIT (2015) 373 ITR 596 / 231 Taxman 790 / (2016) 283 CTR 58 (Delhi)(HC)
Indulata Rangwala v. CIT (2015) 373 ITR 596 / (2016) 283 CTR 58 (Delhi)(HC)

1138 **S.48 : Capital gains – Deductions under section 48(2) are required to be allowed before applying provisions of section 54E [S. 45, 54E]**
While computing long term capital gains, deductions under section 48(2) are required to be allowed before applying provisions of section 54E.(AY. 1992-93)
Torrent Laboratories Ltd. v. Dy. CIT (2015) 229 Taxman 207 (Guj.)(HC)

1139 **S.48 : Capital gains – Capital asset – Personal effect – To be excluded while computing cost of acquisition. [S.2(14), 45]**
At the time of computing cost of acquisition the assessee claimed deduction of amount spent on items like wooden temple, crockery, fans, light fittings etc. The AO rejected assessee's claim holding that aforesaid items were personal effects which were not covered under the head 'capital asset' as per the provisions of section 2(14). On appeal the Court held that the said items were primarily 'personal effect' excluded from definition of capital asset under section 2(14), therefore the assessee's claim deserved to be rejected. (AY. 2009-10)
Sachinder Mohan Mehta v. ACIT (2015) 228 Taxman 283 (Delhi)(HC)

1140 **S.48 : Capital gains – Cost of improvements – Expenses incurred for removing encumbrances was held to be allowable – Joint ownership – Indexation cost to be allowed on transfer of common area. [S.45]**
During relevant year, assessee sold a piece of land and declared certain amount as long-term capital gain. The assessee had entered into agreement to sell said land earlier but final sale could not materialize. Subsequently, in terms of compromise deed, assessee

had to pay certain amount as compensation. Amount so paid was claimed as deduction under head 'cost of improvement'. Tribunal held that the payment was to be allowed as deduction. Similarly the while computing capital gain on sale of property, claimed certain amount of deduction as indexed cost of acquisition. In course of assessment, amount so claimed as deduction was enhanced on ground that assessee was owner of greater area of land which included his share in common area meant for use by all co-owners. Assessing Officer rejected assessee's claim of higher amount of deduction. Tribunal held that since in terms of registered sale deed, what assessee actually transferred was not only lesser area under his exclusive ownership, but also common area on which he had joint ownership rights, his claim for higher amount of deduction was to be allowed. (AY.2007-08)

ACIT v. Pushkar Dutt Sharma (2015) 68 SOT 278 (URO)(Delhi)(Trib.)

S.48 : Capital gains – Computation – In computing "capital gains" the AO is not entitled to substitute the "market value" for the actual "consideration" received by the assessee. He also cannot disregard the valuation report without cogent material.[S.45] 1141

(i) It is settled position of law that in the case of sale, the Assessing Officer has no power to replace the value of the consideration agreed between the parties. In this regard, we find strength from the above cited decision of Hon'ble Delhi High Court in the case of Nilofer Singh holding that the expression "full value of consideration" used in section 48 of the Act does not have any reference to market value.

(ii) A report of a valuer is an important piece of evidence and the same cannot be discarded without there being any cogent material on record showing that the report of the valuer is not correct.

(iii) As the expression "full value of consideration" in section 48 of the Income-tax Act, 1961 does not have any reference to market value, the Assessing Officer was having no power to replace the value of the consideration agreed between the parties with any fair market value or estimation. Only because the Pioneer Ltd. had shown the book value of shares at the rate of ₹ 3.50 per share, the Assessing Officer was not justified to ignore the price agreed between the parties and to doubt the genuineness of the claimed loss, even ignoring the valuation report.(ITA No. 5335/Del/2012, dated 28.09.2015)(AY. 2009-10)

Venus Financial services Ltd. v. ACIT (Delhi)(Trib.); www.itatonline.org

S.48 : Capital gains – Cost of acquisition – Interest – Interest paid on moneys borrowed to acquire assets cannot be treated as the 'cost of acquisition' of the asset.[S.45] 1142

The assessee has claimed the interest cost as a part of the cost of acquisition and/or improvement. On appeal Tribunal held that The first question, therefore, that arises is as to how is the interest cost relating to borrowings made to finance the acquisition of a capital asset, could be considered as toward its acquisition, which is already complete on the passing of the property therein to its owner-holder. The question, as would be apparent, is broader, including within its ambit, all forms of capital assets. That is, how does it, in any manner, promote or is toward acquiring the asset/shares, which would be borrowing itself. The interest cost is toward the retention of the borrowing and, concomitantly, the retention or the holding of the asset under reference, i.e., is a

function of the holding period. It is, thus, rightly described as a holding cost or a period cost, depending upon how one may look at it. This difference is again of relevance in-as-much as the asset may be sold/realized without the repayment of the debt, so that the interest cost continues independent of the asset. Again, the debt may be repaid/ liquidated, extinguishing the interest cost, while the holding of the asset continues. That is, even the holding cost relationship is not automatic or follows as a natural corollary. The two, i.e., the interest cost and cost of the asset, are in any case independent of each other. So, however, it shall not be wrong to describe the interest cost as a period cost, chargeable against the income of the enterprise for the relevant period, against its income from the assets, including the asset under reference, deployed for its activity. Coming back to the acquisition, the said process or event is complete on the transfer of the relevant capital asset to the assessee. The interest cost for the post acquisition period, as would be apparent from the foregoing, does not in any manner contribute toward the same, which process stands completed on the transfer. The same is, at best, a holding cost of the asset and, therefore, revenue in nature, to be, as such, expensed as a period cost for the relevant period. That in fact is precisely what the assessee had done after acquiring the asset in the instant case as well. Appeal of assessee was dismissed. (AY. 2007-08)

Natural Gas company Pvt. Ltd. v. DCIT (2015) 171 TTJ 278 / 121 DTR 86 / 70 SOT 1 / 44 ITR 208 (Mum.)(Trib.)

1143 **S.48 : Capital gains – Computation – Built up area receivable in future – Present value of constructed area as estimated by developer, and not fair market value of land, will constitute full value of consideration for purpose of capital gains.[S.45]**

Assessee handed over possession of land to developer against consideration of 50 per cent of constructed area. According to assessee the full value of the consideration should be a fair market value of the land to be transferred to the developer. Tribunal held that full value of in this case is the cost of construction incurred by the builder on the assessees's share of constructed area, because the assessee would receive constructed area in lieu of the land share. Appeal of revenue was allowed and the cross objection of assesse was dismissed. (AY. 2007-08)

ITO v. N.S. Nagaraj (2015) 152 ITD 262 / 118 DTR 163 / 170 TTJ 599 (Bang.)(Trib.)

Section 49 : Cost with reference to certain modes of acquisition.

1144 **S.49 : Capital gains – Amount paid to sisters as per family arrangement for permitting transfer of property is deductible [Ss.45, 48]**

In view of the Will of late mother Smt. Moghe and thereafter Will of P.M. Moghe, three sisters had a right in property and without extinguishing it or without providing for its adjustment, the assessee could not have sold property. As such, the amount of ₹ 45 lakh paid to three sisters is correctly found to be an expenditure incurred in connection with transfer of property. The arrangement worked out by three sisters and brothers as also three daughters of the deceased Shri P.M. Moghe, is *bona fide* one. The assessee and his three daughters were faced in a peculiar position. They resolved the situation and a family settlement was reduced into writing. It was agreed that at the time of sale, each sister shall be given ₹ 15 lakh and each niece shall be given ₹ Five lakh. Accordingly,

when the property was sold on 07.07.2006, this family settlement has been given effect to. It is, therefore, obvious that in the absence of such family settlement and payment, the sale of property on 07.07.2006 by the assessee could not have materialized. The sisters had a title in property and without their co-operation there could not have been any sale. As such, the amount of Rs.45 lakh paid to his sisters has been rightly accepted as expenditure in connection with transfer of property.(AY. 2007-08)
ACIT v. Kamlakar Moghe (2015) 378 ITR 561 / 125 DTR 273 / 280 CTR 544 / (2016) 236 Taxman 439 (Bom.)(HC)

S.49 : Capital gains – Indexed cost of acquisition – HUF – Partition in the year 1998- Property acquired by HUF prior to 1-4-1981 – Capital gains is to be computed by taking cost inflation index for financial year 1981-82. [S. 45, 47, 48] 1145
The bigger HUF of the assessee owned the property before 1-4-1981. The full partition was made on 20-2-1995 which was accepted by the Assessing Officer on 19-2-1998. However, the assessee also got it by way of Court decree on 19-5-1988. The Assessing Officer had himself accepted the claim of the assessee under section 49(1)(i) taking the cost of the previous owner as on 1-4-1981. However, the Assessing Officer had applied the Cost of Inflation Index for the year 1998-99 instead of 1981-82 and the assessment was completed. On appeal, the Commissioner (Appeals) deleted the additions made by the Assessing Officer on account of difference in Long Term Capital Gain. On second appeal, the Tribunal decided against the revenue. On appeal
Dismissing the appeal the Court held that where capital asset was property of HUF prior to 1-4-1981 and assessee acquired absolute ownership on 19-5-1998 after partition of said HUF property, in such circumstances, date of acquisition of property by HUF being prior to 1-4-1981 would entitle assessee to calculate capital gains tax by taking cost inflation index for financial year 1981-82, and not 1998-99.(AY. 2009-10)
Dy. CIT v. Sushil Kumar (2015) 231 Taxman 788 (P&H)(HC)

S.49 : Capital gains – Capital asset acquired by assessee by inheritance – Indexed cost of acquisition – To be with reference to year in which previous owner acquired asset and not year in which assessee acquired asset.[S2(42A), 45, 55(2(b)(ii)] 1146
The cost of acquisition of capital asset at the option of the assessee is the fair market value of the asset on April 1, 1981. Any other interpretation will not only lead to absurd results and cause immense prejudice to the assessee. If the previous owner, that is to say, the mother had not died and if she herself had sold the property in the year 2003, she would have got the benefit of indexation on the fair market value as at 1st April, 1981. (AY. 2004-05)
CIT v. Mina Deogun (Smt.) (2015) 375 ITR 586 / 233 Taxman 367 (Cal.)(HC)

S.49 : Capital gains – Previous owner – Cost of acquisition – Inherited property land – Determination of fair market value by the Tribunal was affirmed. 1147
The assessee inherited 51 cents of land as on 2-2-1981. He sold part of land to one 'H' on 16-9-2008 at the rate of ₹ 3.75 lakhs. In next year again he sold the remaining land to same 'H' at the same rate. While computing long-term capital gain assessee had adopted the fair market value at ₹ 47,410 per cent as on 1-4-1981 for the calculation of the indexed cost of acquisition of the property sold. The AO however, adopted the

value of ₹ 300 per cent as per the details available in Sub-Registrar's record as on 1-4-1981, as against the value of ₹ 47,410 adopted by the assessee. On appeal, the Commissioner (Appeals) determined the fair market value at ₹ 1200 per cent. On second appeal, the Tribunal determined the fair market value of land at ₹ 5000 per cent. On appeal to the High Court: The Court held that there is absolutely no basis for the claim made by the assessee for determining the fair market value. The documents produced before the Assessing Officer clearly show that the guideline value as on 1-4-1981 is ₹ 300 per cent. Before the Commissioner (Appeals), the document of the year 1984 was submitted and based on that the Commissioner (Appeals) fixed the fair market value at ₹ 1,200 per cent. The Tribunal has fixed the same at ₹ 5,000 per cent, however, without any discussion. However the document dated 14-2-1984 in respect of nearby plot correctly shows the fair market value at ₹ 8,393 and the Tribunal after allowing certain deductions for the three year period, i.e., the difference between the date of acquisition by the assessee, namely, 2-2-1981 and till the date of the noted document, came to a conclusion that ₹ 5,000 should be fair market price. Such a determination by the Tribunal does not warrant any further modification or interference. Hence, the appeals stand dismissed. (AY. 2009-10, 2011-12)
S. H. Syed Sultan v. ITO (2015) 229 Taxman 529 (Mad.)(HC)

1148 **S.49 : Capital gains – Cost with reference to certain modes of acquisition-indexation – Where acquisition of property was by way of Will and previous owner owned it prior to 1-4-1981, relevant year was to be accepted for purpose of indexation.[S.48]**
Since the assessee became the owner of the property by way of a Will, therefore, the cost of the same shall relate back to the previous owner. Since the previous owner had owned the property prior to 1st April, 1981, therefore, the year 1980-81 adopted by the assessee for the purpose of indexation is in consonance with the provisions of the Act. (AY. 2008-09)
Subhash Vinayak Supnekar v. ACIT (2013) 158 TTJ 237 / (2015) 152 ITD 389 (Pune)(Trib.)

Section 50 : Special provision for computation of capital gains in case of depreciable assets.

1149 **S.50 : Capital gains – Depreciable assets – Block of assets – Destruction of wind mill – Compensation – Not assessabale as capital gain or profits chargeable to tax u/s 41. [S. 2(11), 45, 41]**
Allowing the appeal the Court held that compensation received from insurance company on account of destruction of wind mill is not taxable as capital gain under section 50, and also provisions of section 41 cannot be invoked in such case. (AY. 1999-2000)
Gujarat Petrosynthese Ltd. v. Addl. CIT (2015) 230 Taxman 318 (Guj.)(HC)

Section 50B : Special provision for computation of capital gains in case of slump sale.

1150 **S.50B : Capital gains – Slump sale – Sale of business – Finding that it was a slump sale – No liability to tax. [S. 50]**
The assessee was engaged in the business of manufacturing, sales, and distribution of pure carbon dioxide liquid and storage systems. It had transferred a part of the business

as a going concern to P and the consideration received was not offered to tax. Notice under section 148 was issued to the assessee. In response to the notice, the assessee furnished the details as called for. The assessing authority found that the assessee had not sold all the assets. Some buildings, machinery, office equipment, computers, and vehicles had not been sold by the assessee and some cylinders had also been retained by the assessee even after the transfer of the business. Therefore, the assessing authority was of the view that the entire assets forming part of the business were not sold. The nomenclature used in the agreement with P did not make the sale, a slump sale. The Assessing Officer proceeded to levy tax. The Commissioner (Appeals) and the Tribunal held that it was a slump sale. On appeal to the High Court :
Held, (i) that the Appellate Authorities on consideration of the entire material on record had concurrently held that the sale was a slump sale and while coming to the conclusion, they had relied on the orders passed by the Tribunal in connection with the sister concern of the assessee. They had also followed the judgment of the Supreme Court as well as this Court. Under these circumstances, there was no merit in the appeals. The consideration received by the assessee from P was consideration received for a slump sale of a going concern for a slump price and could not be brought to tax under section 50.
CICB – Chemicon P. Ltd. v. CIT (2015) 371 ITR 78 (Karn.)(HC)

Section 50C : Special provision for full value of consideration in certain cases.

S.50C : Capital gains – Full value of consideration (Circle rate) is to be worked out on basis of circle rate prevailing on the date of agreement to sell and not on the date of execution of sale deed. [S. 345, 48] 1151
The assessee entered into an agreement to sell its land on 27-5-2004. Thereafter the sale deed was executed on 16-9-2004. The Circle rate on date of agreement was ₹ 13,000/- per sq. mtr. However, the circle rate on date of execution of sale deed was increased to ₹ 20,000/- per sq. mtr. The A.O. made addition applying the Circle rate on execution of sale deed for computing capital gains. On appeal the Appellate Tribunal held that the enhancement of Circle rate is beyond the control of assessee and buyer had not paid anything above amount that had been agreed. Hence, addition made by AO is unjustified. On facts the Tribunal held that the Circle rate on the date of agreement should be considered. (AY. 2005-06)
ITO v. Modipon Ltd. (2015) 154 ITD 369 / 168 TTJ 480 / 115 DTR 99 (Delhi)(Trib.)

S.50C : Capital gains – Full value of consideration – Stamp valuation – Stamp duty value won't apply if value of property adversely affected due to its usage for industrial purposes only. [S.45] 1152
Assessee sold a property. It adopted sale consideration of said property at fair market value and calculated capital gain tax accordingly. Assessing Officer took a view that lower consideration had been taken by assessee as 'sale consideration' instead of market value of property as taken by stamp valuation authority. Assessing Officer took value adopted by stamp valuation authority as sale consideration and calculated LTCG tax. During appellate proceedings, assessee furnished a letter as 'additional evidence' wherein it was stated that land rate in industrial estate was fixed by Price Fixation Committee.

CIT(A) upheld order. The ITAT observed that since valuation of property was adversely affected as a result of restrictive use of said property for industrial purpose only, it was appropriate and in interests of justice to admit said letter as additional evidence. It was held for reconsideration.(AY.2006-07)
Janakiram v. ACIT (2015) 155 ITD 792 / (2016) 176 TTJ 734 (Hyd.)(Trib.)

1153 **S.50C : Capital gains – Full value of consideration – Stamp valuation – Should not be invoked if difference between stamp value and declared consideration is less than 10%.[S. 45]**
Allowing the cross-objection of assessee the Tribunal held that; in *ACIT v. S. Suvarna Rekha* in ITA No.743/Hyd/2009 dated 29-10-2010 the Hon'ble ITAT, Hyderabad took the view that if difference between valuation for the purpose of stamp duty and the sale consideration actually received by the assessee is 10% or less then the value actually received by the assessee should be adopted for the purpose of computing the long term capital gain. Though section 50C of the Act does not speak of any such variation in terms of percentage between value adopted for the purpose of stamp duty and the registration and the actual consideration received on transfer, keeping in view of the decision of the Hon'ble ITAT, Hyderabad Bench and keeping in view of the fact that the difference between the valuation for the stamp duty and the actual consideration received by the assessee is less than 2% we are of the view that addition sustained by CIT(A) should be deleted. (ITA No. 267/Kol/2013, dt. 07.102.15) (AY. 2009-10)
ITO v. LGW Limited (Kol.)(Trib.); www.itatonline.org

1154 **S.50C : Capital gains – Full value of consideration – Stamp valuation – lease hold rights in land or building – Provision do not apply.**
Allowing the appeal of assessee the Tribunal held that leasehold right in land is also capital asset, however every kind of a capital asset isnot covered within the scope of section 50C. The phraseology of section 50C of the Act clearly provides that it would apply only to a capital asset, being land or building or both. Thus leasehold right in land or building is not covered. (AY.2006-07)
Kancast (P) Ltd. v. ITO (2015) 68 SOT 110 (Pune.)(Trib.)

1155 **S.50C : Capital gains – Full value of consideration – Stamp valuation – Property with encumbrances – Stamp duty value could not be taken as the assessee was not owner of property. [S.45]**
Where property held by assessee was encumbered and, thus, she was not absolute owner of property, while computing capital gain arising from transfer of such a property, market value of property as taken for purpose of payment of stamp duty could not be adopted as sale consideration by applying provisions of section 50C. Since the assessee had only limited rights over the property, which was also encumbered capital asset held by the assessee was neither land nor building as envisaged in sub-section 50(1) of the Act. (AY.2009-10)
D. Anitha (Smt.) v. ITO (2015) 68 SOT 266 (Hyd.)(Trib.)

S.50C : Capital gains – Depreciable assets – Provisions of section 50C would also apply in case of capital gain from depreciable assets – Rate applicable will be of long term capital gains. [S. 2(11), 45, 48, 49] 1156

The capital gain in case of the assessee had to be assessed as long-term capital gain as the flat had been held by the assessee for more than three years. Further, the provisions of section 50 deeming the capital gain as short-term capital gain is only for the purposes of sections 48 and 49 which relate to computation of capital gain. The deeming provisions has, therefore, to be restricted only to computation of capital gain and for the purpose of other provisions of the Act, the capital gain has to be treated as long-term capital gain. Provisions of s. 50C would also apply in case of computation of capital gain from depreciable assets. However, section 50 is to be extended only to stage of computation of capital gain and, therefore, capital gain resulting from transfer of depreciable asset which was held for more than three years would retain character of long-term capital gain for purposes of all other provisions of Act. The stamp duty value assessed by the stamp duty authorities is required to be adopted as sale consideration in case of sale of the flat. And for the purpose of computation of capital gain, the flat has to be treated as short-term capital asset under section 50C, but for the purpose of applicability of tax rate it has to be treated as long term capital asset if held for more than three years. (AY. 2006-07)

Smita Conductors Ltd. v. Dy. CIT (2015) 152 ITD 417 (Mum.)(Trib.)

S.50C : Capital gains – Special provision for computation of full value consideration – Land – When assessee objects for valuation, matter must be referred to Valuation Officer.[S.45] 1157

When assessee had objected to stamp duty valuation adopted by AO matter must refer to Valuation Officer. (AY. 2008-09)

Subhash Vinayak Supnekar v. ACIT (2013) 158 TTJ 237 / (2015) 152 ITD 389 / 93 DTR 5 (Pune)(Trib.)

S.50C : Capital gains – Full value of consideration – Stamp valuation – Sale agreement subjected to valuation for purpose of stamp duty payment – Provision is applicable. [S.45] 1158

Held, that the sale agreement of the flat was subjected to valuation for the purpose of stamp duty payment. Section 50C of the Act was applicable in the case because the agreement itself was subjected to valuation under stamp duty valuation authority(AY. 2005-06)

Prakash Shantilal Parekh v. ITO (2015) 37 ITR 119 (Mum.)(Trib.)

Section 54 : Profit on sale of property used for residence.

S.54 : Capital gains – Profit on sale of property used for residence – To constitute purchase of new house, a registered sale deed is not necessary. Suspicion, howsoever strong, cannot partake the character of evidence. [S. 2(29B), 2(42A), 45, 54F] 1159

In the present case, as pointed out by the CIT(A), the sale deed does show that what was purchased by the appellant is an agricultural land. Khasra Girdawri also clarifies

that while there is a kothi, i.e., house on Khasra No. 76 (purchased by the assessee's father), the land in Khasra Nos. 75 and 90 purchased by the assessee was used only for agricultural purpose. The explanation by the assessee that only the rental income from letting out the constructed portion property was being shared between him and the father in the ratio of 15%:85% appears to be a plausible one. Unless there is document to show that the assessee was a co-owner of the said building to the extent of even 15%, there cannot be an inference in that regard. As explained by *Umacharan Shaw & Bros v. CIT (1959) 37 ITR 271 (SC)* suspicion howsoever strong cannot partake the character of evidence. The evidence produced by the assessee showed that the house was purchased by him on 10th April 2007 within the time allowed under Section 54F of the Act, after making payment and by obtaining the possession thereof. A substantial part of the consideration of ₹ 2 crores was paid on the date of the agreement to sell itself. The balance payment of ₹ 22 lakhs was made on 17th April, 2007 when the possession was handed over. The conclusion that the house was in fact purchased on 10th April, 2007 within the time allowed under Section 54F of the Act stands supported by the documents placed on record by the assessee. The Court is satisfied that prior to 10th April, 2007 the assessee was not the owner of another residential house and therefore the exemption under Section 54 read with Section 54F of the Act could not be denied to him. (AY. 2007-08)

CIT v. Kapil Nagpal (2015) 128 DTR 193 / 235 Taxman 539 / (2016) 381 ITR 351 (Delhi) (HC)

1160 **S.54 : Capital gains – Capital asset – Even booking rights or rights to purchase or rights to obtain title of property is also capital asset – Profit on sale of property used for residence – Expenses incurred to acquire another property – Amount spent towards cost of improvement – Provisional booking of property – Amounts to acquisition of a new capital asset – Entitled to exemption.[S. 2(14), 2(47), 45]**

The assessee sold his half share in two residential properties. He claimed that he used a sum of ₹ 73,27,000 to acquire another property within the period stipulated in section 54 of the Act, that he had spent a sum of ₹ 25,14,700 towards the cost of improvement. The Assessing Officer held that in the absence of an agreement to sell, the rights acquired by the provisional booking of the property did not meet the requirements spelt out under section 54, i.e., acquisition of the new capital asset. He also held that the cost of improvement was not deductible. The Appellate Authorities allowed the claim of the assessee. On appeal:

Held, dismissing the appeal, (i) That the question was not whether the assessee sold the booking rights and was, therefore, entitled to the benefit of capital gains. It was, rather, whether entering into the transaction and acquiring a property for ₹ 73,27,000 (cost of acquisition) amounted to acquiring a capital asset. In the light of the definitions of "capital asset" under section 2(14) and "transfer" under section 2(47) there was no doubt that the assessee's contentions were acceptable.

(ii) That the Revenue did not dispute the acquisition of the second property, it had to necessarily follow that the cost of improvement was deductible. Even booking rights or rights to purchase or rights to obtain title of property is also capital asset. (AY. 2009-10)

CIT v. Ram Gopal (2015) 372 ITR 498 / 230 Taxman 205 (Delhi)(HC)

S.54 : Capital gains – Profit on sale of property used for residence – Acquisition of plot and substantial domain over new house – Requirements for claiming exemption complied with – Entitled to exemption. [S.45] 1161

The assessee sold a property and the sale proceeds were used for construction of a new building. The Tribunal found that the assessee invested the entire net consideration within the stipulated period and in fact had even constructed the major portion of the residential property except some finishing making it fit for occupation. The Tribunal held that as the assessee had acquired substantial domain over the new house and had made substantial payment towards the cost of land and construction, within the period specified under section 54 the assessee could be said to have complied with the requirements for claiming the exemption under section 54. On appeal:

Held, dismissing the appeal, that when it was found on the facts that construction was completed within three years of sale of the property, the benefit would automatically follow. Referred, Circular No 667 dt.18-10-1993 (1993) 204 ITR 103 (St.) (AY. 2007-08)

CIT v. Venkata Laxmi (Smt.) (2015) 373 ITR 572 / 233 Taxman 207 (T&AP)(HC)

S.54 : Capital gains – Sale of land appurtenant as well as residential building – Exemption is available in respect consideration from sale of land. [S.45] 1162

Assessee sold residential building and land appurtenant thereto, earning short term capital gains from the former, and long term capital gains from the latter. AO denied the exemption. On appeal, the High Court held that since the legislature had used the word 'or', buildings and lands appurtenant thereto should be understood disjunctively. So long as the land was not used for any commercial or non-residential purpose, a person may choose to sell only the land on which he resides and claim the benefit as per section 54(1). Since a distinction of the consideration was made between the two capital assets, benefit of exemption could also be determined accordingly. Thus when the sale of land is treated as long-term capital gain and building thereon as short term capital gain, exemption u/s. 54 is allowable in respect of consideration from sale of land. (AY.1996-97)

C.N. Anantharam v. ACIT (2015) 114 DTR 417 / 230 Taxman 34 / 275 CTR 329 (Karn.) (HC)

S.54 : Capital gains – Profit on sale of property used for residence – Construction need not be new residential house – Amount spent on construction is eligible deduction. [S.2(29A), 2(29B), 45] 1163

Long term capital gain arose to assessee from sale of residential flats. Assessee claimed section 54 deduction on account of investment made in construction of residential house. Assessing Officer held that investment was not in construction of a new house and, therefore, assessee was not entitled to said claim. CIT(A) allowed the claim of assessee. On appeal by revenue dismissing the appeal of revenue the Tribunal held that; there is nothing in section 54 requiring that a residential house has to be only a new residential house, since amount spent by assessee on construction was within specified period, assessee was eligible for section 54 deduction.(AY. 2009-10, 2010-11)

Dy. CIT v Sri Vidyasagar Dontineni (2015) 68 SOT 44 1(URO) (Hyd) (Trib)

1164 **S.54 : Capital gains – Profit on sale of property used for residence – Time limit for investment and full value of consideration – Due date of filing of return under section 139(4) would be eligible for exemption – While computing exemption actual sale consideration is to be taken and not stamp duty valuation – Boundary wall expenses was held to be not allowable as deduction.[Ss.48, 50C, 139(4)]**

The Tribunal held that assessee having utilized the sale consideration of his old house for the purpose of a new residential house before the due date of filing of return under section 139(4), the same is eligible for exemption under section 54.

The Tribunal held that while computing the exemption under section 54 the actual sale consideration is to be taken into consideration and not the stamp duty valuation under section 50C.

In the absence of any mention of boundary wall in the sale deed of house and no evidence was furnished by the assessee. The Assessing Officer of having constructed the boundary wall. The expenditure cannot be allowed as cost of improvement in the computation of capital gains. (AY. 2008-09)

Nand Lal Sharma v. ITO (2015) 172 TTJ 412 / 40 ITR 518 / 61 taxmann.com 271 (Jaipur) (Trib.)

1165 **S.54 : Capital gains – Profit on sale of property used for residence – Giving advance to builder constitutes "purchase" of new house even if construction is not completed and title to the property has not passed to the assessee within the prescribed period.[S.45]**

On appeal by the assessee to the Tribunal HELD allowing the appeal:

(i) It is not disputed by the Revenue that the sum of ₹ 1.00 crore has been invested by the assessee towards acquiring new property. Of course, the legal title in the said property has not passed or transferred to the assessee within the specified period and it is also quite apparent that the new property was still under construction. So however, the allotment letter by the builder mentions the flat number and gives specific details of the property. The word 'purchase' used in Section 54 of the Act should be interpreted pragmatically. The intention behind Section 54 was to give relief to a person who had transferred his residential house and had purchased another residential house within two years of transfer or had purchased a residential house one year before transfer. It was only the excess amount not used for making purchase or construction of the property within the stipulated period, which was taxable as long term capital gain while on the amount spent, relief should be granted. Principle of purposive interpretation should be applied to sub-serve the object and more particularly when one was concerned with exemption from payment of tax.

(ii) The plea of the Revenue is that no purchase deed was executed by the builder and that there was only an allotment letter issued. As per the Revenue the advance could be returned at any time and, therefore, the assessee may lose the exemption under section 54 of the Act. In our considered opinion, the aforesaid does not militate against assessee's claim for exemption in the instant assessment year, as there is no evidence that the advance has been returned. In case, if it is found that the advance has been returned, it would certainly call for forfeiture of the assessee's claim under section 54 of the Act. In such a situation, the proviso below

section 54(2) of the Act would apply whereby it is prescribed that such amount shall be charged under section 45 as income of the previous year, in which the period of three years from the date of the transfer of the original asset expires. The aforesaid provision also does not justify the action of the Assessing Officer in denying the claim of exemption under section 54 in the instant assessment year. (AY. 2010-11)

Hasmukh N. Gala v. ITO (2015) 125 DTR 299/ 173 TTJ 507 (Mum.)(Trib.)

S.54 : Capital gains – Profit on sale of property used for residence – Purchase – Construction of new house – Booking of a flat which is going to be constructed by a builder, has to be considered as a case of "construction of flat" and not purchase – Not entitled deduction. [S.45] 1166

The assessee sold a residential flat in October, 2005 for certain amount and claimed deduction under section 54 in respect of cost of new flat.

The Assessing Officer noticed that the assessee had booked a flat in a project in December, 2002 in the joint name of assessee and her relative and she obtained possession of the new flat in December, 2004.

The Assessing Officer did not accept the assessee's contention that the date of possession of new house should be taken as the date of purchase and rejected claim for deduction under section 54. On appeal, the Commissioner (Appeals) confirmed the decision of the Assessing Officer.

On second appeal it was held that:

In the instant case, the assessee along with her relative has entered into an agreement on 4-12-2002 with a builder. As per the registered sale agreement, the builder shall construct residential apartments on a piece of land and allot a specified flat to the assessee. As per the agreement, the builder constructed the residential apartments and finally handed over the possession on 4-12-2004. The ratio laid down in the several cases clearly show that the booking of a flat which is going to be constructed by a builder has to be considered as a case of "construction of flat". The deduction under section 54 is available only if the assessee constructs a new house within three years after the date of transfer. In the instant case, the assessee has constructed a house prior to the date of transfer of original house, in which case, the assessee is not entitled to claim deduction under section 54 in respect of the cost of new flat. In view of the foregoing discussion, the assessee has not fulfilled the conditions prescribed under section 54. Accordingly, the decision taken by the Commissioner (Appeals) was upheld. (AY. 2006-07)

Farida A. Dungerpurwala v. ITO (2014) 35 ITR 205 / (2015) 67 SOT 208 (Mum.)(Trib.)

S.54 : Capital gains – Profit on sale of property used for residence – Booking a flat – Construction – Booking a flat which is going to be constructed by the builder is a case of "construction" of the flat. If the flat is booked prior to the date of transfer of the old flat, deduction u/s. 54 is not available. The date of receiving possession of the new flat cannot be regarded as the date of "purchase" of the new flat.[S. 45] 1167

The assessee sold a flat on 27-3-2008 and generated Long term capital gain of ₹ 1.55 crores thereon. The assessee claimed deduction u/s. 54 of the Act pertaining to the

cost of another flat. The assessee had booked the flat with M/s. Life Style Property Venture in the year 2004 and the agreement was registered on 01-12-2004. He paid the consideration in instalments as per the agreement. He finally got the possession on 30th June, 2007. The assessee claimed that the date of possession of flat should be considered as the date of purchase of flat, whereas the AO took the view that the date of purchase should be considered as the date of entering of agreement, viz., 1-12-2004. Since the deduction u/s. 54 of the Act could be availed, *inter alia*, only if the residential house was purchased within one year prior to the date of house giving rise to capital gain and since the date of purchase of flat, according to AO, fell beyond the period of one year, the AO rejected the claim for deduction u/s. 54 of the Act. The CIT(A), however, agreed with the contentions of the assessee and accordingly allowed the deduction u/s. 54 of the Act. On appeal by the department to the Tribunal HELD allowing the appeal: The booking of a flat which is going to be constructed by a builder has to be considered as a case of "Construction of flat". Deduction u/s. 54 is available only if the assessee constructs a new house within three years after the date of transfer. In the instant case, the assessee has constructed a house prior to the date of transfer of original house, in which case, the assessee is not entitled to claim deduction u/s. 54 of the Act in respect of the cost of new flat. (AY. 2008-09)
ACIT v. Sagar Nitin Parikh (Mum.)(Trib.); www.itatonline.org

Section 54B : Capital gain on transfer of land used for agricultural purposes not to be charged in certain cases.

1168 **S.54B : Capital gains – Land used for agricultural purposes – Land need not be used continuously – Land purchased in the name of wife was not eligible deduction. [S.45]**
Court held that section does not indicate that land should have been used continuously, since assessee had established that he had been using said land for a period of two years immediately preceding date on which he transferred same exemption was to be allowed, however, purchase of land in the name of wife was held to be not eligible deduction.(AY. 2006-07)
CIT v. Dinesh Verma (2015) 233 Taxman 409 (P&H)(HC)

1169 **S.54B : Capital gains – Transfer of land used for agricultural purposes – Land purchased in the joint name of his son – Entitled deduction. [S.45]**
Assessee, a 75 year old agriculturist, sold a land which was in joint name of assessee and his son. He claimed deduction under section 54B. Deduction under section 54B was denied on the ground that new land was purchased in name of assessee's son. It was held that since son of assessee was also joint owner of land, which was sold and new land was purchased in name of son because of assessee's old age and other technical reason, assessee was entitled to deduction under section 54B. (AY. 2005-06, 2007-08)
Bant Singh v. ITO (2014) 34 ITR 679 / (2015) 67 SOT 205 (Chd.)(Trib.)

Section 54E : Capital gain on transfer of capital assets not to be charged in certain cases.

S.54E : Capital gains – Investment in specified asset – Six months is to be reckoned from transfer of long term capital asset and not from the date of final receipt of sale consideration.[S.45] 1170

Assessee claimed deduction on basis of investment made in NRDB within six months from receipt of final instalment. Tribunal held that for purpose of allowing deduction under section 54E, stipulated period of six months is to be reckoned from date of transfer of long-term capital asset and not from date of final receipt of sale consideration. Order passed by Tribunal was justified. (AY. 1984-85)

Jyotindra H. Shodhan v. ITO (2015) 229 Taxman 299 / 120 DTR 30 / 278 CTR 98 (Guj.) (HC)

Editorial: Jyotindra H. Shodhan v. ITO (2003) 81 TTJ 1(SB) (Ahd)(Trib.) is affirmed.

Section 54EC : Capital gain not to be charged on investment in certain bonds.

S.54EC : Capital gains – Investment in bonds – If REC Bonds are not available during the prescribed period, time for investment has to be extended – Fact that NHAI Bonds were available is irrelevant. [S. 45] 1171

Insofar as investment under Section 54EC of the Act is concerned, the assessee had received sale consideration on 7-7-2006 and period of six months available for such investment, therefore, expired on 6-1-2007. From that date onwards till 24-1-2007, REC Bonds were not available. Vide Cheque issued on 24-1-2007 REC Bonds were purchased on 27-1-2007. The availability of the bonds only for a limited period during this period cannot prejudice the assessee's right to exercise the same up to last date. The bonds were admittedly not available during the said period. The fact that the Bonds issued by the National Highway Authority of India were available and hence the assessee ought to have invested in those bonds within the stipulated period of six months is not acceptable. Section 54EC gives assessee an option to invest either in bonds of National Highway Authority of India or then in bonds of Rural Electrification Corporation Limited. The said provision does not stipulate that the investment has to be in any bond whichever is available. Both bonds carry different benefits and hence deliberately Parliament has given option to the assessee to invest in any one out of two as per his choice. In a given case, the assessee may choose to invest in both. However, discretion is conferred upon the assessee, who is the best judge of his own needs and interests. He cannot be forced to invest in the bond whichever is available because period of six months is about to expire. This option or discretion given by Parliament to the assessee needs to be honoured here. If said option was available when period of six months was to expire and could have been expressed by the assessee when said period was about to expire, the situation would have been otherwise. In present matter, the REC Bonds became available in VIA issue on 22-1-2007 and, therefore, investment made therein cannot be said to be after an undue or unreasonable delay. The investment has been made at the earliest possible opportunity. (AY.2007-08))

ACIT v. Kamlakar Moghe (2015) 378 ITR 561 / 125 DTR 273 / 280 CTR 544 / (2016) 236 Taxman 439 (Bom.)(HC)

1172 **S.54EC : Capital gains – Investment in bonds – Investment falling under two financial years – Exemption could not be restricted to ₹ 50 lakhs only – Amendment is prospective from AY. 2015-16. [S.45]**

Held, the Assessing Officer was not justified in restricting the deduction to ₹ 50 lakhs stating that the intention of the Legislature was to limit the investment in long-term specified asset to ₹ 50 lakhs only. The assessee was entitled to exemption of ₹ 50 lakhs each in two financial years. Ambiguity has been removed by the Legislature with effect from April 1, 2015, in relation to the assessment year 2015-16 and the subsequent year. (AY.2009-10)

CIT v. Coromandel Industries Ltd. (2015) 370 ITR 586 / 230 Taxman 548 (Mad.)(HC)

1173 **S.54EC : Capital gains – Investment in bonds – Depreciable asset – Land and Building – land and building was held for more than three years and capital gain on same was invested in NABARD bonds, assessee would be entitled for exemption [S. (2(12), 45, 48, 49, 50]**

S.50 applies in case of depreciable assets only, bifurcation of land and building into separate part for purpose of capital gain is permissible. S.50 does not convert a long term capital assets into short-term capital assets. Where land and building was held for more than three years and capital gain on same was invested in NABARD bonds, assessee would be entitled for exemption. (AY. 2001-02)

CIT v. Cadbury India Ltd. (2015) 229 Taxman 5 (Bom.)(HC)

1174 **S.54EC : Capital gains – Investment in bonds – Depreciable assets – Exemption is allowed – Doubted the correctness of judgment. [S. 2(29A, 50C, 254(1)]**

Dismissing the appeal of revenue the Tribunal held that amount invested in bonds is held to be eligible exemption, however, the Tribunal has doubted the correctness of the Judgment in *CIT v. ACE Builders (P) Ltd. (2006) 281 ITR 210 (Bom.)(HC)* and stated that their view may be considered in an appropriate proceedings. (ITA No. 698/Mum/2014, dt. 14.10.2015) (AY. 2009-10)

ITO v. Legal Heir of Shri Durgaprasad Agnihotri (Mum.)(Trib.); www.itatonline.org

1175 **S.54EC : Capital gains – Not to be charged on investment in certain bonds – Advance money – Investment part of advance money prior to actual sale – Would qualify for exemption. [S.45]**

Assessee had invested part of advance money received on agreement to sell of property in specified bonds prior to actual sale, such investment would qualify for exemption under section 54EC. In view of Circular 359 dated 10-5-1983 (1983) 143 ITR 1(St.) investment in specified bonds would qualify for exemption under section 54EC. (AY. 2008-09)

Subhash Vinayak Supnekar v. ACIT (2013) 158 TTJ 237 / 95 DTR 5 (2015) 152 ITD 389 (Pune)(Trib.)

S.54EC : Capital gains – Investment in bonds – Firm – Partner – Property introduced by a partner into firm becomes the asset of the firm even if there is no registered deed. Though the asset is held by the firm as a depreciable asset and though the investment in s. 54EC bonds is made in the names of the partners, the firm is eligible for s. 54EC exemption [S.45, Partnership Act, S.14, Indian Contract Act, S. 239] 1176

Allowing the appeal the Tribunal held that though the asset is held by the firm as a depreciable asset and though the investment in S. 54EC bonds is made in the names of the partners, the firm is eligible for S.54EC exemption. (AY. 2008-09)

Chakrabarty Medical Center v. TRO (2015) 117 DTR 253 / 169 TTJ 745 (Pune)(Trib.)
ITO v. Mrinmay J. Chakrabarty (Dr.) (2015) 117 DTR 253 / 169 TTJ 745 (Pune)(Trib.)
ITO v. Neela M. Chakrabarthy (Dr.)(Mrs.) (2015) 117 DTR 253 / 167 TTJ 745 (Pune)(Trib.)

S.54EC : Capital gains – Investment in bonds – Investment prior to transfer of property – Qualify for deduction.[S.45] 1177

Where assessee had invested part of consideration received on sale of property in REC bond prior to transfer of property, said amount would qualify for deduction under section 54EC. (AY. 2009-10)

Hemant Kumar Nema v. ACIT (2014) 52 taxmann.com 202 / (2015) 67 SOT 49 (Indore) (Trib.)

Section 54F : Capital gain on transfer of certain capital assets not to be charged in case of investment in residential house.

S.54F : Capital gains – Investment in a residential house – Matter remanded to Assessing Officer for decision afresh without being influenced by observation of High Court. [S. 139(1), 139(4)] 1178

The assessee had sold his property on March 16, 2007, and purchased a land along with a house alleged to have been renovated by him on September 5, 2007. His claim to deduction under section 54F of the Income-tax Act, 1961, on the premise that he had spent money for construction of residential premises before the due date mentioned in section 139(4) of the Act was disallowed on the ground that the due date referred to was that under section 139(1) of the Act and not under section 139(4) of the Act. The assessee appealed to the Commissioner (Appeals) who allowed the appeal. The Department preferred the appeal before the Tribunal which remanded the matter to the Assessing Officer for decision in the light of the decision of the Supreme Court in *Prakash Nath Khanna v. CIT [2004] 266 ITR 1*. The High Court remanded the matter to the Assessing Officer observing that the facts had to be considered with reference to the provisions of section 54F(4) along with section 139(1) of the Act, as the due time would be under section 139(1) only not under section 139(4) of the Act. On appeal: The Supreme Court, looking at the facts, modified the judgment of the High Court directing the Assessing Officer to consider the matter *de novo* without being influenced by any observation made by the High Court, in accordance with law. (AY. 2007-08)

Xavier J. Pulikkal v. Dy. CIT (2015) 379 ITR 535 / (2016) 131 DTR 368 / 284 CTR 205 (SC)

1179 **S.54F : Capital gains – Investment in a residential house – Amount invested – Construction though not completed within three years entitled to exemption.[S.45]**
Assessee sold a property on 6-10-2008. She purchased another residential plot on 13-10-2008. On 2-6-2010 she obtained approval of building plan from local authority and commenced construction, which was not completed within 3 years, i.e., on or before 5-10-2011. She claimed exemption under section 54F in respect of long-term capital gain arising from sale of property. Assessing Officer disallowed claim on ground that assessee had not completed construction of house within three years as per section 54F. Dismissing the appeal of revenue the Court held that; once it was established by assessee that she had invested entire net consideration in construction of residential house within stipulated period, it would meet requirement of section 54F and she would be entitled to get benefit of section 54F. (AY. 2009-10)
CIT v. B.S. Shanthakumari (Smt.) (2015) 233 Taxman 347 / 126 DTR 436 (Karn.)(HC)

1180 **S.54F : Capital gains – Investment in a residential house – Additions, alternations, modifications and improvements – Eligible deduction. [S.45]**
Allowing the appeal of assessee, Court held that; If assessee purchases a new asset, which is habitable but requires additions, alternations, modifications and improvements, money spent on those aspects would be eligible for benefit of deduction. (AY. 2005-06)
Rahana Siraj (Mrs.) v. CIT (2015) 232 Taxman 327 / 128 DTR 302 (Karn.)(HC)

1181 **S.54F : Capital gains – Investment in a residential house – Entire sale consideration in construction of a residential house within three years from date of transfer, he could not be denied exemption under section 54F on ground that he did not deposit said amount in capital gains account scheme before due date prescribed under section 139(1). [S.45, 139(1)]**
The assessee sold certain converted lands to a trust for a consideration of ₹ 2.87 crore. In the returns filed under section 153A, the assessee computed Long Term Capital Gains of ₹ 2.87 crore before claiming exemption under sections 54B and 54F. During assessment proceedings the assessing authority disallowed assessee's claim for exemption under section 54F. On appeal, the Commissioner (Appeals) held that the assessee's investment in construction subsequent to the date of sale and investment in the eligible project even after the project of the house is started beyond one year will be eligible for exemption under section 54F. However, investment made prior to more than one year before the date of transfer was not eligible for exemption. Accordingly, he granted exemption. On revenue's appeal, the Tribunal affirmed the said order. On appeal by revenue, dismissing the appeal the Court held that; in terms of section 54F(1), all investment made in construction of residential house on said vacant site within a period of one year prior to sale of original asset would be eligible for exemption under section 54F(1). Further, assessee having invested entire sale consideration in construction of a residential house within three years from date of transfer, he could not be denied exemption under section 54F on ground that he did not deposit said amount in capital gains account scheme before due date prescribed under section 139(1).
CIT v. K Ramachandra Rao (2015) 277 CTR 522 / 230 Taxman 334 / 120 DTR 72 (Karn.) (HC)

S.54F : Capital gains – Investment in a residential house – Amount spent on construction of house – Entitled exemption. [S.45, 263] 1182

Assessee sold agricultural land and long-term capital gain arose to him. Amount was spent towards construction of house. The assessee filed his return of income which included capital gain. The Assessing Authority allowed the benefit under section 54F to the assessee.

The Commissioner invoked his powers under section 263 and reviewed the order. The Tribunal held that the benefit extended to the assessee was strictly in conformity with section 54F. There is no scope for the different interpretation as sought to be made out by the Revisional Authority and therefore, he allowed the appeal setting aside the order passed by the Revisional Authority. On appeal by Revenue dismissing the appeal of revenue; the Court held that even before sale of agricultural land, assessee, with help of borrowed housing loan, had started construction on site belonging to him after sale of agricultural land amount spent towards said construction of house was more than consideration received by sale of agricultural land. Assessee was entitled to benefit of section 54F. (AY. 2004-05)

CIT v. Anandraj (2015) 230 Taxman 534 / (2016) 284 CTR 84 (Karn.)(HC)

S.54F : Capital gains – Investment in a residential house – Computation – Assessee and his brothers demolishing residential building and handing over vacant space to developer – Not entitled to exemption under section 54 but entitled to exemption under section 54F – Exchange value specified in project development to be taken as basis for computation of construction in joint development. [S.2(47), 45, 54, Transfer of Property Act 1882, S.53A] 1183

Under the development agreement entered into between the parties, the assessee and his brothers had demolished their existing residential building and handed over the vacant space to the developer for construction of the apartment and, hence, they were not entitled to claim benefit under section 54 of the Act. At the most they were entitled to benefit under section 54F. Exchange value specified in project development to be taken as basis for computation of construction in joint development, cost incurred by developer need not necessarily represent cost of construction. (AY. 2001-02)

CIT v. Ved Prakash Rakhra (2012) 210 Taxman 605 / (2013) 256 CTR 285 / 82 DTR 234 (2015) 370 ITR 762 (Karn.)(HC)

S.54F : Capital gains – Investment in a residential house-purchased new asset within two years from date of transfer of original asset s. 54F(4) requiring to deposit amount within prescribed time would not be attracted and would be entitled to benefit. [S. 45, 54F(4)] 1184

Assessee had sold his office on 8-1-2008 and invested entire amount of sale consideration in residential property on 5-10-2009. AO denied assessee's claim of deduction u/s. 54F on ground that assessee had not deposited amount in the manner prescribed u/s. 54F(4). Since assessee had purchased new asset within two years from date of transfer of original asset, s. 54F(4) would not be attracted and he would be entitled to benefit u/s. 54F. (AY. 2008-09)

Ashok Kapasiawala v. ITO (2015) 155 ITD 948 (Ahd.)(Trib.)

1185 **S.54F : Capital gains – Investment in a residential house – Not owning more than one residential house at time of purchase of new residential house – Entitled to exemption – Payment of compensatory in nature – Entitled to deduction. [Ss.45, 48]**

The assessee, an individual, sold a property and claimed exemption u/s. 54F from payment of tax on capital gains therefrom, on the ground that the sale proceeds were invested in the purchase of a residential house, transfer charges, excess tax paid after sale and penal charges for late possession on sale of property. The AO disallowed the exemption u/s. 54F as well as claim of expenditure of excess tax paid after sale and penal charges for late possession on sale of property. The CIT(A) held that the assessee owned only one residential house, that the other properties were commercial properties and that the assessee was entitled to the exemption u/s. 54F. Regarding the claim of exemption on sale of property, the CIT(A) treated the payment as penal in nature and not as compensation for late possession of property.

The Tribunal held that (i) that the Department had not brought anything on record to controvert the evidence produced by the assessee. The evidence filed before the CIT(A) was available on record and these properties were commercial in nature. Therefore, it could not be the assessee owned more than one residential house at the time of purchase of new residential house out of sale proceeds received from his capital asset and exemption was to be allowed. ii) according to the agreement the assessee paid to the seller for delay in execution of sale deed and handing over of possession within a specified period. The explanation furnished for the delay in handing over possession to the seller showed that the assessee's payment was compensatory in nature and it was part of the sale transaction. Deduction was to be allowed. (AY. 2009-10)

ACIT v. Irshad Mirza (2015) 41 ITR 593 (Luck.)(Trib.)

1186 **S.54F : Capital gains – Investment in a residential house – Transferable tenancy rights – Owner – Substantial rights giving assessee dominion, possession and control over said property with transferable rights, which were almost identical to that of an owner of property, assessee was entitled for exemption. [S. 45]**

Assessee earned long-term capital gains on sale of shares. She claimed exemption under section 54F on plea that she had purchased a residential flat. Assessing Officer noted from transfer deed that assessee had "transferable tenancy rights" and "not ownership" of flat, therefore disallowed claim under said section. Where rights of assessee in flat were not mere tenancy rights but were substantial rights giving assessee dominion, possession and control over said property with transferable rights, which were almost identical to that of an owner of property, assessee was entitled for exemption. (AY. 2005-06)

Archana Parasrampuria v. ITO (2015) 68 SOT 550 (Mum.)(Trib.)

1187 **S.54F : Capital gains – investment in residential house – Farmhouse – Even where assessee purchased share in a property without right in land on which said property was constructed being transferred to assessee, was eligible for deduction. [S. 45]**

The assessee earned long term capital gain on account of sale of shares and claimed deduction under section 54F for a sum which was invested out of the sale consideration for acquisition of rights in a property. The assessee had purchased 50 per cent of the

share of a farmhouse (used for residential purposes) constructed on the land belonging to the members of the HUF, from one of the members, 'I'.
Exemption was denied by the AO which was confirmed by CIT(A). On appeal, allowing the appeal Tribunal held that;
It is amply evident that the land is an independent and identifiable capital asset, which can be separate from superstructure built up on it. A person can be the owner of a superstructure and can earn income separately from such a superstructure, either in the form of rent or by gain on selling it. It is not necessary that the assessee should hold the exclusive right on the land while purchasing the house or *vice versa*. Such kind of arrangement always happen in the case of lease land. Therefore, the contention of the department that, simply because the property has been sold without the transferring the right in the land, the same cannot be held to be sale of property, is not to be agreed.
So far as the issue, whether the assessee can purchase fractional interest, that is, buying of share in the property and whether it can be held as purchase or not, it is found that this issue, in principle, is settled by the decision of the Supreme Court in the case of *CIT v. T.N. Aravinda Reddy [1979] 120 ITR 46 (SC)*. Section 54F, *per se,* does not prohibit or bar that fractional interest or share in the property, which has been purchased, will not be entitled for deduction under section 54F. Thus, following the said proposition laid down by the Court, it is held that the assessee is eligible for deduction under section 54F on the amount spent on acquisition of rights in a property from the other members of the family or HUF. (AY. 2009-10)
Chandrakant S. Choksi HUF v. ACIT (2015) 67 SOT 311 (Mum.)(Trib.)

S.54F : Capital gains – Investment in residential house – Matter set a side for verification. 1188
Assessee earned long-term capital gain on sale of a property and invested a part of sale consideration in new residential property and claimed exemption u/s. 54F. Revenue authorities disallowed claim for want of documents in respect of investment and ownership of residential property. Assessee submitted that he was in position to produce architect and also furnish details towards construction of property. Matter was remanded to examine assessee's claim. (A.Y. 2008-09)
Subhash Vinayak Supnekar v. ACIT (2013) 158 TTJ 237 / (2015) 152 ITD 389 (Pune)(Trib.)

S.54F : Capital gains – Investment in residential house – Invested in land before permission from Executive Engineer, Municipality – Rejection of claim was not justified, when assessee constructed a house. [S.45] 1189
Assessee received compensation towards acquisition of land by National Highway Authorities. Revenue authorities' negated claim of assessee to allow deduction u/s. 54F on amount invested in construction of building on ground that permission from Executive Engineer, Municipality had not been obtained before construction of building. It was noted that assessee had constructed house which was evident from copy of certificate of valuation by Municipal Engineer and moreover, assessee had requested AO to call for Engineer, who had given certificate. AO had not called any information from Municipality and disallowed claim. The matter was restoring back to AO. to verify genuineness of certificate, which he had not done and therefore, assessee's claim for deduction was to be allowed. (AY. 2003-04)
Harendra Kumar Das v. ITO (2015) 152 ITD 359 / 170 TTJ 269 (Cuttack)(Trib.)

1190 **S.54F : Capital gains – Investment in residential house – Approval of building plan – There is no condition that building plan of residential house should be approved by Municipal Corporation or any other competent authority – Entitled exemption.[S. 45]**
The assessee earned long-term capital gain on sale of shares. The assessee claimed deduction under section 54F in respect of construction of a new residential property. The revenue authorities rejected assessee's claim holding that since there was no approved plan for the new construction, the assessee was not entitled to claim exemption under section 54F. The provisions of section 54F mandate the construction of a residential house, within the period specified, however, there is no condition that the building plan of the residential house constructed should be approved by the Municipal Corporation or any other competent authority. If any person constructs a house without approval of building plan, he will be raising construction at his own risk and cost. As far as for availing exemption under section 54F, approval of building plan is not necessary. The approved building plan, certificate of occupation etc. are sought to substantiate the claim of new construction. In the present case, the fact that the assessee has raised new construction is evident from the interim order issued by the Municipal Corporation. (AY. 2006-07)
B. Sivasubramanian v. ITO (2015) 152 ITD 379 / 170 ITD 125 (Chennai)(Trib.)

1191 **S.54F : Capital gains – Investment in a residential house – Amount paid to builder for house is equivalent to amount spent by assessee for construction. Fact that only advance is given and construction is delayed beyond 3 years does not deprive assessee of exemption. [S.45]**
Question before the Tribunal was whether the amount of consideration received on transfer invested by the assessee in a flat constructed within three years would amount to construction of a residential house within the time limit of three years. Tribunal held that we are of the opinion that a flat which is newly constructed by a builder on behalf of the assessee is in no way different from a house constructed. Section 54F being a beneficial provision has to be interpreted so as to give the benefit of residential unit viz., flat instead of house in the present state of affairs. Further, as already pointed out even if only advance is given the benefit still will be available for exemption u/s. 54F. (AY. 2009-10) (ITA No. 1520/Hyd/2013, dt. 31-12-2014)
Pradeep Kumar Chowdhry v. DCIT (Hyd.)(Trib.) www.itatonline.org

1192 **S.54F : Capital gains – Investment in a residential house – Even if construction/ purchase of new house is not completed within stipulated period, deduction is admissible if investment is made – is a beneficial provision which has to be construed liberally. [S.45, 263]**
Provision contained under section 54F being a beneficial provision has to be construed liberally. In various judicial precedents it has been held that the condition precedent for claiming benefit under section 54F is only that the capital gain realized from the sale of capital asset should be parted by the assessee and invested either in purchasing a residential house or in constructing a residential house. If the assessee has invested the money in construction of residential house, merely because the construction was not complete in all respects and it was not in a fit condition to be occupied within

the period stipulated, that would not disentitle the assessee from claiming the benefit under section 54F. Once the assessee demonstrates that the consideration received on transfer has been invested either in purchasing a residential house or in constructing a residential house, even though the transactions are not complete in all respects and as required under the law, that would not disentitle the assessee from availing benefit under section 54F. Even investment made in purchasing a plot of land for the purpose of construction of a residential house has been held to be an investment satisfying the conditions of section 54F. Though there cannot be any dispute with regard to the above said proposition of law, the assessee is required to prove the actual date of investment and the amount invested towards purchase/construction of the residential house with supporting evidence. (AY. 2006-07)
S. Uma Devi v. CIT (2015) 117 DTR 151 / 169 TTJ 487 / 70 SOT 225 (Hyd.)(Trib.)
V. Shailaja v. CIT (2015) 117 DTR 151 / 169 TTJ 487 (Hyd.)(Trib.)

S.54F : Capital gains – Investment in residential house – More than three houses – Two houses in the name of HUF – Matter remanded.[S.45] 1193
The AO denied the exemption on the ground that assessee was having three houses. CIT (A) also confirmed the disallowance of exemption. On appeal the assessee contended that two of the three houses were owned by HUF and not by assessee in his individual capacity. Tribunal held that no clear finding regarding ownership of these two properties claimed to be belonging to HUF was recorded. Matter was remanded to the AO for re adjudication. (AY. 2008-09)
Dr. Sunil Kumar Sharma v. ITO (2014) 52 taxmann.com 437 / (2015) 67 SOT 158 (Delhi) (Trib.)

Section 54G : Exemption of capital gains on transfer of assets in cases of shifting of industrial undertaking from urban area.

S.54G : Capital gains – Shifting of industrial undertaking from urban area – Section does not require that the machinery etc. has to be acquired in the same Assessment Year in which the transfer takes place. It is sufficient if the capital gain is "utilized" towards purchase of P&M by giving advances to suppliers – Advances paid for purpose of purchase and/or acquisition of plant and machinery, and land /building amount to utilisation – Entitled to exemption.[S.45, 54H, 280Y(d), 280ZA, General Clauses Act, S. 6, 6A, 24] 1194
Allowing the appeal of assessee the Court held that ; Section does not require that the machinery etc has to be acquired in the same Assessment Year in which the transfer takes place. It is sufficient if the capital gain is "utilized" towards purchase of P&M by giving advances to suppliers. Advances paid for purpose of purchase and/or acquisition of plant and machinery, and land/building amount to utilisation is entitled to exemption. (AY.1991-92)
Fibre Boards (P) Ltd. v. CIT (2015) 376 ITR 596 / 279 CTR 89 / 62 taxmann.com 135 (SC)

Section 55 : Meaning of "adjusted", "cost of improvement" and "cost of acquisition".

1195 **S.55 : Capital gains – Cost of improvement – Cost of acquisition – Corporatised and demutualized – Deduction on cost of acquisition of membership card – Protective addition was deleted. [S. 45, 55(2)(ab)]**

The assessee-company was a member of Bombay Stock Exchange (BSE). It engaged in the business of shares and securities broking, jobbing and investment in shares and securities. In the year, the operations of BSE had been corporatised and demutualised resulting in the member being given benefit. The benefit was that the trading right would continue but in lieu of the membership card, the shares of the stock exchange were allotted. The assessee company claimed deduction on cost of acquisition of membership card.

The Assessing Officer disallowed the said claim and made protective addition holding that though the transfer of shares allotted by BSEL had not taken place in the instant year but because the exchange had taken place in the instant year and the benefit of section 55(2)(ab) accrued in instant year, although it may be realized later. On appeal, the Commissioner (Appeals) upheld the order of the Assessing Officer.

On appeal, the Tribunal deleted the protective addition made by the Assessing Officer.

On appeal :

The conceded position is that the card has not been transferred in the year under consideration. That it would be or it may be transferred in future is the assumption on which the Assessing Officer and the Commissioner have proceeded. The Tribunal has held that if what has been transpired in the year under consideration viz. the Assessment Year in question is the acquisition of 10,000 shares of BSEL in lieu of the membership card, then, that is by itself and without anything more not a case of transfer in the year under consideration. If the transfer had not taken place now but may occur in future then all the issues that have been raised and considered in the appeal of *CIT v. Walfort Shares and Stock Broking Pvt. Ltd.* (ITA No 800 of 2012 dt 19-9-2014). It is precisely this basis and, as held in the other case of Walfort Shares and Stock Broking Private Limited that the question of law had projected is purely academic.

Any deviation is not permissible and possible when the revenue itself states that the case is similar to that of Walfort. The distinction as drawn or attempted to be drawn is without any basis. The position may be distinct on the transfer of the shares by the assessee. In that event, it would be open for the revenue to take such steps as are permissible in law including questioning the deduction claimed on the basis of the cost of acquisition of the shares allotted. In such circumstances and by keeping the option open so also all contentions of both sides in that regard, this appeal is dismiss. It does not raise any substantial question of law. (AY. 2006-07)

CIT v. Tata Securities Ltd. (2015) 232 Taxman 124 (Bom.)(HC)

1196 **S.55 : Capital gains – Cost of acquisition – Valuation of land – Working out Fair Market Value of land – Indian Valuers Directory and Reference Book and Stamp Duty Ready Reckoner and by adopting annual rate of appreciation method is correct. [S.45, 48]**

When no sale instance is available of same area for valuation of a property, relying upon an instance of nearby area or similar type of property cannot be flawed. Where no sale instances was available of same area, CIT(A) right in working out fair market value of

land by relying upon rate mentioned in Indian Valuers Directory and Reference Book and Stamp Duty Ready Reckoner and annual rate of appreciation method. (AY. 2001-02)
Pfizer Ltd. v. Dy. CIT (2015) 153 ITD 433 (Mum.)(Trib.)

Section 55A : Reference to Valuation Officer.

S.55A : Capital gains – Reference to Departmental Valuation Officer – Only where Assessing Officer of opinion that valuation made by registered valuer less than fair market value of property – Valuation made by registered valuer was on higher side – No occasion for Assessing Officer to make reference.[S.45] 1197
Held, (i) that under clause (a) of section 55A, as it stood at the relevant point of time, the Assessing Officer could have made a reference provided he was of the opinion that the valuation made by the registered valuer was less than the fair market value of the property. When the valuation made by the registered valuer was on the higher side, there was no occasion for the Assessing Officer to refer the matter to the valuation officer under section 55A. Therefore, the valuation at a sum of ₹ 18,40,244 as on April 1, 1981, was correctly accepted by the Tribunal. (AY. 2004-05)
CIT v. Mina Deogun (Smt.) (2015) 375 ITR 586 / 233 Taxman 367 (Cal.)(HC)

S.55A : Capital gains – Reference to valuation officer – Valuation report by registered valuer – Not justified in making reference to Valuation Officer. [S.45] 1198
The assessee acquired a property on 1-4-1981. The value of that property at that time was taken at ₹ 3.91 lakhs. The assessee sold the said property in the year 1994 for ₹ 9.51 lakhs.
The AO referred the matter to the Valuation Officer, who determined the value of the property as on the date of sale at ₹ 15.52 lakhs and fair market value of the property as on 1-4-1981 was determined at ₹ 1.62 lakhs. Accordingly, the capital gain was computed by the AO.
On appeal, the CIT(A) upheld the order of the AO. On second appeal, the Tribunal allowed the appeal of the assessee holding that the AO before making a reference to the Valuation Officer had not brought anything on the record indicating that the assessee had disclosed lesser sale price and there was nothing on the record which could suggest to ignore the report of the registered valuer and to adopt the report of the Valuation Officer and, therefore, the AO ought not to have made a reference to the DVO for determination of the fair market value of the property in dispute.
On Revenue's appeal to the High Court. Tribunal has given cogent and convincing reasons in arriving at the conclusion. Therefore, the appeal is dismissed.
CIT v. Manjulaben M. Unadkat (2015) 229 Taxman 531 (Guj.)(HC)

Section 56 : Income from other sources.

S.56 : Income from other sources – Business Income – Lease of factory – Rental income is assessable as income from other sources and not as business income. [S.28(i)] 1199
The assessee discontinued its manufacturing business and leased the entire factory building for a period of 11 months and had offered rental income as business income. While ruling against the assessee, Court observed that there was nothing on record to

show that the assessee had only let out the factory building temporarily and intended to resume its business. Accordingly, the High Court ruled that lease income would be taxable as income from other sources and not as business Income.
CIT v. Venkateswara Rao, M. & Ors. (2015) 370 ITR 212 / 232 Taxman 123 / 119 DTR 189 / 279 CTR 313 (AP)(HC)

1200 **S.56 : Income from other sources – Clubbing of income – Where assessee received cheques as gift in his individual name, but deposited same in HUF account, matter remanded for re adjudication for analysis of section 52(2)(vii) and section 64(2). [S.64]**
The assessee received gifts from his son, wife, mother and daughter through cheques in name of individual and same had been subsequently deposited in the HUF account. The cheques, which were drawn in the name of the individual became blended with the property of HUF by way of journal entry. The AO invoked explanation to proviso of section 56(2)(vi) and held that the HUF would not come within the definition of relative and, therefore, added amount in name of HUF. The CIT(A) and Tribunal confirmed the order of AO.
The High Court observed that the assessee has invoked section 64(2) which has not considered the legal plea so raised and, therefore, prejudice is caused to the assessee in not considering this legal plea. The High Court held that since the issue raised by the assessee requires an in-depth analysis of both the provisions, viz., section 56(2)(vii) and section 64(2), the matter requires to be considered by the AO by way of *de novo* proceedings and hence, the matter is remanded back to AO for *de novo* consideration of the entire issue (AY. 2008-09)
M. Veluswamy v. ITO (2015) 54 taxmann.com 221 / 113 DTR 257 / 273 CTR 543 (Mad.) (HC)

1201 **S.56 : Income from other sources – Co-operative society – Interest from fixed deposit – Assessable as income from other sources. [S.80P(2)(a)(i)]**
Assessee, a co-operative society, engaged in providing credit facilities to its members, deposited surplus funds in fixed deposits and earned interest thereon, said interest would be assessable as 'income from other sources' and, thus, not eligible for deduction under section 80P(2)(a)(i). (AY.2008-09)
Mantola Co-operative Thrift & Credit Society Ltd. v. CIT (2015) 229 Taxman 68 (Delhi) (HC)

1202 **S.56 : Income from other sources – Transfer of allotment letter – Consideration was assessable as income from other sources – Making payment to builder even before sanction of building plan itself cannot be said to have yielded right in assessee to get a property which was neither in existence at the time of nor any process for construction of the same was started. [S. 2(14), 2(47)(v), 2(47(vi)]**
Assessee claimed that the consideration received on transfer of allotment was assessable as long term capital gains. On appeal dismissing the appeal of assessee the Tribunal Transfer of assessee's right in office premises was held to be assessable as income from other sources as there was no building plan when the allotment letter was issued, even prior to sanction of building plan itself cannot be said to have yielded a vested right in

assessee to get a property which was neither in existence at that time nor any process of construction was started. (AY. 2009-10)
S. Narendra kumar & Co. v. Dy. CIT (2015) 129 DTR 1 / (2016) 156 ITD 440 / 175 TTJ 113 (Mum.)(Trib.)

S.56 : Income from other sources – Compensatory interest – builder's failure to deliver flat by a specified date, compensatory interest received by assessee on refund of deposit amount was assessable as interest income – Lump sum awarded as compensation was held to be capital in nature. [S.2(28A), 4] 1203
Assessee entered into an agreement with a builder for purchase of two residential flats. Flats booked were not delivered despite lapse of considerable time. Assessee received entire amount from builder along with interest at contracted rate besides another amount by way of compensation. Excess amount received by assessee under contract as interest at specified rate represented a compensation on non-performance of contract by a specified date and, thus, same being revenue receipt was assessable as interest income u/s. 56. Tribunal also held that lump sum amount awarded by common forum as compensation was on capital account. (AY. 2006-07)
Kumarpal Mohanlal Jain v. ITO (2015) 153 ITD 292 (Mum.)(Trib.)

S.56 : Income from other sources – Company – Inter-corporate gifts – Book profit – Deemed dividend – Gift received by company – Company, if authorized by the Memorandum of Association and Articles of Association are competent to make and receive gifts. Natural love and affection is a not necessary requirement for a gift. The gift is neither taxable as income s. 56 (pre-amendment) nor as capital gain nor as income u/s.2(22)(e) – No adjustment was required to book profit declared by assessee u/s. 115JB.[S.2(22)(e), 2(24), 4, 45, 115JB, Transfer of Property Act, 1882, S. 5, 122]] 1204
Dismissing the appeal of revenue, the Tribunal held that; (i) As per the provisions of law prevailing during the year under consideration, the gift received by one corporate body from another corporate body does not come under the ambit of income as contemplated u/s. 2(24) of the Act or any other provisions of the Act. The gifts received are a voluntary payments made by the donors to the assessee. Neither the assessee has any legal right to claim the gift from the donor nor donors have any legal or contractual obligations to give gift to the assessee. The gifts received by the assessee was voluntary payments made by the donor, without consideration to the assessee. The gift received has nothing to do with the business of the assessee so as to constitute its income from business or a revenue receipt in the nature of income. The AO has limited power of making increase or reduction as provided in the Explanation to the said Section. Furthermore, the Explanation to section 115JB of the Act is applicable only if the item of expense or income is debited or credited to the Profit & Loss Account. However, when the item of expense or income is not debited or credited to the Profit & Loss Account, Explanation to section 115JB of the Act cannot apply and hence no adjustment is required under that section to the books profit, in the case of the assessee gift was received from corporate bodies were not credited to the Profit & Loss Account and hence no adjustment is required to the book profit declared by the assessee u/s. 115JB of the Act. (AY. 2009-10)
DCIT v. KDA Enterprises Pvt. Ltd. (2015) 39 ITR 657 / 120 DTR 163 / 171 TTJ 1 / 68 SOT 349 (URO)(Mum.)(Trib.)

1205 **S.56(2)(v) : Income from other sources – Amount received under Family settlement claimed exempt – Held not taxable.**

The assessee an Individual has received substantial income under Family settlement/ agreement and claimed whole such amount as deduction under section 56(2)(v). The AO summoned donor, verified transaction genuineness and creditworthiness of the donor but added the income concluding the assessee intentionally and deliberately understated the real consideration by adopting a colourable device, the gift deeds are not properly stamped. CIT(A) quashed the addition. Tribunal also held, the fact remains that the entire property was in existence at the time of partition in which concerned family members were having their interest/shares, and by way of the mutual settlement only the respective shares were determined therefore, it was clearly a family settlement. Therefore, the family arrangement is not taxable and no addition was warranted on the income which never arose to the assessee. (AY. 2007-08)

DCIT v. Paras D. Dundecha (2015) 169 TTJ 1 / 155 ITD 880 (Mum.)(Trib.)

1206 **S.56(2)(vi) : Income from other sources – Portfolio Management Scheme – Amount received under Power of Attorney from other party for investment and due to be return back along with income thereon, cannot be included as income of assessee.**

The assessee, an individual received amount under General Power of Attorney from client for investment in Portfolio Management Scheme where such amount is stipulated to be returned back with income thereon. The assessee never became the beneficiary of the impugned amount, thus there is no question of making the addition u/s. 56(2)(vi) of the Act. Even otherwise, the amount after liquidating the investment was returned back meaning thereby, the amount was returned back along with profit, consequently, the provision of section 56(2)(vi) is not applicable. (AY. 2008-09)

Sannidhi C. Patel (Miss) v. ITO (2015) 168 TTJ 244 / 114 DTR 300 (Mum.)(Trib.)

1207 **S.56(2)(vi) : Income from other sources – Gift – Alimony – Amount received as alimony from ex-husband was held to be not taxable.**

During the year, the assessee received an amount of ₹ 73,60,787/- from her ex-husband Mr. Siguar Erich Zaun, a German citizen. The amount was claimed to have been received as alimony on divorce with her husband and the same was claimed as exempt. The AO, however, held that the said amount was taxable as income from other sources. The CIT(A) upheld the addition on the ground that the German Court granted the divorce on 17.07.2001 but the alimony was paid after a gap of five years when there was no relationship between the assessee and Mr. Zaun and therefore the amount received from Mr. Zaun by the assessee in the normal course was chargeable under the provisions of section 56(2)(vi).

Held by the Tribunal, maintenance or alimony is paid by the husband to his wife in recognition of her pre-existing right, whether marriage relationship is still continuing or has been dissolved, does not bar the payment of alimony by the ex-husband to the divorced wife and under those circumstances, in the definition of spouse, ex-spouse is also included except where there is an evidence that the payment is not made as a gift or an alimony but for some other consideration or by virtue of some other transaction. In the absence of any such evidence, the payment of alimony amount by the ex-husband

to his wife is nothing more than a gift and is exempt under the proviso to section 56(2)(vi) of the Act. (ITA No. 2109/M/2011 dated 13-2-2015) (AY. 2007-08)
Prema G. Sanghvi v. ITO (Mum.)(Trib.) www.ctconline.org

Section 57 : Deductions.

S.57 : Income from other sources – Deductions – Transaction to be considered as a whole – Interest paid was held to be allowable. 1208
Assessee borrowed ₹ 3 crores from 'A' Ltd. at rate of 18.5 per cent per annum and invested said amount in Optionally Convertible Debentures of four companies, at rate of 12 per cent per annum till said OCDs were converted into shares. In return of income, assessee claimed deduction of excess interest paid over interest received during assessment year in question. Assessing Officer held that since assessee failed to establish that excessive interest was paid for earning income, claim raised could not be allowed under section 57(iii). Tribunal upheld order of Assessing Officer. On appeal allowing the appeal the Court held that since investment made by assessee in four companies were not loss making concern at relevant time, decision of assessee to borrow money at a higher rate of interest and to invest same in said four companies at rate of 12 per cent with a hope to get shares in future was made to earn income. Even otherwise, once primary transaction of lending, borrowing and payment of interest was found to be genuine, merely because it resulted into less or equal amount of income, would not become a colourable device and consequently earning any disqualification. Accordingly assessee's claim was to be allowed. (AY. 1995-96)
Atir Textile Industries (P.) Ltd. v. Dy. CIT (2015) 230 Taxman 104 / 120 DTR 338 (Guj.)(HC)

S.57 : Income from other sources – Deduction – Direct nexus – Netting off interest was allowed. [S.56, 57(iii)] 1209
Allowing the appeal of assessee; where assessee having availed of loan from a bank, advanced said amount to its holding company, since there was a direct nexus between earning of interest on loan advanced by assessee and payment of interest, assessee's claim for netting off of interest in terms of S. 57(iii) was to be allowed.(AY. 2002-03 to 2003-04)
Vodafone South Ltd. v. CIT (2015) 378 ITR 410 / 235 Taxman 169 / 126 DTR 244 (Delhi) (HC)

S.57 : Income from other sources – Deduction – Exempt income – Interest – Expenditure incurred on borrowings invested in shares could not be considered while computing income from other sources.[S. 14, 56] 1210
Tribunal held that marginal note to S.14A clearly states that expenditure incurred in relation to income not 'includible' in total income which means that if income is not includible in total income whether it is actually earned or not, corresponding expenditure has to be disallowed u/s. 14A, where income from shares which is in form of dividend has to be excluded from total income, such income cannot be considered as income from other sources and, therefore, expenditure incurred on borrowings invested in shares could not be considered while computing income from other sources. (AY. 2008-09)
Varsha R. Taurani (Mrs.) v. ACIT (2015) 153 ITD 533 (Mum.)(Trib.)

Section 61 : Revocable transfer of assets.

1211 **S.61 : Revocable transfer of assets – Obtaining concurrence of trustee for revocation does not make transfer irrevocable – Income chargeable to income-tax as income of transferor – Assessee not subjected to tax. [S. 63]**

On appeal : Held, dismissing the appeal; that the facts that concurrence of the trustee had to be obtained by the transferor for revocation would not make the trust an irrevocable transfer. Section 61 of the Act read with section 63 of the Act which mandated that income arising to a person by virtue of a revocable transfer of assets should be chargeable to income tax as income of the transferor would apply to the assessee's case and therefore the assessment in the hands of the transferee or representative assessee was not proper. (AY. 2008-09, 2009-10)

ITO v. India Advantage Fund-I (2015) 39 ITR 360 (Bang.)(Trib.)
Dy. CIT v. ICICI Econet Internet and Technology Fund (2015) 39 ITR 360 (Bang.)(Trib.)
Dy. CIT v. ICICI Emerging Sectors Fund (2015) 39 ITR 360 (Bang.)(Trib.)

Section 64 : Income of individual to include income of spouse, minor child, etc.

1212 **S.64 : Clubbing of income – Trusts in favour of minor children of assessee – Stipulation that income from trusts not to be given to or used for benefit of beneficiaries until they attain majority – Income of trusts from firm not to be included in assessee's income.[S.64(1)(iii), Expln. 2A]**

The brother-in-law of the assessee created two trusts for the benefit of two minor children of the assessee. The trust deeds provided that income earned by the trusts shall not be received by the two minors during their minority and was to be spent for their benefit only once they attained majority. In case either of the beneficiaries died before attaining majority, his or her share would be given to the other sibling. The trustees of the trusts became partners in a firm. The firm earned profits in the year 1980-81 and the share of the two trusts was given to them. The Assessing Officer included the income in the income of the assessee and taxed it under section 64(1)(iii) of Income-tax Act, 1961. The assessee appealed before the Commissioner (Appeals) who held that since the minors had no right to receive the income of the trusts as long as they were minors, the provisions of section 64(1)(iii) read with Explanation 2A of the Act would not be attracted. The Tribunal set aside the order of the Commissioner (Appeals) and the High Court dismissed the assessee's appeal. On further appeal :

Held, allowing the appeal, that while the two minor children of the assessee were the beneficiaries under the two trusts, the trustees were the partners in the firm and had their shares in the income as partners in the firm. The income that had been earned by the trustees was not available to the two minor children nor was it to be spent for the benefit of the minor children till they attained majority and the money was to be handed over to them only on their attaining majority. There was a specific stipulation in both the trust deeds that in case of demise of any of the minors the income would accrue to the other child. Therefore, the receipt of the income was also contingent upon this eventuality and the two minors had not received the benefit immediately for the assessment year in question viz. as "minor" children. Explanation 2A would

not be attracted when the income earned by the trust cannot be utilised for the benefit of the minor during his minority. Moreover, the language of section 64(1)(iii) is clear and categorical which makes the income of the minor child taxable at the hands of individual. It has to be shown that the share of income is at the hands of minor child which requirement was not satisfied in the present case. On attaining majority when the money in the form of income was received by the two individuals it would be open to the Department to tax the income at that time or the Department could take up their cases under section 166 of the Act if permissible. (AY.1980-81)
Kapoor Chand (Dead) v. ACIT (2015) 376 ITR 450 / 234 Taxman 657 / 279 CTR 434 (SC)
Editorial : Decision of the Uttaranchal High Court in Kapoor Chand v. Asst. CIT [2004] 265 ITR 212 (Uttaranchal) is reversed.

Section 68 : Cash credits.

S.68 : Cash credits – Carry forward and set off – Unexplained investment cannot be treated as business income for purposes of set-off of current year's business loss or brought forward business loss or unabsorbed depreciation.[S. 28(i), 32, 72] 1213
The Tribunal, held that the claim of receipt of profit from commodity trading was a sham or bogus one and the Assessing Officer rightly assessed the sum as credit under section 68 of the Income-tax Act, 1961. Thereafter, the Tribunal examined the illegality of the rejection of the claim of the assessee to set off of business loss and carry forward business loss and depreciation holding that the assessee was entitled to claim set off of the current year's loss and also brought forward loss and unabsorbed depreciation against the unexplained income in accordance with the relevant provisions of the Act. On appeal: Held, allowing the appeal, that the income had been treated as unexplained cash credit under section 68. Once it was so done for the purpose of set off or any other purpose, the unexplained income could not be treated as business income under any one of the heads provided under section 14 in which case the question of set off did not arise. Therefore, the order of the Tribunal to the extent it had set aside the order of the Commissioner (Appeals) directing the Assessing Officer to allow the set off of the current year's business loss as well as brought forward business loss and unabsorbed depreciation against income assessed under section 68 was to be set aside. (AY. 2010-11)
CIT v. Kerala Sponge Iron Ltd. (2015) 379 ITR 330 / (2016) 285 CTR 198 (Ker.)(HC)
Editorial : Order in Kerala Sponge Iron Ltd. v. ACIT [2014] 32 ITR 718 (Cochin)(Trib.) is reversed on this point.

S.68 : Cash credits – Share application money – Possible conclusion that assessee not able to establish 65,185 shareholders – Addition was held to be justified. 1214
Court held that there was no justification for the Commissioner (Appeals) to have deleted the addition made by the Assessing Officer in respect of the 65,185 shareholders on the ground that the Assessing Officer did not conduct any enquiry. When the Assessing Officer sought details of shareholders who invested ₹ 25,000 or more, the assessee was able to furnish the addresses of only the top 100 shareholders. The only conclusion that was possible in this regard was that reached by the Assessing Officer, viz., that the assessee was unable to establish the identities of the 65,185 persons in

respect of an amount of ₹ 55,55,89,359. The onus on the assessee of providing some prima facie material to establish the identity, genuineness and creditworthiness of the 65,185 persons was not discharged by the assessee. The deletion of the addition made by the Assessing Officer of the sum corresponding to 65,185 shareholders was to be set aside. The sum would stand added to the income of the assessee. However, the deletion of the addition made in respect of the amount brought in by 50 + 17 shareholders was to be upheld. Also, the order of the Commissioner (Appeals), affirmed by the Tribunal, remanding the matter to the Assessing Officer in respect of 8 persons and some part of 25 persons who were not traceable and whose addresses had not been furnished was to be upheld. (AY. 1995-96 to 1999-2000)
CIT v. Jet Lite (India) Ltd. (2015) 379 ITR 185 / (2016) 236 Taxman 453 / 282 CTR 113 (Delhi)(HC)

1215 **S.68 : Cash credits – Inference that entries pertaining to loan were accommodation entries – Assessing Officer has not produced any evidence – Ample evidence was produced by assessee – Addition was held to be not justified.[S.147, 148]**
Dismissing the appeal of Revenue the Court held that Inference that entries pertaining to loan were accommodation entries however the Assessing Officer has not produced any evidence and the assessee has produced ample evidence hence addition was held to be not justified.(AY 2001-02)
CIT v. Multiplex Trading and Industrial Co. Ltd. (2015) 378 ITR 351 / 128 DTR 217 / 63 taxmann.com 170 (Delhi)(HC)

1216 **S.68 : Cash credits – Forfeited amount – Failed to discharge the credit worthiness of parties – Addition was held to be justified. [S.28 (i)]**
Allowing the appeal of Revenue the Court held that there were no particulars with respect to SFT or COPL, the documents incorporating these entities or even describing their identities (especially important since the assessee argued that SFT was a Government of USSR enterprise) was ever revealed. Those two companies' shareholding pattern, trading or manufacturing activities decision of the board of directors were kept undisclosed. In short, the assessee made no attempt to reveal the true identity of these two concerns. Furthermore, the credibility of these transactions too stood undermined from the very beginning considering COPL's role *vis-a-vis* SFT was never explained. It was not SFT which gave the money to the assessee. Therefore, the onus to prove that the amounts came from credible sources and creditworthiness of the entity or the source, was never discharged. The addition of ₹ 10.65 crores on account of unexplained cash credit was assessable under section 68 for the assessment year.(AY.1993-94)
CIT v. Velocient Technologies Ltd. (2015) 376 ITR 131 / 280 CTR 142 / 60 taxmann.com 353 (Delhi)(HC)

1217 **S.68 : Cash credits – Share capital – It is a fallacy to assume that a company which has not commenced business has unaccounted money – Fact that investors have a common address is not relevant – Fact that shares were subsequently sold at reduced rate is not relevant – Addition was deleted.**
Dismissing the appeal of Revenue, the Court held that (i) There is a basic fallacy in the submission of the Revenue about the precise role of the Assessee, Five Vision. The broad

sweeping allegation made is that "the Assessee being a developer is charging on money which is taken in cash". This, however, does not apply to the Assessee which appears to be involved in the construction of a shopping mall. In fact for the AYs in question, the Assessee had not commenced any business. The construction of the mall was not yet complete during the AYs in question. The Profit and Loss Account of the Assessee for all the three AYs, which has been placed on record, shows that only revenue received was interest on the deposits with the bank. Assessee is, therefore, right in the contention that the basic presumption of the Revenue as far as the Assessee is concerned has no legs to stand. Correspondingly, the further allegation that such 'on money' was routed back to the mainstream in the form of capital has also to fail.

(ii) The other submission that the assessee was itself being used as a conduit for routing the 'on money' or that the investment in the assessee was also for routing such 'on money' has not even *prima facie* been able to be established by the Revenue. On the one hand there is an attempt to treat the cash credit found in the assessee's books of account to be 'undisclosed income of the assessee' by showing the investors to be 'paper companies'. On the other hand, the attempt is to show that this money in fact belongs to certain other entities whose source has not been explained by the Assessee.

(iii) Coming to the core issue concerning the identity, creditworthiness and genuineness of the investor companies, it is seen that as far as the Table I investors were concerned, only 9 were searched and in their cases, the ITAT on a very detailed examination was satisfied that they not only existed, but that the assessee had discharged the primary onus of proving their creditworthiness and genuineness. They had responded to the summons issued to them. Directors of 14 of these companies appeared before the AO and produced their books of account.

(iv) The mere fact that some of the investors have a common address is not a valid basis to doubt their identity or genuineness.

(v) Also, the fact that the shares of the assessee were subsequently sold at a reduced price is indeed not germane to the question of the genuineness of the investment in the share capital of the assessee. The question of avoidance of tax thereby may have to be examined in the hands of the person purchasing the shares. (AY.2007-08, 2009-10)

CIT v. Five Vision Promoters Pvt. Ltd (2016) 380 ITR 289 / 236 Taxman 502 / 131 DTR 337 / 284 CTR 134 (Delhi)(HC)

S.68 : Cash credits – Share application money – Mere identity of share applicant is not sufficient – Addition was held to be justified. 1218

Dismissing the appeal of assessee the Court held that mere establishing identity of share applicant or creditor is not sufficient for assessee to discharge onus under section 68; assessee has to further satisfy revenue as to genuineness of transaction and creditworthiness of share applicant or individual who is advancing amounts and creditworthiness of share applicants has to be seen in context of assertion made by them or materials presented before Assessing Officer at relevant time. (AY. 2002-03)

Riddhi Promoters (P.) Ltd. v. CIT (2015) 377 ITR 641 / 232 Taxman 430 (Delhi)(HC)

1219 **S.68 : Cash credits – Share application money – If the identity and other details of the share applicants are available, the share application money cannot be treated as undisclosed income in the hands of the Co. The addition, if at all, should be in the hands of the applicants if their creditworthiness cannot be proved.**

(i) The Revenue has not doubted the identity of the share applicants. The sole basis for the Revenue to doubt their creditworthiness was the low income as reflected in their Income Tax Returns. The entire details of the share applicants were made available to the AO by the Assessee. This included their PAN numbers, confirmations, their bank statements, their balance sheets and profit and loss accounts and the certificates of incorporation etc. It was observed by the ITAT that the AO had not undertaken any investigation of the veracity of the above documents submitted to him. It has been rightly commented by the ITAT that without doubting the documents, the AO completed the assessment only on the presumption that low return of income was sufficient to doubt the credit worthiness of the shareholders.

(ii) The Court is of the view that the Assessee produced sufficient documentation, discharged its initial onus of showing the genuineness and creditworthiness of the share applicants. It was incumbent to the AO to have undertaken some inquiry and investigation before coming to a conclusion on the issue of creditworthiness. In para 39 of the decision in *CIT v. Nova Promoters & Finlease Ltd. 342 ITR 169*, the Court has taken note of a situation where the complete particulars of the share applicants are furnished to the AO and the AO fails to conduct an inquiry. The Court has observed that in that event no addition can be made in the hands of the Assessee under Section 68 of the Act and it will be open to the Revenue to move against the share applicants in accordance with law. (ITA Nos. 71-72 & 84 of 2005, dated 12-8-2015) (AY. 2006-07 2007-08, 2008-09)

CIT v. Vrindavan Farms (P) Ltd. (Delhi) (HC); www.itatonline.org

1220 **S.68 : Cash credits – Identity and creditworthiness is proved – No addition could be made.**

Assessee reflected certain amounts as loans/advances obtained from various parties and entities. Onus is upon assessee to disclose true identity of a creditor and creditworthiness of said party. Since identity and creditworthiness had been established, no addition could be made.(AY. 2007-08)

CIT v. Lalit Kumar Poddar (2015) 231 Taxman 816 (Delhi)(HC)

1221 **S.68 : Cash credits – Gifts – NRI – Where identity and relationship of donor was known, amount received by assessee by way of gift from said donor could not be treated as income from undisclosed source.**

Where identity and relationship of donor was known, amount received by assessee by way of gift from said donor could not be treated as income from undisclosed source.

CIT v. Ramesh Suri (2015) 231 Taxman 380 (Delhi)(HC)

S.68 : Cash credits – Failing to furnish further explanation – Tribunal not examining correctness of views expressed by Assessing Officer and Commissioner (Appeals) – No reasons disclosed by Tribunal why views expressed by them wrong – Tribunal's order deleting addition is held to be not sustainable. 1222

Held, allowing the appeals, that the creditworthiness of the creditors and the source of the source are relevant enquiries. The Tribunal did not examine the correctness of the views expressed by the Assessing Officer and the Commissioner (Appeals). No reasons had been disclosed why the views expressed by the Commissioner (Appeals) and the Assessing Officer were wrong. Therefore, the order of the Tribunal deleting the addition could not be sustained.(AY. 2006-07)

CIT v. Mihir Kanti Hazra (2015) 375 ITR 555 (Cal.)(HC)

S.68 : Cash credits – Gift – Donors relatives of assessee – Gifts made out of love and affection – Details of each donor's return produced before Assessing Officer – Donors income-tax assessees – Gifts reflected in books of account – Transfer of amounts voluntarily and by way of entries – Creditworthiness and genuineness of transactions proved – Gifts valid. 1223

Held, all the donors were relatives of the assessee and the gifts were made out of love and affection. The details of each donor's return were produced before the Assessing Officer, as all the donors were income-tax assessees. Thus, their creditworthiness was proved. The amount was reflected in the books of account. Thus, the identity of the donors had been proved. The transfer of the amount was voluntary and the amount was transferred by way of entries, so the genuineness of the transaction had been proved. Hence, in the peculiar facts and circumstances of the case, the gifts were genuine. Also by looking to the amount involved, the gifts were genuine. All the ingredients of a valid gift had been proved.(AY. 2002-03)

Radhey Shaym Bhatia v. CIT (2015) 375 ITR 294 / 234 Taxman 507 (All.)(HC)

S.68 : Cash credits – Gift – Donor not known to assessee – Addition was held to be justified. 1224

Dismissing the appeal of assessee the Court held that Assessee admitting that donor not known to him. Declaration that gift made out of love and affection incorrect. That gift emanated from bank account of donor not sufficient to prove genuineness. Provisions exempting certain gifts from gift-tax is not relevant in determining genuineness of gift. (AY. 1993-94)

Pawan Kumar Aggarwal v. ITO (2015) 373 ITR 301 / 275 CTR 166 / 115 DTR 57 / 234 Taxman 144 (Delhi)(HC)

S.68 : Cash credits – Gift – Burden of proof on assessee – Tribunal finding that assessee had not proved that gift was genuine – Addition was justified. 1225

In the return the assessee had shown credit of ₹ 2.60 lakh in the capital account under the narration "gift". The Assessing Officer disbelieved the claim and made an addition of the amount to the income as declared. The Commissioner (Appeals) deleted the addition. The Tribunal held that the assessee had failed to prove or establish a close relationship with the donor and had not been able to show the circumstances under

which the gift was made. The donor was a stranger to the donee. The fact that the money had originated from a foreign bank account maintained by the donor was not sufficient to establish the genuineness of the gift. It restored the addition. On appeal to the High Court:
Held, dismissing the appeal, that the assessee had not been able to prove the genuineness of the gift and also the *factum* that the transaction was out of love and affection, a *sine qua non* to establish a genuine gift. The addition was justified.(AY 1994-95)
Sarita Aggarwal v. CIT (2015) 373 ITR 586 / 231 Taxman 600 / (2016) 131 DTR 103 (Delhi)(HC)

1226 **S.68 : Cash credits – Peak credit – Benefit of peak credit would be available unless otherwise established by the Revenue that it was invested elsewhere. [S.69]**
The assessee accounted for certain purchases in the cash book on later dates than the date of bills. An addition u/s. 69 was made by the AO on the same. On appeal, the HC held that items purchased were at short intervals, hence funds rotated and benefit of peak credit can be invoked and entire addition could not be made. If the AO comes to a finding that withdrawn amount was used or spent by assessee for any other investment or expenditure then the benefit of peak of such credit, in such circumstances, may not be available. (AY. 1994-95)
Sind Medical Stores v. CIT (2015) 117 DTR 78 (Raj.)(HC)

1227 **S.68 : Cash credits – Evidence produced to produce creditworthiness – No addition could be made.**
Assessee taking loans. Amount credited on previous day and cheques issued on next day. No legal bar for such transaction. Assessee producing evidence to prove creditworthiness and genuineness of transactions. Evidence produced showing assessee fulfilling requirements of provision. No addition could be made. (AY. 2006-07)
CIT v. Mark Hospitals (P) Ltd. (2015) 373 ITR 115 / 232 Taxman 197 (Mag.)(Mad.)(HC)

1228 **S.68 : Cash Credits – Gifts – Non-resident Indians – Unknown donors – Addition was held to be justified.**
Where assessee proved identity and credibility of donors but could not explain receipt of huge amounts as gifts from two unknown donors, genuineness of transaction was not established. (AY. 2002-03)
Aalok Khanna v. CIT (2015) 229 Taxman 610 / 277 CTR 60 / 118 DTR 280 (MP)(HC)

1229 **S.68 : Cash credits – Income from undisclosed sources – No evidence to show loan repaid by further availing of loan from various parties – No material to show resolution passed to avail of such loan to discharge liability – Income treated as income from undisclosed sources.**
Dismissing the appeal of assessee the Court held that the assessee had not in any manner let in any evidence to show that the amount of ₹ 1 crore received from India Cements was repaid by further availing of loan from various parties. The person who had taken the loan expired during the course of the assessment proceedings.

Consequently, the names could not be furnished. Nevertheless it was a matter of record that the assessee had not produced any material by way of any resolution to avail of such loan to discharge the liability. Thus, in the absence of any material furnished by the assessee, the only other course available to the Assessing Officer was to consider this income as income from other sources. The reasoning was not faulty or illogical and the issue raised was a pure question of fact. (AY. 2009-10)
Young Men's Christian Association v. JCIT (2015) 372 ITR 398 / 233 Taxman 201 (Mad.)(HC)

S.68 : Cash credits – Sale of agricultural land – Sale consideration deposited in bank and return filed voluntarily disclosing income – Assessing Officer without giving reasons discarding overwhelming evidence led by assessee and framing assessment-Deletion of addition by the Tribunal was held to be justified. 1230

The Revenue received certain information that the assessee had deposited an amount of ₹ 1,08,32,752 in the bank and made enquiries and recorded statements of the assessee and the purchasers. The assessee stated that he had sold the agricultural land for a sum of ₹ 1.20 crores to Y and R. Both the purchasers denied in their statements to have purchased the land for a consideration of ₹ 1.20 crores from the assessee. They stated that they had purchased the land only for ₹ 22 lakhs. The sale deed was executed on the sale value of ₹ 22 lakhs. The surplus amount of ₹ 97,80,000 over the sale deed value was suspected to be income from undisclosed sources and the case was selected for scrutiny on which notice under section 143(2) of the Income-tax Act, 1961, was issued. On the queries served upon the assessee he filed copies of the khasra and khatauni (record of possession and title) in respect of the agricultural land holding, the debit and credit entries in his bank account and justification in respect of agricultural income along with other documentary evidence. The Assessing Officer rejected the submission of the assessee and substantially made the addition of ₹ 77,80,000 in the income of the assessee.
Held, the assessee, as an honest citizen not only made a complaint to the registering authority that the sale deed had been registered at a value much below the amount, which he had actually received, he deposited the entire amount in the bank and voluntarily filed the return. There was no material whatsoever or any circumstance, which could have suggested that this amount was received by him from any other source. The deposition of witnesses of the sale deed, the bank manager and the evidence filed with regard to the valuation of the property was more than sufficient to discharge the burden, which the Assessing Officer had unreasonably placed on the assessee. The Assessing Officer in disbelieving the evidence had not given any reasons whatsoever to discard the statement of the witnesses, deposit of the entire sale consideration in the bank and the deposition of the bank manager. The assessee had not only deposited the entire amount in the bank but also informed the registering authority of the deficiency of the stamp in the sale deed. In the case of one of the purchasers, the Assessing Officer had accepted that he was the owner of the money, i.e., ₹ 97,80,000 and, accordingly, an addition of ₹ 77,80,000 was made in his hands on substantive basis as his income during the year for which a copy of the assessment order was filed on record. Therefore, the Tribunal rightly directed the Assessing Officer to delete the addition made at ₹ 77,80,000 on account of income from undisclosed sources. (AY. 2008-09)
CIT v. Intezar Ali (2014) 99 DTR 201 / 220 Taxman 72 (Mag.) / (2015) 372 ITR 651 (All.) (HC)

1231 **S.68 : Cash credits – Failure by creditors to participate in inquiry and furnish accounts – Does not mean that creditors lacked identity – No material to show that amounts advanced by creditors in reality represented money belonging to assessee – Sums cannot be treated as cash credits.**

Dismissing the appeal of revenue the Court held that; omission on the part of the creditors to subject themselves to the enquiry initiated by the Revenue or their failure to furnish accounts would not lead to the conclusion that the creditors lacked identity, without any other contradiction of facts and particulars of the transactions between them furnished by the assessee being uncontroverted. The Tribunal while deleting the addition had held in substance with regard to each of those loan transactions, that the Revenue had failed to bring any other material on record to show that the amounts advanced by the creditors were not in reality and in fact, money belonging to the assessee. (AY. 1994-95)

CIT v. Chandela Trading Co. P. Ltd. (2015) 372 ITR 232 / 58 taxmann.com 45 (Cal.)(HC)

1232 **S.68 : Cash credits – Diary – Peak credit – Highest Peak as increased by net profit of 5% was held to proper.**

From material found during search at residence of assessee's brother it was found that assessee did not disclose certain amount. Assessing Officer made certain addition to income of assessee. Assessing Officer did not consider explanation tendered by assessee and did not assign any reason for not believing profit and loss account of unaccounted transactions of assessee to be true. He even overlooked working of peak based on seized diary. Tribunal allowed the claim on the basis of highest peak as increased by net profit of 5%. On appeal by revenue the dismissing the appeal Court held that income from transactions recorded in seized diary was to be determined on basis of highest peak as increased by net profit of 5 per cent on receipts. (AY. 2004-05 to 2006-07)

CIT v. Tirupati Construction Co. (2015) 230 Taxman 198 (Guj.)(HC)

1233 **S.68 : Cash credits – Cash receipts – Repayment of dues and sale of shares – Explanation was not satisfactory – Issuance of summons was not paryed – Addition was held to be justified.**

Assessee had shown two cash receipts on account of alleged repayment of existing dues of assessee and on account of sale of shares. Assessee neither disclosed name of buyer of shares nor did he produce sold note issued by broker through whom shares were sold. Tribunal has deleted the addition. On appeal by revenue, allowing the appeal the Court held that the assessee could have applied for issuance of summons both to broker and buyer as well as to debtor but he did not do so, therefore on facts assessee could not be said to have discharged his burden and Assessing Officer rightly added both amounts by invoking section 68.

CIT v. Sanjay Jain (2015) 230 Taxman 550 (Cal.)(HC)

1234 **S.68 : Cash credits – Confirmation and balances sheet was filed – Deletion of addition was held to be justified.**

Dismissing the appeal of revenue the Court held that Appellate authorities after considering balance sheet of lender as well as confirmatory certificates in respect of

advances given to assessee, deleted addition made by Assessing Officer, order so passed did not give rise to any substantial question of law. (AY. 2009-10)
CIT v. Avant Grade Carpets Ltd. (2015) 230 Taxman 165 (All.)(HC)

S.68 : Cash credits – Share capital – Loans – Agriculturists – Matter remanded. 1235
Assessee constructed and installed a cold storage during year. It was required to furnish details of investment in cold storage, source of share capital and genuineness of loans. Assessee submitted that shareholders/depositors were agriculturists having substantial land holdings for which evidence in form of Khasra Khatauni, and certificates from Gram Pradhan as well as Block Pramukh were submitted. AO being not satisfied with assessee's explanation, made addition. On appeal, Tribunal deleted addition in absence of departmental representative even though mystery pertaining to creditworthiness remained unsolved. On facts, matter was to be remanded to Tribunal for *de novo* adjudication. (AY. 2004-05)
CIT v. T. C. Ice & Cold Storage (P.) Ltd. (2015) 229 Taxman 464 (All.)(HC)

S.68 : Cash credits – Identity established – Transaction was made through banking channel – Deletion of addition by Tribunal was held to be justified. 1236
Where in respect of credit entries, assessee established identity of creditors by bringing on record their PAN and complete addresses and, moreover, transaction was made through proper banking channel, impugned addition was to be set aside. Appeal of revenue was dismissed. (AY. 2002-03)
CIT v. Anurag Agarwal (2015) 229 Taxman 532 (All.)(HC)

S.68 : Cash credits – Failure to issue summons – Deletion of addition was held to be justified. 1237
Assessee having received and repaid the amount in question through banking channels and also furnished PAN of creditor, burden on assessee under s.68 stood discharged and AO having failed to invoke s. 131 for summoning the creditor, Tribunal was justified in deleting addition. (AY. 2002-03)
CIT v. Varinder Rawlley (2014) 366 ITR 232 / (2015) 114 DTR 367 / 274 CTR 392 (P&H) (HC)

S.68 : Cash credits – Burden on Revenue – No effort made by Revenue to show whether creditors were credit worthy – Loans taken from family members – Creditors genuine and amounts shown in their books of account – No addition could be made. 1238
While the assessee was travelling from Delhi to Bareilly in a car, the car was intercepted by the customs authorities. The customs authorities recorded the statements of the driver and the assessee. In the statements, both stated that the assessee had gone to Delhi to sell gold and the seized cash was the consideration for the sale. The customs authorities observed that it was not established that the money was the sale proceeds of the smuggled gold. Later, before the income-tax authorities, the assessee stated that he had gone to Delhi to purchase a plot but the deal was not finalised so he had to return to Bareilly with cash which was taken from the family members and the slip of each family member was attached on the bundle of currency notes. The Assessing Officer was not satisfied so he made an addition of ₹ 3.90 lakhs. However, the Commissioner

(Appeals) deleted the addition observing that the assessee was involved in the gold business, so the profit might have been earned. Finally, he had made an addition of ₹ 40,000 deleting the remaining amount. The Tribunal restored the addition of ₹ 3.90 lakhs. On appeal :
Held, allowing the appeal, that all the creditors had shown the entries in their books of account, a few of them had given a meagre amount for which no entry was made. The order of the customs authorities was not before the Commissioner (Appeals), who had wrongly observed that the assessee was engaged in the business of gold. Especially when the customs authorities had observed that the assessee was not involved in the business of gold, the statements given by the assessee as well as the driver could not be relied upon. No attempt was made by the Department to examine the creditors. The identity of the creditors had been established. From the family members, loans for petty amounts can be taken in cash. Hence, the creditors were genuine. When credit was taken from the family members and the amount was petty or had been shown in the books of account, there was no occasion to make the addition. Therefore, all the orders of the lower authorities were set aside and the addition of ₹ 3.90 lakhs was to be deleted. The assessee would get the relief, accordingly, for the assessment year 1987-88. (AY. 1987-88)
Radha Raman Agrawal v. ITO (2015) 371 ITR 435 / 232 Taxmman 502 (All.)(HC)

1239 **S.68 : Cash credits – Details of creditors and amount due to each creditor under various heads not given – 10% of the total advances treated as unexplained cash credit reasonable.**
The assessee furnished some particulars, but the detail of the parties as well as the amount due to the creditors under various heads was not given. AO therefore, treated 10% of the total advances as unexplained cash credit u/s. 68. Held:
AO was justified in adding 10% of total advances as unexplained cash credit u/s. 68. (AY 1997-98 to 1999-2000)
CIT v. Bellary Steel & Alloys Ltd. (2015) 370 ITR 226 / 114 DTR 287 / (2014) 223 Taxman 491 (Karn.)(HC)

1240 **S.68 : Cash credits – Business income – Calculation was made on scientific basis, assessee was justified in treating 39 per cent of total price as an amount for fulfilment of warranty conditions – Amounts were held to be not assessable as cash credits.[S. 68, 145]**
Assessee had undertaken liaisoning work of sale of medical equipments, etc., and had received certain commission. As assessee had future obligation of maintenance of medical equipments for next five years with spare parts and for another five years without spare parts, she had treated 39 per cent of said commission as maintenance contract income and offered same for tax in proportionate basis in 5 assessment years as corresponding or necessary expenditure would be incurred in said span of 5 years. AO held that bifurcation was not justified and made addition of said amount by invoking section 68. Court held that when assessee had future obligation of maintenance services and necessary expenditure required therefore, and assessee's calculation was made on scientific basis, assessee was justified in treating 39 per cent of total price as an amount for fulfilment of warranty conditions. Amounts was held to be not assessable as cash credits. (AY. 2007-08)
CIT v. Paramjeet Luthra (Smt.) (2015) 371 ITR 306 / 228 Taxman 348 (Delhi)(HC)

S.68 : Cash credits – Gifts – Non-resident – Finding of fact – Appellate Tribunal – Rectification of mistake – Rejection of Miscellaneous application was held to be justified. [S. 254(2)] 1241

Assessing Officer made addition in income of assessee as income from undisclosed sources holding that gifts received by assessee from one 'K' were not genuine. CIT(A) as well as Tribunal upheld findings of Assessing Officer. On rectification application, Tribunal held that there was no error apparent on record after recording that mere routing of a gift through a banking channel would not by itself establish that gift was genuine. On writ the Court held that finding of facts recorded by Tribunal could not be interfered with.(AY. 1995-96)

Naresh K. Pahuja v. ITAT (2015) 375 ITR 526 / 229 Taxman 252 / 277 CTR 289 / 116 DTR 390 (Bom.)(HC)

S.68 : Cash credits – Sale of shares – DMAT account and contract note showed the credit details – Deletion of addition by Tribunal was held to be justified. 1242

Assessee declared capital gain on sale of shares of two companies. Assessing Officer, observing that transaction was done through brokers at Kolkata and performance of concerned companies was not such as would justify increase in share prices, held said transaction as bogus and having been done to convert unaccounted money of assessee to accounted income and, therefore, made addition under section 68. On appeal, Tribunal deleted addition observing that DMAT account and contract note showed credit/details of share transactions; and that revenue had stopped inquiry at particular point and did not carry forward it to discharge basic onus. On facts, transactions in shares were rightly held to be genuine and addition made by Assessing Officer was rightly deleted. (AY. 2003-04 to 2006-07)

CIT v. Shyam R. Pawar (2015) 229 Taxman 256 (Bom.)(HC)

S.68 : Cash credits – Loans from minors – Gift received from uncle – Addition was held to be justified. 1243

Where assessee claimed to have taken loans from his two minor sons and source of loan was stated to be gift received by assessee's sons from their uncle i.e., brother of assessee, since assessee's brother categorically stated that he had not given any gifts to anybody, impugned addition made by Assessing Officer in respect of loan amount was to be confirmed. (AY. 2001-02)

CIT v. Virendra Behari Agrawal (2015) 229 Taxman 193 (All.)(HC)

S.68 : Cash credits – Transaction of purchase and sale of shares was held to be bogus – Addition was held to be justified. 1244

Once transaction of purchase and sale of shares was found to be bogus then sale proceeds had to be added as income of assessee under section 68 as money received on basis of bogus transaction had been credited by assessee in his books of account which remained unexplained. (AY. 2005-06)

Chandan Gupta v. CIT (2015) 229 Taxman 173 (P&H)(HC)

1245 **S.68 : Cash credits – Share capital – Commission on account entry taken – Addition was confirmed – Assessment proceedings under the Income-tax Act are not a game of hide and seek – If AO does not conduct proper inquiry, the obligation to do so is on the CIT(A) & ITAT – Matter remanded. [S. 131,143 (3), 250(4)]**

Allowing the appeal of Revenue the Court held that; The AO here may have failed to discharge his obligation to conduct a proper inquiry to take the matter to logical conclusion. But CIT (A), having noticed want of proper inquiry, could not have closed the chapter simply by allowing the appeal and deleting the additions made. It was also the obligation of the First Appellate Authority, as indeed of ITAT, to have ensured that effective inquiry was carried out, particularly in the face of the allegations of the Revenue that the account statements reveal a uniform pattern of cash deposits of equal amounts in the respective accounts preceding the transactions in question. This necessitated a detailed scrutiny of the material submitted by the assessee in response to the notice under section 148 issued by the AO, as also the material submitted at the stage of appeals, if deemed proper by way of making or causing to be made a "further inquiry" in exercise of the power under section 250(4). This approach not having been adopted, the impugned order of ITAT, and consequently that of CIT (Appeals), cannot be approved or upheld. Appeal of revenue was allowed, however the issue of reassessment was remanded to the CIT(A). (AY. 2004-05)

CIT v. Jansampark Advertising & Marketing (P) Ltd. (2015) 375 ITR 373 / 231 Taxman 384 (Delhi)(HC)

1246 **S.68 : Cash credits – Finding that assessee had reasonable explanation for cash credits – Addition was deleted.**

Held that during the course of appellate proceedings, the assessee was able to produce documents and the details of repayment made through cheque. Even the bank confirmations were filed by the assessee before the Commissioner (Appeals) showing that the cheques issued by the assessee were encashed by the respective parties. The assessee had also furnished identity of persons with complete details of addresses and the fixed deposit applications showing details. The addition under section 68 was not warranted.(AY. 2005-06, 2006-07)

CIT v. ABT Ltd. (2015) 370 ITR 159 (Mad.)(HC)

1247 **S.68 : Cash credits – Once source of cash deposit in bank account is explained, subsequent withdrawal is not required to be explained – Addition cannot be made as cash credits.**

Assessee explained cash deposit in bank account by submitting names of persons from whom unsecured loans were taken. Merely because assessee withdrew cash instead of sufficient cash balance available with him and subsequently redeposited same in bank account for his own use, no addition could be made. (AY. 2009-10)

CIT v. Manoj Indravadan Chokshi (2015) 229 Taxman 56 (Guj.)(HC)

1248 **S.68 : Cash credits – Share application money – Share premium – Investors confirmed – Addition was held to be not justified.**

Assessee received share application money and share premium money from four parties. AO treated said money as unexplained credit. However all four parties were

limited companies and enquiries were made and received from four companies and all companies accepted their investment. Court held that where assessee had categorically established nature and source of said sum, addition of such subscription as unexplained credit was unwarranted. (AY. 2007-08)
CIT v. Pranav Foundations Ltd. (2015) 229 Taxman 58 / 117 DTR 227 (Mad.)(HC)

S.68 : Cash credits – Share capital – No opportunity of cross-examination – Transaction through account payee cheque – Deletion of addition was held to be justified. 1249
AO made addition on account of amount received for share capital, its premium and amount paid as commission for arranging it on basis of statement made by third parties who were related to purchasing companies stating that these companies were engaged in providing accommodation entries in lieu of commission. However, said third party statement was made behind back of assessee and no opportunity of being heard or cross-examining third parties was provided to assessee. AO could not bring any material to disapprove genuineness of confirmation and affidavits filed by assessee. Further, all transaction were through account payee cheques, all these companies had PAN numbers and were regularly assessed to tax. Investor companies were registered under Companies Act and Form No. 2 for allotment was also filed. Deletion of addition by the Appellate Authorities was held to be justified. (AY. 2004-05)
CIT v. Supertech Diamond Tools (P.) Ltd. (2015) 229 Taxman 62 (Raj.)(HC)

S.68 : Cash credits – Purchase and sale of gold – Addition was made as undisclosed source – Matter was set aside. 1250
The assessee who started trading in gold, purchased first lot of gold from ICICI bank for ₹ 43.17 lakh which was sold for an aggregate sale consideration of ₹ 43.20 lakh. Thereafter, the assessee purchased another lot of gold for ₹ 43.76 lakh which was sold for ₹ 43.80 lakh.
For the purchase of the first lot of gold, the assessee claimed to have paid out of his own funds which were transferred from HDFC bank to ICICI bank.
The AO treated the entire deposit of cash of ₹ 87 lakh as the assessee's own money earned from undisclosed source. On appeal, the CIT(A) deleted the addition. On revenue's appeal, the Tribunal confirmed the deletion made by the Commissioner (Appeals) to the extent of ₹ 44 lakh only since this was the amount which was transferred by the assessee from his own account from HDFC bank to ICICI bank.
On appeal: the Court held that,it is primarily for the Tribunal to consider as to whether the invoking of section 68 was in order. It would be appropriate to restore the proceedings for a decision afresh by the Tribunal. (AY. 2008-09)
Amarnath Agarwal v. ACIT (2015) 229 Taxman 54 (All.)(HC)

S.68 : Cash credits – Expression 'any sum is found credited in books of assessee' means all entries on credit side as well as on debit side in books of account and not an entry only on credit side – On facts order of Tribunal deleting the addition was affirmed. 1251
Assessee, engaged in business of Banarsi sarees on commission basis, had shown a liability for supply of sarees. AO held that liabilities in balance sheet remained

unexplained and added a part of outstanding amount to income of assessee as unexplained credit – Similar issue was raised in preceding assessment year in case of assessee and by a detailed order passed under section 264, Commissioner had deleted addition on account of unexplained liabilities. Since fact in relevant assessment year were same, addition made by AO was to be deleted. Court also held that Expression 'any sum is found credited in books of assessee' means all entries on credit side as well as on debit side in books of account and not an entry only on credit side.) (AY. 1999-2000)
CIT v. Abdul Haseeb, Prop. M.S.J.B. Silk (2015) 228 Taxman 71 (Mag.)(All.)(HC)

1252 **S.68 : Cash credits – Share application money – Address and PAN Nos. were not provided – Addition was held to be justified.**
AO held that in respect of shares application money the assesssee has not provided the address and PAN, in case of some of share applicants, there were transactions of deposits and immediate withdrawals of money therefore assessed the amount as cash credits. Tribunal deleted the addition. On appeal by revenue allowing the appeal the Court held that provision of section 68 was rightly invoked by the AO. Appeal of revenue was allowed. (AY. 2002-03)
CIT v. Focus Exports (P.) Ltd.(2014) 111 DTR 12 / (2015) 228 Taxman 88 (Mag.)(Delhi) (HC)

1253 **S.68 : Cash credits – Corpus donations – Addition as cash credits was deleted.**
The Tribunal held that the donor's receipts found during the course of search bear the names, addresses and PANs of the donors acknowledging that the donation is made towards the corpus fund and all the donors (except in 39 cases) have confirmed the donations made to the assessee directly to the AO, and the amounts of donations being very small in the cases of remaining 39 donors who have made payments mostly by cheques or drafts, all the donations are to be accepted as genuine and therefore the impugned addition made by the AO cannot be sustained. (AY. 2003-04, 2004-05, 2009-10)
Indo Global Education Foundation v. DCIT (2015) 169 TTJ 437 / 39 ITR 489 (Chd.)(Trib.)

1254 **S.68 : Cash credits – Share capital – Statement – Despite statement of Mukesh C. Choksi & Jayesh Sampat admitting bogus share capital, addition cannot be made in assessee-company's hands.[S.147]**
The assessee-company has fully discharged the burden of proof, onus of proof and explained the source of share capital and advances received by established the identity, creditworthiness and genuineness of transaction by banking instruments with documentary evidences. The further stand of the assessee has been that the assessee substantiated the details with the documentary evidences as extracted from the website of Ministry of Corporate Affairs, Government of India before the Assessing Officer. These facts have not been rebutted on behalf of the Revenue. If the share application money is received by the assessee company from alleged bogus shareholders who's name are given to the AO then the department is free to proceed to reopen their individual assessments in accordance with law but it cannot be regarded as undisclosed income of assessee company. (ITA No. 3645/Mum/2014 dated 30-11-2015) (AY. 2007-08)
ITO v. Superline Construction P. Ltd. (Mum.)(Trib.); www.itatonline.org

S.68 : Cash credits – Share capital – All the documents were in order – Deletion of addition was held to be justified. 1255

Assessee received share capital from investor company. Assessing Officer suspected genuineness of entries as all investors were Kolkata based companies. Assessing Officer carried out investigation and based on inspector's report made addition in income of assessee as unexplained cash credits. CIT(A) has deleted the addition. On appeal by revenue dismissing the appeal the Tribunal held that the inspector did not make enquiry about existence of investor companies hence inspector's report could not be sole basis for making addition when all other documents were in order. (AY. 2005-06)

Dy. CIT v. GDA Finvest & Trade (P.) Ltd. (2014) 36 ITR 161 / (2015) 68 SOT 362 (URO) (Delhi)(Trib.)

S.68 : Cash credits – Mere confirmations are not sufficient to prove creditworthiness of parties and genuineness of transaction. 1256

The assessment was completed u/s. 145(3) and thereafter the CIT invoked s. 263. The AO made an addition u/s. 68 on certain cash credits. The Assessee had submitted confirmations without mentioning the PAN, mode of payment, date, etc. with the AO at the time of original assessment. The ITAT upheld the additions made and held that confirmations only identified the parties and did not prove their capacity and genuineness of credit transactions. (AY. 2008-09)

Prabhat Construction Company v. CIT (2015) 155 ITD 813 / (2016) 176 TTJ 501 (Pat.)(Trib.)

S.68: Cash credits – Bank deposits – Re-deposit of excess withdrawals made out of explained bank deposits can't be held as unexplained money – Matter remanded. 1257

Tribunal held that re-deposit of excess withdrawals made out of explained bank deposits can't be held as unexplained money – Matter remanded. (AY.2008-09)

Gurpreet Singh v. ITO (2015) 40 ITR 467 / (2016) 157 ITD 262 (Chd.)(Trib.)

S.68 : Cash credits – Share capital – Financial share capital of contribution made by other companies were furnished – No addition could be made. [S.153C] 1258

Where assessee had duly shown in its financial statements share capital contribution made by other companies and revenue did not find any incriminating material in search, no addition could be made on account of capital contribution. (AY 2003-04 to 2008-09)

ACIT v. Gajannan Distributors & Developers (P) Ltd. (2015) 169 TTJ 641 / 61 taxmann. com 287 (Indore)(Trib.)

S.68 : Cash credits – Peak credit – Unexplained cash deposits – Addition was held to be justified. 1259

Assessee was a Railway employee, saving bank account showed certain cash deposits and withdrawals, which according to assessee, and represented interest-free loans taken from agriculturists. Assessee neither furnished purpose of loan nor proved creditworthiness of lenders. Made addition u/s. 68 holding land doesn't prove capacity and creditworthiness of lenders, unexplained cash deposits in bank account as income from other sources of assessee. However, only 'peak amount' for credit entries in bank account of assessee could be added to income of assessee. (AY. 2006-07)

ITO v. Pawan Kumar (2015) 153 ITD 448 (Delhi)(Trib.)

1260 **S.68 : Cash credits – Carried forward credit – Addition cannot be made as cash credits, however addition was held to be justified u/s. 41(1). [S.41(1)]**

The assessee was not able to furnish the bank statement copy, however, the AO procured the bank statement from the bank and found certain discrepancies in the statement regarding payment to sundry creditors. And he made an addition of ₹ 35,13,739/- in respect of outstanding creditors treating as cessation liability. However, CIT(A) called for remand report from the AO, and once again the AO called for details of sundry creditors and payment to them. The assessee failed to furnish the details in respect of sundry creditors. Tribunal held that, the assessee failed to establish the actual existence of the impugned disputed amount in the books of account of the assessee. The assessee has drawn its balance sheet based on its books of account, in which the above amount, were being claimed as liabilities due, to various parties, as at the end of the accounting year under dispute. However, the assessee failed to establish the genuineness of these liabilities by producing supporting evidence. Simply the liabilities being reflected against certain names in the books of account would not establish the genuineness of liabilities. Tribunal confirmed the addition u/s. 41(1) of the Act. (AY.2007-08)

Bharat Dana Bera v. ITO (2015) 39 ITR 632 / 153 ITD 421 / 169 TTJ 721 (Mum.)(Trib.)

1261 **S.68 : Cash credits – Gift – Non-resident sister-in-law – Genuineness of transaction was proved – Addition was deleted.**

The assessee received a gift of ₹ 48,61,232, from her late husband's sister, who was a non-resident Indian based in Hong Kong. The Assessing Officer treated the gift under section 68 of the Income-tax Act, 1961, as income of the assessee from undisclosed sources, on the ground that the financial capacity of the donor was not fully proved. The Commissioner (Appeals) confirmed the order of the Assessing Officer holding that gift from a younger sister-in-law without any reciprocity was hard to believe. On appeal: Held, allowing the appeal, that the entire details of the gift transaction were fully explained through the bank statement of the assessee, remittance advice, bank statement of the donor and foreign remittance advice issued by the bank in Hong Kong. From the bank account of the family concern of the donor, it was evident that an amount of US $ 100,035 had been debited and credited to the bank account of the donor on February 5, 2009 and on the same date itself the amount had been remitted to the assessee's bank account in India. Thus, the genuineness of the transaction and the creditworthiness of the donor were proved and the customary relationship could not be the basis for confirming the addition. (AY. 2009-10)

Ichudevi L. Choraria (Smt.) v. ITO (2015) 39 ITR 57 (Mum.)(Trib.)

1262 **S.68 : Cash credits – Charitable trust – Donation – Addition cannot be made as unexplained cash credits. [S.11, 12]**

Donations received by charitable trust. Donors giving permanent account numbers and receipts. Assessee able to prove identity of donors and utilisation of donation towards construction of educational building. Addition cannot be made as unexplained cash credits. (AY. 2003-04, 2004-05, 2009-10)

Dy. CIT v. Indo Global Education Foundation (2015) 39 ITR 489 / 169 TTJ 437 (Chd.)(Trib.)
Sukhdev Sigh v. Dy. CIT (2015) 39 ITR 489 / 169 TTJ 437 (Chd.)(Trib.)

S.68 : Cash credits – Profits chargeable to tax – Remission or cessation of trading liability – Bogus credits – Unclaimed liabilities to creditors, even if fictitious and bogus, cannot be assessed u/s. 41(1) in the absence of a write-back. The bogus credits can be assessed u/s. 68 only in the year the credits were made and not in the year they are found to be not payable.[S.41(1)] 1263

(i) Having held that the sundry creditors are not payable and fictitious, the next question that comes up for our consideration is the year in which the amount is taxable under what provisions of law either under Section 41(1) or 68 of the Act. We are required to examine whether this amount should be brought to tax in the year in which credit was made first time in the books of account or in the year in which these are found not payable. An identical issue had come up for consideration before the Hon'ble Gujarat High Court in the case of *CIT v. Bhogilal Ramjibhai Atara* in Tax Appeal No. 588 of 2013, dated 4-2-2013, in which it was held that that even if the debt itself is found to be non-genuine from the very inception there was no cessation or remission of liability and that therefore, the amount in question cannot be added back as a deemed income under section 41(1) of the Act. The Jurisdictional High Court in the case of *CIT v. Shri Vardhman Overseas Ltd., (2012) 343 ITR 408 (Del.)*, has dealt with the issues of taxability under section 41(1) of the Act in a case where long outstanding sundry creditors were treated as taxable. The High Court after referring to the decisions of Hon'ble Supreme Court in the cases of *CIT (Chief) v. Kesaria Tea Co. Ltd., (2002) 254 ITR 434 (SC)* and *CIT v. Sugauli Sugar Works P. Ltd (1999) 236 ITR 518 (SC)*, has held that such amounts cannot be brought to tax under Section 41(1) of the Act. The Hon'ble Supreme Court in the case of *CIT v. Sugauli Sugar Works P. Ltd.* (supra) held that a unilateral action cannot bring about a cessation or remission of the liability because a remission can be granted only by the creditor and a cessation of the liability can only occur either by reason of operation of law or the debtor unequivocally declaring his intention not to honour his liability when payment is demanded by the creditor, or by a contract between the parties, or by discharge of the debt.

(ii) Applying the ratio in the cases mentioned supra, the amount in question cannot be brought to tax in the year under appeal under the provisions of Section 41(1) of the Act. It is trite law that an addition under Section 68 can be made only in the year in which credit was made to the account of the creditors in the books of account maintained. Kindly refer to the Supreme Court in the case of *Damodar Hansraj v. CIT, (1969) 71 ITR 427 (SC)*. Admittedly, in this case the credit to the account of creditors was made in the earlier years and therefore, the amount even cannot be brought to tax under Section 68 in the year under appeal. However, it is open to the Department to levy tax on such amount by resorting to the remedies available under the provisions of Act by duly following the procedure known to the law. (ITA No. 159/Del/2011, dated 22.04.2015)(A.Y. 2007-08)

Perfect Paradise Emporium Pvt. Ltd. v. ITO (Delhi)(Trib.); www.itatonline.org

1264 **S.68 : Cash credits – Profits chargeable to tax – Remission or cessation of liabilities – Old liabilities – Capital accounts – Old liabilities, even if treated as genuine in earlier years and even if on capital account, are liable to be assessed as "income" in year of write-back if assessee is unable to provide confirmations and substantiate genuineness of liabilities. [S. 2(24), 28(i), 41(1), 56 (2)(v) to (vii), 59(1)]**

(i) Vide sections 56(2)(v) to (vii), provisions recently introduced, provide for receipt without consideration from an unrelated party, except otherwise than in any specified condition, is statutorily presumed to bear the character of income. The same is the second exception to the rule of a capital receipt being not considered as income under the Act and, in that sense, is again a rule of evidence, i.e., as S. 68, etc. The provision/s is harsh on genuine transfers, legislated in view of the propagation and proliferation of 'gifts' from unrelated parties. The same, however, is without prejudice to the generality of section 56(1). It would, therefore, be of little consequence even if section 56(2)(vi), the specific provision covering the period under reference, i.e., F.Y. 2007-08, is considered as inapplicable in the facts of the case. In fact, section 56(2)(viib), inserted by Finance Act, 2012, duly incorporated in section 2(24) defining income, provides for treating the share premium in excess of the fair market value of the share as income. The apex court in T.V. Sundram Iyengar [1996] 222 ITR 344 (SC) opined in favour of the write back of trade advances as income, *de hors* the provision of section 56(2), applying the concept of income, consistent with section 2(24), in the facts of the case. The efflux of time, coupled with the write back, so that it was no longer payable, it opined, was sufficient to signify a qualitative change in the nature of the sum as one of receipt of business. The finding of it representing a trade surplus (and, therefore, assessable u/s. 28), in view of the trading relationship between the parties, is, though relevant, secondary, in the larger context of the ratio/import of the decision. It may not be of much import inasmuch as it would only alter or impact the head of income under which the income stands to be assessed. The issue before us is not *qua* the head of income under which the impugned sum would stand to be assessed; it not being even the Revenue's case that the same is business income, assessing it as 'income from other sources' u/s. 56, but as to the nature of the receipt, i.e., if it at all is, or represents, the assessee's income.

(ii) Section 68 would hold even if the impugned sums represent, as contended by the Revenue, the assessee's liabilities, assumed in the past, on whatever count. The same no longer representing a liability, there is admittedly a qualitative change therein – its nature transforming from a liability (for goods, services, whatever – which could itself vary over different persons, and remains unspecified) to the assessee's own money, as signified by the credit to her capital account, which is a fresh credit/s during the year. Both sections 68 and 56(2)(vi) would apply. *Qua* the latter, the sum of money may have been received earlier, but there is a constructive receipt during the year inasmuch as it is received on own account, while the earlier 'receipt' was that by way of incurring a liability for value received (in kind) or even if in the form of money, only for being paid back and, as such, not without consideration. The second receipt, however, is without consideration. Section 68 shall also, as afore-referred, apply inasmuch as there is fresh credit/s

in the assessee's books in the form of credit/s to the capital account. In our view, the particular section is not of much significance considering the amount to be no longer a liability, but accretion the capital during the year, so that even section 56(1) shall hold, quite in the same vein as the Hon'ble apex court found the write back to be assessable u/s. 28 as business income in the case of T.V. Sundram Iyengar [1996] 222 ITR 344 (SC).

(iii) When an amount, which is stated, claimed and accepted as a payable, is no longer so, the assessee gains to that extent. There is nothing unreal or notional about this gain. It can show that, even so, the same is not chargeable as income or no tax liability is attracted inasmuch as the benefit is not in the nature of income. The assessee offers no such explanation. What is admitted though is that there has been remission/cessation of liability inasmuch as these are no longer payable. Why? No reason is advanced. It is under these circumstances that the law permits the AO to draw an adverse inference of it as representing the assessee's income. As regards the year, there can again be little doubt in the matter. The impugned credit/s, which we have found as a fresh credit/s, is during the current year. The liability was accepted as genuine for and up to the immediately preceding year, while it is no longer payable as at the year-end. The taxable event, in terms of gain, thus, has taken place during the year, even if one considers the passing of the journal entry, recording so, on a particular (single) date in the books, to be a matter of convenience only. It is for these reasons that we find the impugned credit as corresponding and answering to the concept of income under section 2(24) and, further, as standing to fall to be assessed u/ss. 56(1) and 56(2), finding strong support in the decision in the case of T.V. Sundram Iyengar [1996] 222 ITR 344 (SC) (AY. 2008-09)

Panna S. Khatau v. ITO (2015) 154 ITD 790 / 172 TTJ 160 (Mum.)(Trib.)

S.68 : Cash credits – Bank accounts – Acknowledgement for filing of return – Balance sheet – Sufficient to prove creditworthiness – Addition was not justified. 1265

The assessee an individual was engaged in business. Unsecured loan appearing in books of the assessee added in the income of assessee based on unproved creditworthiness of lender. Held Submission of respective bank account statements, copies of the acknowledgement of returns of income filed, balance-sheets etc., that all the transactions were found recorded in the contra Bank account statements of the assessee as well as of the respective creditors, that all those parties were filing their regular returns of income, that the confirmations and the related evidences furnished by the assessee were not disproved by the AO, that most of the credits pertained to the preceding assessment years, that the assessee had duly discharged his burden as required u/s. 68 of the Act, that the confirmations filed by the assessee were not disproved by the AO, that no contrary evidences were brought on record to prove that the creditors were ingenuine or bogus, that all the transaction were made through regular banking channels. These are sufficient evidences to prove creditworthiness in case of unsecured loans.(AY 2007-08)

ACIT v. Sanjay M. Jhaveri (2015) 168 TTJ 751 / 70 SOT 502 (Mum.)(Trib.)

1266 **S.68 : Cash credits – Assessee dealing in resale of petroleum products – Creditors, mainly agriculturists, depositing cash to ensure regular supply of diesel – Deposits genuine – Addition is not justified.**

The assessee received unsecured loans from 62 creditors. The Assessing Officer, on the view that the creditors were not of sufficient means to give interest-free loans, added the loan to the income of the assessee as income from undisclosed sources, on the ground that the assessee had failed to establish the creditworthiness of the creditors and the genuineness of the transaction. The Commissioner (Appeals) confirmed the order of the Assessing Officer. On appeal :

Held, allowing the appeal, that the assessee was dealing in resale of petroleum products and the depositors, who were mainly agriculturists, made the deposits to ensure uninterrupted supply of diesel during the harvesting or sowing season. The assessee produced the depositors before the Assessing Officer, their statements were recorded and evidence of their landholding was produced. Therefore, the deposits in question were genuine and the addition was not justified. (AY. 2003-04)

Pushpak Auto Centre v. ITO (2015) 154 ITD 588 / 38 ITR 447 / 168 TTJ 17 (Delhi)(Trib.)

1267 **S.68 : Cash credits – Income from undisclosed sources – Cash deposits in bank – Cash surrendered on search and duly reflected in wealth-tax return and accepted – Cash cannot thereafter be treated as undisclosed income.**

The assessee deposited a sum of ₹ 94,40,180 in his savings account. The Assessing Officer included the sum to the income of the assessee, on the ground that the assessee had failed to prove the source of the deposits. The assessee contended that the cash of ₹ 80 lakhs was available out of the surrender made during the search conducted in the year 2007 and the cash was duly reflected in the wealth-tax return. The Commissioner (Appeals) deleted the addition. On appeal by the Department :

Held, dismissing the appeal, that admittedly the assessee had disclosed a sum of ₹ 1.03 crores in the assessment year 2007-08, and a sum of ₹ 10 lakhs in the assessment year 2008-09. This amount was surrendered during the search and the tax had been duly paid and the assessed income was including the amount of surrender. The cash deposited had duly been reflected in the wealth-tax return. Once the fact was accepted by the Revenue in the wealth-tax assessment proceedings, it could not later challenge the existence of cash. There was no infirmity in the order of the Commissioner (Appeals). (AY. 2010-11)

ACIT v. Joginder Paul (2015) 38 ITR 486 / 69 SOT 744 (Chd.)(Trib.)

1268 **S.68 : Cash credits – Share capital – Even if the issue share capital is bogus, no addition can be made in assessee's hands if identity of shareholder is established – Assessee is not required to show source of shareholder's funds.**

Hon'ble Supreme Court of India in the case of *CIT v. Lovely Export 299 ITR 261 (SC)* which has confirmed the order of Hon'ble Delhi High Court has held that once the identity of the shareholder have been established, even if there is a case of bogus share capital, it cannot be added in the hands of company unless any adverse evidence is not on record. The documentary evidence filed by the assessee shows that the assessee has provided confirmations from all the parties as well as various evidences to establish the

genuineness of the transaction. In *Nemi Chand Kothari v. CIT 264 ITR 254 (Guwahati) (HC)*, it was held that it is a certain law that the assessee is to prove the genuineness of transaction as well as the creditworthiness of the creditor must remain confined to the transactions which have taken place between the assessee and the creditor. It is not the business of assessee to find out the source of money of creditors. Similar observation has also been given in the case of Hastimal 49 ITR 273 (Madr) and Daulatram Rawatmal (1973) 87 ITR 349 (SC). Accordingly order of CIT(A) deleting the addition as cash credits was confirmed. (AY. 2006-07)

ITO v. Neelkanth Finbuild Ltd. (2015) 70 SOT 368 / 40 ITR 665 (Delhi)(Trib.)

S.68 : Cash credits – Sale of shares – Despite documentary evidence and broker's confirmation, genuineness of penny stock transactions has to be determined on the basis of 'preponderance of human probabilities'. If assessee is unable to explain 'intriguing' facts and circumstances, genuineness of transaction cannot be accepted – Addition was confirmed as cash credits. 1269

AO has made the addition as cash credits in respect of sale of shares treating the same as non-genuine. On appeal considering the various documents produced by the assessee deleted the addition. On appeal by revenue, allowing the appeal the Tribunal held that;

(i) The issue is whether the documents furnished by the assessee, including averments made by him, or even his broker, satisfy the test of preponderance of human probabilities. The ITAT observed that if the assessee has reasonably explained the 'intriguing' facts and circumstances as pointed by the AO, and on the strength of which the genuineness is assailed by him, and which further agree with observed in the case of a penny stock company, no case for treating the transaction as not genuine shall arise. The onus u/s.68 though is on the assessee, so that his explanation would, however, require being substantiated or proved.

(ii) Firstly, documentary evidences, in the face of unusual events, as prevailing in the instant case, and without any corroborative or circumstantial evidence/s, cannot be regarded as conclusive. Two, the preponderance of probabilities only denotes the simultaneous existence of several 'facts', each probable in itself, albeit low, so as to cast a serious doubt on the truth of the reported 'facts', which together make up for a bizarre statement, leading to the inference of collusiveness or a device set up to conceal the truth, i.e., in the absence of credible and independent evidences. For a scrip to trade at nearly 50 times its face value, only a few months after its issue, only implies, if not price manipulation, trail blazing performance and/or great business prospects (with of course proven management record, so as to be able to translate that into reality), while even as much as the company's business or industry or future programme (all of which would be in public domain), is conspicuous by its absence, i.e., even years after the transaction/s. The company is, by all counts, a paper company, and its share transactions, managed. Accordingly, reversing the findings of the First Appellate Authority, confirm the assessment of the impugned sum u/s. 68 of the Act. (AY. 2006-07)

ITO v. Shamim M. Bharwani (2015) 118 DTR 268/170 TTJ 238 (Mum.)(Trib.)

1270 **S.68 : Cash credits – Burden on assessee to prove genuineness and creditworthiness of transaction and identity of parties – Failure by assessee to prove genuineness of transaction to extent of ₹ 7 lakhs. Addition proper.**

The assessee received a sum of ₹ 10 lakhs as loan from a non-resident Indian, from a non-resident external account. The Assessing Officer treated it as the assessee's income but the Commissioner (Appeals) accepted the genuineness of the transaction to the extent of ₹ 5 lakhs and deleted the addition and in the absence of evidence on record, confirmed the addition to the extent of ₹ 7 lakhs. On appeal :

Held, dismissing the appeal, that it was the duty of the assessee to prove the genuineness and creditworthiness of the transaction and the identity of the parties. The assessee had failed to prove the genuineness of the transaction to the extent of ₹ 7 lakhs. The Commissioner (Appeals) had rightly confirmed the addition.

The assessee claimed ₹ 5 lakhs as opening cash balance in the cash flow statement. Since the assessee could not substantiate the opening cash balance during the assessment proceedings, the AO disallowed the entire opening cash balance of the assessee and made an addition of ₹ 3,51,450. The Commissioner (Appeals) restricted the disallowance to ₹ 3,33,631. On appeal :

Held, dismissing the appeal, that though the assessee was engaged in purchase and sale of stamps, he did not maintain any proper books of account. Hence the claim of opening cash balance to the extent of ₹ 5 lakhs was not justified. There was no infirmity in the order of the authorities. (AY. 2003-04 to 2009-10)

K. Govinda Pillai .v. Dy. CIT (2015) 37 ITR 772 (Cochin)(Trib.)

1271 **S.68 : Cash credits – Bank withdrawals – No full details were furnished – Addition was held to be justified.**

AO noticed certain discrepancies in bank accounts. As the explanation was not satisfactory he made addition as cash credits. On appeal before the Tribunal the assessee took stand that its share broker had arranged fund from Andhra Bank, however, no such conclusive confirmation had been brought before Tribunal either from Andhra Bank or from broker. Tribunal held that explanations of assessee were full of discrepancies and contradictions and unsubstantiated hence addition made by revenue was justified. (AY. 1987-88 to 1990-91)

Dhanraj Mills (P.) Ltd. v. ACIT (2015) 152 ITD 253 (Mum.)(Trib.)

1272 **S.68 : Cash credits – Advance on account of sale of land – Identity and genuineness of transaction had been established – Addition was deleted.**

The assessee received advance for sale of agricultural land. AO treated the said advance as cash credits. CIT(A) deleted the addition. On appeal by revenue Tribunal held that the assessee has produced documentary evidence like sale agreement mode of advance bank certificate certifying mode of payment by cheque and also declaration of creditors, thus, identity, and genuineness of transaction had been established addition on account of unexplained advances was rightly deleted by CIT(A). Order of CIT(A) was affirmed. (AY. 2008-09)

Dr. Sunil Kumar Sharma v. ITO (2014) 52 taxmann.com 437 / (2015) 67 SOT 158 (Delhi) (Trib.)

Section 69 : Unexplained investments.

S.69 : Unexplained investments – Income from undisclosed sources – Unaccounted sales – Sales accounted by sister concern – Double addition – Matter remanded. [S. 131] 1273

In the statement recorded u/s. 131 partners of the firm admitted excess stock. The Assessing Officer made the addition which was confirmed by CIT(A) and Tribunal. Appeal of assessee was dismissed by High Court. Before the Supreme Court the plea was raised of double addition. It was contended that the unaccounted sales was shown as income by its sister concern. Allowing the petition the Court held that if the unaccounted sales of the assessee have been shown as income by its sister concern on which tax has been paid by it, the assessing authority to give an opportunity to the assessee to demonstrate as to whether the sister concern has already paid the tax on the income from the aforesaid sales and to accord benefit the assessee if that is shown. Matter was remanded.(AY. 1992-93, 1993-94)

Ashish Plastic Industries v. ACIT (2015) 373 ITR 45 / 278 CTR 107 / 120 DTR 235 / 231 Taxman 238 (SC) 1274

S.69 : Unexplained investments – Purchase of sugar – Books of account was duly audited – Deletion of addition was held to be justified.

Dismissing the appeal of revenue the Court held that Tribunal finding sugar purchased duly recorded in books of account duly audited and there was no evidence to show that purchases made outside regular books of account hence addition on ground of unexplained investment was held to be not warranted.(AY 2010-11)

CIT v. Bharat Bhushan (2015) 377 ITR 189 (P& H)(HC)

S.69 : Unexplained investments – Survey of hospital disclosing payments in cash to doctors – Statement on oath by employees of hospital confirming payments – High Court holding in assessment of hospital that its accounts were unreliable – Additions of amounts in hands of doctors was held to be justified. [S. 133A] 1275

High Court set aside the matter to Tribunal and directed to reconsider the appeals after verifying the records, particularly the seized accounts and the statements recorded from the employees and the managing director and after going through the assessment and records of the hospital. The assessee and the Department were also directed to be given an opportunity to be heard. The matter was accordingly considered by the Tribunal afresh and the Tribunal disposed of the appeals upholding the assessment. On appeals to the High Court the Court held that the addition was held to be justified. The Court also held that the observations made in disposing of case cannot be considered to be "obiter dicta". (AY 2000-01)

Nassar Yusuf (Dr.) v. CIT (2015) 377 ITR 595 / 63 taxmann.com 298 (Ker.)(HC)

S.69 : Unexplained investments – Construction of property – Addition based solely on report of District Valuation Officer – Not valid. 1276

Dismissing the appeal of revenue the Court held that addition to cost of construction solely on the basis of Valuation Officer was held to be not valid. (AY. 2002-03, 2003-04, 2004-05)

PCIT v. J. Upendra Construction P. Ltd. (2015) 377 ITR 383 / 232 Taxman 697 (Guj.)(HC)

1277 **S.69 : Unexplained investments – Excess generation of scrap – Books of account not rejected – Addition was held to be not justified. [S.143(3)]**
When the books of account of assessee was not rejected additions on ground of excess generation of scrap was held to be not justified. (AY. 1999-2000)
CIT v. Gujarat Foils Ltd. (2015) 377 ITR 324 (Guj.)(HC)

1278 **S.69 : Unexplained investments – Purchases – Paid by account payee cheques – Deletion of addition was held to be justified.**
Assessing Officer made addition on account of undisclosed cash purchases and bogus sundry creditors. However, details of ledger account and copies of bill clearly indicated that purchases were made from these parties and payments were made through bank. All payments were made by account payee cheque which were duly debited in assessee's bank account and credited in bank account of suppliers. Tribunal deleted the addition. On appeal by revenue; dismissing the appeal the Court held that, since assessee had made purchases in actual which had been paid by account payee cheques, no disallowance could be made.
CIT v. Manish Enterprises (2015) 232 Taxman 115 / 276 CTR 89 (Cal.)(HC)

1279 **S.69 : Unexplained investments – Shortage of cash – Cannot be set off against unexplained investment on mere presumption. [S. 158BC]**
Assessee, a partnership firm, was engaged in business of money lending business. During its search proceeding, shortage of cash was found. Assessing Officer treated it as undisclosed income on account of unexplained investment. However, Tribunal allowed set off of this shortage of cash on presumption that this shortage was an investment in unaccounted money lending business On appeal by revenue allowing the appeal the Court held that where undisclosed income remained unexplained by assessee, there was no reason to give set off on a presumption that said amount was invested in unaccounted money lending business.
CIT v. Meriya Bankers, Chits & Investments (2015) 232 Taxman 117 (Ker.)(HC)

1280 **S.69 : Unexplained investments – Cash received on sale of property shown as income – Buyer of property denied having paid any cash – Deletion of addition was held to be justified. [S.153A]**
During search at assessee's premises it was found that assessee had purchased a property (Anand Niketan property). Assessee explained that his company RFPL had received cash amount of ₹ 1 crore on account of sale of other property (Golf Link property) and said amount was used by assessee for purchasing Anand Niketan property. Buyer of Golf Link property, however, denied to have paid any cash to RFPL. On that basis Assessing Officer held that cash involved in purchase of Anand Niketan property remained unexplained and made addition accordingly. Appellate authorities deleted addition on ground that RFPL had shown cash receipt of ₹ 100 lakhs on account of sale of a property and had declared long-term capital gain on basis of sale proceeds of ₹ 255 lakhs which had been accepted by Assessing Officer of that company and, hence, it had to be accepted that this much cash was received by that company. On appeal by

revenue the Court held that; on given fact – intensive nature of matter, findings recorded by appellate authorities were to be upheld.
CIT v. Tilak Raj Anand (2015) 373 ITR 1 / 232 Taxman 653 (Delhi)(HC)

S.69 : Unexplained investments – Under invoicing of goods – Statement in the course of search – Addition was held to be justified.[S.132(4)] 1281
A search was carried out at business premises of assessee-HUF in course of which it was found that cash deposits were made in bank accounts of HUF on day-to-day basis and subsequently, withdrawals were made for advancing loans to family members. Members of assessee-HUF made statements that said amount had been received on account of under-invoicing of sales and inflation of expenses. Assessing Officer, however, added amount in question to assessee's income by invoking provisions of section 69. Tribunal upheld said addition. On appeal dismissing the appeal of assessee the Court held that in absence of any evidence on record showing co-relation between under-invoicing of goods and amount credited to bank accounts of assessee-HUF, impugned addition made by authorities below was to be confirmed.
Bhagwandas D. Vachhani v. ACIT (2015) 231 Taxman 390 (Guj.)(HC)

S.69 : Unexplained investments – Cost of construction – Addition on the basis of DVO was held to be not justified. 1282
Assessing Officer made addition on difference between cost of construction of hotel building determined by DVO and as declared by assessee in his books of account. On appeal Tribunal found that assessee furnished valuation report from an approved valuer, whereas, DVO valued construction at CPWD rates which were 30 per cent higher than market rate. Further, it was found that only 7.5 per cent of total valuation was allowed by DVO for personal supervision as against 15 per cent permissible under law and benefit of valuation of raw structure existing at site had not been allowed by DVO. On appeal by revenue dismissing the appeal the Court held that findings recorded by Tribunal were not found to be illegal or perverse hence deletion of addition was held to be justified.(AY. 2008-09)
CIT v. Rajesh Mahajan (2015) 231 Taxman 250 (P&H)(HC)

S.69 : Unexplained investments – Purchase of property – No evidence to demonstrate that the assessee has paid more than the amount disclosed in the agreement – Addition on the basis of valuation report of AVO was held to be not justified. [S.132, 158BB] 1283
Assessee purchased a property for a consideration of ₹ 3.70 lakh. During course of block assessment proceedings, Assessing Officer rejected transaction value and referred matter to AVO who in his report valued property at ₹ 10.65 lakh. Accordingly, addition of ₹ 6.95 lakh was made to assessee's income. Tribunal, set aside said addition. On appeal by revenue; dismissing the appeal the Court held that in absence of any incriminating evidence with respect to payment over and above reported amount, it could not be concluded that transaction relating to property in question was undervalued, and, therefore, impugned order deleting addition was to be confirmed. (AY. 2001-02 to 2007-08)
CIT v. Vivek Aggarwal (2015) 231 Taxman 392 (Delhi)(HC)

1284 **S.69 : Unexplained investments – Income from undisclosed sources – Assessee purchasing shares and paying amount by cheque to share broker and amount credited to share broker – Bank account showing payment made to share broker after expiry of accounting year – Payment made by assessee fully supported by bank statement – Addition not sustainable.**

Copies of the contract note, the ledger account of share broker, the letter from the Mumbai Stock Exchange and the bank statement had been furnished before the authorities. The assessee purchased 19,000 shares of KD for ₹ 42,32,215 and 3,100 shares of KD for ₹ 6,76,575. These amounts had been credited to the account of the share broker and debited to the share account in the books of the assessee on September 27, 1994, and September 30, 1994. These amounts had been paid by the assessee to the share broker on April 8, 1995. On verification of the bank account it was revealed that an amount of ₹ 49,08,825 had been debited to the assessee's account being withdrawn on April 8, 1995. It was, therefore, clear that the payment had been made to the share broker after the expiry of the accounting year, relevant to the assessment year 1994-95, that is, it had been paid in the month of April, 1995. There was no material on record to show that the amount had actually been paid by the assessee to the share broker at the end of the current year. The subsequent payment made in April, 1995, had not been found to be bogus or non-genuine. It was, therefore, clear that there was an outstanding liability of ₹ 49,08,825 on account of the amount payable against the purchase of shares. The Commissioner (Appeals) as well as the Assessing Officer had made the additions only on suspicion and surmises disbelieving the assessee's contention and presuming that no share broker would keep the amount outstanding for such a long time. The transaction of payment made by the assessee was fully supported by the bank statement. Thus, there was no reason to sustain the addition.(AY. 1994-95)

CIT v. Chandela Trading Co. P. Ltd. (2015) 372 ITR 232 (Cal.)(HC)

1285 **S.69 : Unexplained investments – Income from undisclosed sources – Search and seizure – No specific evidence had been brought on record by Assessing Officer to the effect that impugned investment related to assessee – Addition was deleted. [S.132, 260A]**

Dismissing the appeal, the Court held that, the Tribunal based on the oral and documentary evidence had come to the conclusion that the addition of the amount to the income of the assessee was illegal and upheld the order of the Commissioner (Appeals) with elaborate discussion with reference to the evidence. Upon considering the order of the Tribunal it was clear that there was no perversity in appreciating the materials on record and in coming to the conclusion. The amount was not includible in the total income of the assessee.

CIT v. Chandmal Sarawgi & Co. (2015) 373 ITR 309 / 234 Taxamn 299 (Gauhati)(HC)

1286 **S.69 : Unexplained investments – Survey – Statement of vendor – Addition was held to be justified.[S.133A]**

Assessee purchased a plot *vide* registered sale deed for consideration of ₹ 3.70 lakhs. During survey conducted under section 133A vendors declared sale consideration of said plot at ₹ 38 lakhs. On basis of sale consideration declared by vendors, location of plot and its possibility of usage as hotel, as well as auction rate disclosed by PUDA

for similar plots, Assessing Officer opined that there was unexplained investment of ₹ 34.30 lakhs on part of assessee and made addition accordingly. On appeal dismissing the appeal of assessee the Court held that since statements of vendors, regarding higher sales consideration remained unrebutted and, moreover, assessee could not controvert findings recorded by Assessing Officer, impugned addition was to be confirmed.
Joginder Lal v. CIT (2015) 230 Taxman 552 (P&H)(HC)

S.69 : Unexplained investments Jewellery – Explained source of jewellery in her possession being gifts received on occasion of her marriage from her father and father-in-law and Assessing Officer did not dispute same, invocation of section 69 was not justified. [S.158BB, 158BC] 1287

A search was conducted upon the assessee. Consequent to the search, the assessee was called upon to explain the jewellery found in her possession. The assessee had explained source of jewellery in her possession being gifts received on occasion of her marriage from her father and father-in-law. The Assessing Officer did not accept the explanation and made an addition by invoking section 69. On appeal, the Tribunal upheld the order of the Assessing Officer. On appeal:
The explanation offered by the assessee to her possession of jewellery of ₹ 6.57 lakhs was that the same was gifted to her on occasion of her marriage by her father and father-in-law. This explanation was not contested by the father and father-in-law. The authorities accepted the source of the jewellery in her possession. However, the Tribunal was not satisfied with the evidence produced by her father and father-in-law. This cannot be lead to be conclusion that the explanation offered by the assessee in respect of the jewellery in her possession is not satisfactory. In the normal course of human conduct, on occasions such as marriage the parents and parents-in-law of a bride do normally gift jewellery to the bride. On occasion such as this, it is not possible to expect the bride to ask for evidence of bills/invoices to support the purchase of the jewellery. One has to proceed on the basis that it is genuine. Thus her explanation that she received the jewellery as gifts from her father and father-in-law is sufficient explanation of the jewellery in her possession and the gifts are not denied by her father and father-in-law. Therefore, invocation of section 69 is completely unwarranted.
Komal Wazir (Mrs.) v. Dy. CIT (2015) 230 Taxman 563 / 282 CTR 506 (Bom.)(HC)

S.69 : Unexplained investments – Assignment of right – No documentary evidence was filed – Addition was held to be justified. 1288

Assessee an exporter was issued import licence under which it could import goods valued at ₹ 5 lakhs or it could assign same to others. Assessee claimed that aforesaid licence was assigned to UET, a partnership firm on receipt of a premium. However, since assessee failed to file necessary documentation before Chief Controller, Assessing Officer opined that assessee had sold imported goods in open market and earned unaccounted income and, hence, assessment was reopened. Where UET had not imported goods in question under any invoices and had in categorical terms, denied any import whatsoever, order of Tribunal sustaining additions in hands of assessee was justified. (AY. 1982-83)
Dalmia Cement (Bharat) Ltd. v. CIT (2015) 229 Taxman 170 (Delhi)(HC)

1289 **S.69 : Unexplained investments – Reference to DVO – Assumption of order of Tribunal on assumption of DVO's report u/s. 55A – Reference was made u/s. 131 – Matter was set aside. [S.55A, 131]**

Assessees had jointly purchased a property. AO made a reference under section 131 to DVO and on basis of his report, made addition under section 69. Tribunal held that report of Valuation Cell was binding on AO only CIT(A) had power to give relief. Assessee filed Rectification Application on ground that reference to DVO was made under section 131 and not under section 55A and, therefore, it was not binding on AO. Court held that since entire premise and foundation of Tribunal's order was on assumption that DVO's report was under section 55A and once said premise and reasoning was erased, appeal before Tribunal required complete reconsideration and fresh hearing. Matter remanded. (AY. 1994-95)

Deepika Jain v. ITAT (2015) 229 Taxman 53 (Delhi)(HC)

1290 **S.69 : Unexplained investments – Jewellery – Search and seizure – Board circular – Since assessees had not offered any such explanation, Board Circular was not applicable and excess jewellery was rightly included as unexplained investment. [S.132, 153A]**

AO made addition by treating excess jewellery found during search as unexplained investment. Assessees relied upon Board Instruction No. 1916 [F.No. 286/63/93-IT (INV. II)], dated 11-5-1994 for deletion of addition. Tribunal confirmed the addition. On appeal by assessee the Court held that, clause (iii) of Board Instruction, dated 11-5-1994 which enables AO to exclude a larger quantity of jewellery and ornaments from seizure, will be applicable only if there are circumstances to come to conclusion that status of family and custom and practices of the community require holding of such jewellery. On the facts since assessees had not offered any such explanation, Board Circular was not applicable and excess jewellery was rightly included as unexplained investment. (AY. 2009-10)

V.G.P. Ravidas v. ACIT (2015) 370 ITR 364 / 228 Taxman 93 (Mag.) / 278 CTR 93 (Mad.)(HC)
V.G. Selvaraj v. ACIT (2015) 370 ITR 364 / 228 Taxman 93 (Mag.) / 278 CTR 93 (Mad.)(HC)

1291 **S.69 : Unexplained investments – Bogus purchases – Books of account not rejected – Disallowance was restricted to 15 per cent of purchases. [S.145]**

Assessee Company was running a hospital, AO treated purchases of cotton made by assessee as unverifiable and disallowed same. CIT(A) upheld order of AO The ITAT held that, as compared to the A.Y. 2009-10 the assessee's gross receipts, gross profit and net profit percentage have gone up and at the same time percentage consumption of cotton has gone down. The same data has not been disputed in any manner by the Revenue, the assessee claims that no cotton was purchased in 2009-10. In this circumstance an alternate plea is advanced that a suitable estimate of disallowance be adopted instead of total disallowance. The addition *qua* unverifiable purchases of semi-precious stones has been held to be at 15 per cent. of such unverifiable purchases. The books of account being not rejected and consumption of cotton having comparatively decreased, therefore the ITAT directed to restrict the disallowance to 15 per cent of purchases.(AY.2011-12]

Sharma East India Hospitals and Medical Research Ltd. v. Dy. CIT (2015) 41 ITR 604 (Jaipur)(Trib.)

S.69 : Unexplained investments – Gifts – Shown as income of assessee's son – Addition was held to be not justified. [S.153A] 1292

AO noted from return filed by son of Assessee that he received gift of ₹ 22,50,000/- inadvertently taken as ₹ 27 lakhs. In absence of proof of genuineness of gift, AO substantively added sum of ₹ 27 lakhs in income of Assessee while protectively added same in hands of Assessee's son. The Tribunal held that the total gifts shown by Assessee's son in his return originally filed on 20.10.2003 were only ₹ 22,50,000. By mistake AO had taken ₹ 5 lacs instead of ₹ 50,000/- and took figure of ₹ 27 lacs while correct figure of such gift received by Assessee's son was only ₹ 22,50,000. Assessee's son shown those gifts in his original return filed much prior to search and for which assessment was not pending at time of search and therefore could have not abated. Those gifts were also again shown by son of assessee in his returns filed in response to notice issued u/s. 153A. No evidence or material was found or brought on record which proved that gifts had been received by assessee. Gifts had been received through cheque and Assessee's son submitted relevant evidence. There was no evidence on record to prove that funds had flown for those gifts from assessee. Order of CIT (A) confirmed that those gifts could not be added in hands of assessee. (AY. 2003-04 to 2008-09)

Yogiraj Sharma (DR.) v. ACIT (2015) 169 TTJ 547 (Indore)(Trib.)

S.69 : Unexplained investments – Once gross profit rate applied, no further addition called for in respect of purchase and introduction of cash. 1293

The assessee was found to have deposited cash in his bank account above the threshold limit, the Assessing Officer issued notice to the bank calling for a statement of the assessee's account. The Assessing Officer estimated the gross profit rate at 8 per cent. of the total receipts. The Assessing Officer also treated the initial investment of ₹ 5,00,000 as capital investment and added it to the total income of the assessee as unexplained investment in the business of steel rods. The Commissioner (Appeals) confirmed the order of the Assessing Officer. On appeal: it was held, allowing the appeal, (i) that the assessee himself accepted that the bank account was not disclosed to the Revenue and the credits in the bank account were turnover from sale of steel rods. In terms of that account, voluminous transactions had taken place. But the gross profit rate of 8 per cent was on the higher side and it would be appropriate if it was restricted to 7 per cent as against 8 per cent. (ii) That the addition of ₹ 5,00,000 made on account of initial investment was unwarranted and uncalled for, once the gross profit rate was applied. (AY. 2009-10)

Amit Agarwal v. ITO (2015) 38 ITR 77 (Raipur)(Trib.)

S.69 : Unexplained investments – Bishop of church – Overriding title – Deposits in bank account in name of assessee belong to church – Account held in fiduciary capacity – Sums in account not taxable in his hands. [Indian Contract Act] 1294

Held, dismissing the appeal, that the moment the assessee had executed the oath of affirmation, all movable and immovable properties, assets, bank deposits held by the assessee would belong to the church and not to him. When the assessee willingly executed an oath of affirmation in favour of the church it was binding on him as a contract under the Indian Contract Act and the assessee could not go beyond his oath of affirmation. Under the Indian Contract Act, this oath of affirmation can be enforced

against the assessee by the Church. Therefore all landed properties, bank accounts, assets possessed by the assessee in his individual capacity would be the property of the church and the money received by him as bishop would go to the church by way of overriding title. If the money credited in the bank account of the assessee is not accounted in the books of account of the church or diocese addition could be made only in the hands of the church or diocese and not in the hands of the individual, who is the metropolitan/bishop of the church. Hence no part of the income would arise or accrue to the assessee. The Commissioner (Appeals) had rightly deleted the addition. (AY. 2004-05 to 2007-08)
ITO v. Most Rev. Dr. Joseph Marthoma (2015) 69 SOT 588 / 39 ITR 349 (Cochin)(Trib.)

1295 **S.69 : Unexplained investments – Cash deposit – Sale proceeds – Matter remanded.**
Tribunal held that two documents, i.e. bank accounts of the assessee's proprietary concern and sale vouchers, were sufficient to show that the amount received was part of sale proceeds. The documents were not produced before the AO, CIT(A) or the Tribunal. Tribunal directed the assessee to produce documents and the Assessing Officer to examine documents and decide afresh. Matter remanded. (AY. 2009-10)
ITO v. Bir Parkash Malhotra (2015) 39 ITR 536 / 70 SOT 382 (Chd.)(Trib.)

1296 **S.69 : Unexplained investments – Charitable Trust – Commission – No material to support – Addition was deleted.**
Tribunal held that there is no material to support finding that commission paid to commission agent for arranging donations. No need for assessee to make payment by way of commission being charitable society. Addition made on basis of payment of commission to be deleted. (AY. 2003-04, 2004-05, 2009-10)
Dy. CIT v. Indo Global Education Foundation (2015) 39 ITR 489 / 169 TTJ 437 (Chd.)(Trib.)
Sukhdev Sigh v. Dy. CIT (2015) 39 ITR 489 / 169 TTJ 437 (Chd.)(Trib.)

1297 **S.69 : Unexplained investments – Cash deposits in bank – Source explained – Addition was held to be not justified.**
Assessee recording remuneration received in cash in books of account and depositing it in bank. Amount cannot be considered as unaccounted money. (ITA No. 1388 to 1391/Mads/2008, dated 26.09.2014) (AY. 2003-04 to 2006-07)
Dy. CIT v. Yuvanshankar Raja (2015) 37 ITR 355 (Chennai)(Trib.)

1298 **S.69 : Unexplained investments – Difference between purchases as debited in trading account and in terms of certificates of tax collected at source – Failure by assessee to reconcile difference – Difference properly treated as unexplained investment.**
The assessee, a trader in Indian Made Foreign Liquor, debited an amount of Rs. 78,32,073 for purchase in its trading account. The certificates of tax collected at source showed that the assessee had made purchase for ₹ 92,63,349. Since the assessee did not reconcile or explain the difference, the Assessing Officer treated the amount of difference as unexplained investment under section 69 of the Income-tax Act, 1961. The Commissioner (Appeals) confirmed the order of the Assessing Officer. On appeal : Held, dismissing the appeal, that admittedly, the assessee could not reconcile the

difference between the purchases as debited in the trading account and that in terms of the certificates of tax collected at source before the Tribunal and the assessee himself admitted that he did not maintain any books of account. There was a clear cut difference between purchases and unaccounted purchases, which was not explained or accounted for. The Commissioner (Appeals) had rightly confirmed the addition as undisclosed purchases under section 69 of the Act. (AY. 2005-06, 2006-07)
Debasish Banerjee v. ITO (2015) 154 ITD 849 / 38 ITR 469 (Kol.)(Trib.)

S.69 : Unexplained investments – Bogus purchases – Assessee furnishing proof to substantiate purchases – Addition to be deleted. [S.143(3)] 1299
The assessee purchased certain materials from V. It produced all documents in the name of proprietor of V. The Assessing Officer rejected all documents and treated the purchases as bogus and added the sum in question to the income of the assessee. The Commissioner (Appeals) held that the assessee had produced all documentary evidence in support of the purchases from V and deleted the disallowance of bogus purchases. On appeal by the Department :
Held, dismissing the appeal, that the assessee furnished proof to substantiate the purchases made from V. Further the assessee contended that the entire purchases were made by bills and sales tax was paid. Even the payments to the party were made by account payee cheques as was evident from the copy of accounts of V in the books of account of the assessee. Therefore, the CIT(A) was right in deleting the addition. (AY. 2006-07 to 2010-11)
Dy. CIT v. Selvel Advertising P. Ltd. (2015) 37 ITR 611 (Kolkata)(Trib.)

Section 69A : Unexplained money, etc.

S.69A : Unexplained money – Jewellery – Assessee would be treated in possession of jewellery, from date of opening of locker, i.e., when jewellery was found and seized by revenue, and would be added to his income accordingly – Addition for the relevant year was held to be justified.[S.132] 1300
The assessee is an Individual. The Assessee's premise was subjected to search. The official found jewellery in its locker. Since, it is only on opening of the locker on 28-7-1986, did the Revenue find the jewellery and hence, the AO made an addition u/s. 69A of the Act for the previous year relevant to the assessment year 1987-88, i.e., financial years 1-4-1986 to 31-3-1987. The CIT(A) and Tribunal upheld the order of the AO.On an appeal before the High Court, the Assessee argued that that the jewellery found in the locker was sourced from the amounts received by the assessee in cash from company in which he was Director and the same was a subject matter of consideration by the revenue for the assessment year 1986-87. Thus charging of tax in the assessment year 1987-88 would lead to double taxation. After hearing both parties, the High Court held that when jewellery was found and seized by revenue, and would be added to his income in the year under consideration only. (AY. 1987-88)
Ajay R. Dhoot v. Dy. CIT (2015) 376 ITR 347 / 234 Taxman 351 / 124 DTR 21 (Bom.)(HC)

1301 **S.69A : Unexplained money – Addition on the basis of e-mail and seized documents was held to be not justified. [S.132, 158BB, Information Technology Act, 2000. [S. 2(22AA), 2(t)]**

A search was carried out at assessee's premises in course of which Assessing Officer seized certain letters/e-mail. On basis of said documents, Assessing Officer made addition to assessee's income on account of undisclosed salary. Commissioner (Appeals) as well as Tribunal deleted addition holding that in absence of any corroborative material to link such e-mail letter or its contents with assessee, inference that some additional income was earned by him by way of salary, was incorrectly drawn. Dismissing the appeal of revenue the Court held that; since document seized was both undated and unsigned and even taken at face value did not lead to further enquiry on behalf of Assessing Officer, impugned order of Tribunal deleting addition was to be confirmed. (AY. 2001-02 to 2007-08)

CIT v. Vivek Aggarwal (2015) 231 Taxman 392 (Delhi)(HC)

1302 **S.69A : Unexplained money – Survey – Retraction – After thought – Addition confirmed by the Tribunal was up held. [S. 132 (4), 133A]**

The assessee was engaged in real estate and construction activities. During the course of survey, the statement of one of its directors was recorded, wherein he disclosed that a sum of ₹ 15 crores was an additional income outside the regular books of account and furnished details in this regard. Assessee did not disclose this income in his returns but declared it at time of survey. However, before Assessing Officer, assessee alleged that surrendered amounts were not voluntary and *bona fide* and in absence of any evidence or material in relation to surrender, surrender made during survey was also retracted. However the AO made addition on the basis of survey statement. On appeal, the Commissioner (Appeals) gave partial relief by taking into account the debit entries from the gross receipts, thus, reducing the total taxable income. On cross appeals the assessees appeal was rejected. On appeal dismissing the appeal the Court held that; In the circumstances of the case, the approach of the Commissioner as affirmed by the Tribunal cannot be faulted. The discretion vested in the Revenue authorities in content and character is not radically different in the case of a survey or in the case of search and seizure operations as is evident from a plain reading of sections 133A(3) and 132(4). Whereas the latter uses the expression 'may examine on oath', the former says that the authority 'may record statement which may be useful for, or relevant to' in proceedings under the Act. This provision, section 133A(3) had undergone further amendment inasmuch as the revenue is precluded from taking any action under section 133A(3)(ia) or section 133A(3)(ii), i.e., from impounding and taking into custody any books of account, etc. or making an inventory of any cash, stock or other valuable item verified by him while acting under section 133(2A) by the Finance Act 2 of 2014. The obvious inference, therefore, is that in respect of statement which fall in section 133A(3)(iii), the discretion to use it as a relevant material continues.

All that section 133A(3)(iii) enables to the authority concerned to do is to draw an adverse inference by relying upon materials which are seized, or dealt with in the course of the survey.

In the instant case, the admitted facts are that during the survey, a Director of the assessee - who was duly authorized to make a statement about the materials and the

undisclosed income, did so on 20-11-2007. The Company did not retract it immediately or any time before the show-cause was issued to it. For the first time, in reply to the show-cause notice it faintly urged that the statement was not voluntary and sought to retract it. The reply, a copy of which has been placed on record, undoubtedly makes reference to some previous letter retracting the statement. The assessee urged that letter was written on 21-12-2007. However, the actual reply to the show-cause notice is silent as to the date. This itself casts doubt as to whether the retraction was in fact made or was claimed as an afterthought.

Furthermore, this Court is of the opinion that in the circumstances of the case both the Commissioner (Appeals) and Tribunal were correct in adding back the amount of ₹ 63.33 lakhs after adjusting the expenditure indicated. The explanation given by the assessee, in the course of the appellate proceedings, that the surrender was in respect of a certain portion of the receipt which had remained undisclosed or that some parts of it were supported by the books, is nowhere borne out as a matter of fact, in any of the contentions raised by it before the lower authorities. For these reasons, this Court is of the opinion that no substantial question of law arises.

Raj Hans Towers (P.) Ltd. v. CIT (2015) 373 ITR 9 / 230 Taxman 567 (Delhi)(HC)

S.69A : Unexplained money – Block assessment – Income-tax Officer cannot carry out functions of an authority under Central Excise Act and determine quantity by of production or to utter a final word on intricacies of manufacturing process, that too, without referring to any reliable material – Deletion of addition by the Tribunal was upheld.[S. 145, 158BC, 158BD, Central Excise Act, 1944] 1303

Assessee was a manufacturer of Manganese alloys. Several registers were maintained and typical procedure was followed for manufacture of alloys. Said finished product was subjected to levy of excise duty. Assessing Officer doubted accuracy of figures mentioned in registers, and made addition. In appeal Tribunal deleted the addition. On appeal by Revenue; dismissing the appeal the Court held that an Income Tax Officer cannot carry out the functions of an authority under the Central Excise Act and arrogate to himself the power to determine the quantity of production, or to utter a final word on the intricacies of the manufacturing process, that too, without referring to any reliable material. The Assessing Officer, in the instant case, was totally unsuited for undertaking the activity of determining the exact production of the material, which itself involves very complicated procedures. (BP. 1988-89 to 1997-98)

CIT v. Girija Smelters (P.) Ltd. (2015) 378 ITR 487 / 230 Taxman 28 / 128 DTR 80 (AP) (HC)

S.69A : Unexplained money – Search and seizure – Cash found – Reasonable Deletition of addition was held to be justified. 1304

Where Assessing Officer could not point out any defect or discrepancies in books of account and cash found during search with each member of family of assessee was reasonable, addition under section 69A on account of unexplained cash was not justified. (AY. 1999-2000 to 2005-06)

CIT v. Bimla Rani (Smt.) (2015) 230 Taxman 629 (P&H)(HC)

1305 **S.69A : Unexplained money – Revision proceedings were dropped – Amount could not be taxed again.[S.263]**

Where assessee had already discharged his tax liability in earlier year in respect of surrendered/recovered income and proceedings initiated under section 263 had admittedly been dropped, assessee could not be taxed once again for same income in relevant assessment year. Appeal is dismissed. (AY. 1989-90)

Dy. CIT v. Om Parkash Aggarwal (HUF) (2015) 228 Taxman 375 (Mag.)(P&H)(HC)

1306 **S.69A : Unexplained money – Additions made on account of bogus Share Capital, unexplained agricultural income & tuition fee, Undisclosed income of son & cash deposits in wife's account etc. – Assessee and relative individual, companies are independent assessee, hence additions deleted.**

The assessee was a State Government employee and a search was conducted at his residence and at his relatives. While concluding the assessment high pitch additions made on account of Bogus Share Capital, Unexplained agricultural income & tuition fee, undisclosed income of son & cash deposits in wife's account Unexplained cash and foreign exchange found etc. CIT(A) already deleted most of additions for which revenue is in appeal.

Bogus Share Capital added in assessee treating concerns belonging to assessee's wife and son to be the benami concerns of the assessee based on statement recorded of one Chartered Accountant and Directors of capital subscriber. Held as such concerns not controlled and managed by the assessee as also he has not derived the benefit from these concerns, the onus is on revenue to prove that these are assessee's benami concerns which it failed hence deletion of additions justified. Further in all other additions on account of income related to son & wife in his income treating benami the revenue could not prove nexus of such income flown from assessee hence deletion of additions by CIT(A) confirmed. Held the seized cash also not belonged to assessee as he resides his son's house as decided by MP High Court in service related case due to this search by Income Tax Department. On seized loose papers also date and name of assessee not mentioned as also utilization of alleged income is also not proved by Income Tax /department, hence addition of commission/kickback amount on assessee based on loose paper while search are not sustainable. Hence all additions made on assessee not sustainable. (AY. 2004-05 to 2008-09)

ACIT v. Yogiraj Sharma (Dr.) (2015) 169 TTJ 547 (Indore)(Trib.)

1307 **S.69A : Unexplained money – Once books of account of assessee have been prepared based mainly on bank entries and other details, same should be rejected only by cogent reasoning – Matter was remanded. [S. 132(4)]**

A search action was carried on at the premises of assessee. During the course of search action some documents were found which showed evasion of tax by assessee. On basis of seized papers, summary of books and other transactions was prepared by investigating team. The assessee admitted his undisclosed income in the statement recorded under section 132(4). Subsequently, the assessee retracted from his statement. Thereafter, books of account were prepared by assessee based on bank transactions, property deals, etc., and return was filed. AO made the addition on the basis of statement made by the

assessee by observing that the retraction of statement was without any cogent reason. On appeal the Appellate Tribunal held that the AO did not advance any cogent reason to reject reconciled Statement prepared by assessee. Hence, addition made by AO is unjustified. Matter remanded. (AY. 2004-05 to 2009-10)
Moreshwar Mahdev Bhondve v. ACIT (2014) 151 ITD 224 / (2015) 168 TTJ 249 (Pune) (Trib.)

S.69A : Unexplained moneys – Bank deposits – Assessee failed to produce evidence in respect of source of amount found in saving bank account, addition was held to be justified. 1308
AO found huge amount in saving bank account of assessees and accordingly, he made additions to their income. Assessees explained that they had collected money from friends and neighbours as advance for providing them different services of skilled workers for construction /renovation of building and that money was kept in saving bank account just to satisfy demand of their bankers. Even keeping amounts advanced by others was contended to be temporary adjustment, assessees had not withdrawn impugned amounts immediately after expiry of concerned financial year. The assessees failed to filed basic details even in respect of big amounts stated to have been received from others also not substantiate that the amounts were received from whom and for what work they had promised to carry out. Addition made by the AO was confirmed. (AY. 2009-10)
S. Muthukumar v. ITO (2015) 153 ITD 114 / 28 ITR 518 (Chennai)(Trib.)

Section 69B : Amount of investments, etc., not fully disclosed in books of account.

S.69B : Amounts of investments not fully disclosed in books of account – Acquisition of properties disclosed in the regular books of account – Addition cannot be made on the basis of valuation report of the department valuer. [S.158BA] 1309
Dismissing the appeal of Revenue, the Court held that; where due disclosure of acquisition of properties had been made in course of regular assessments by assessee and those valuations had been accepted by income-tax authorities as well as wealth tax authorities, Assessing Officer could not tax said amounts merely based upon DVO's report in absence of any material pointing to under-valuation in block assessment proceedings.
CIT v. Nishi Mehra (2015) 232 Taxman 111 (Delhi)(HC)

S.69B : Amounts of investments not fully disclosed in books of account – Cost of construction – No addition can be made with respect to difference between determined by DVO and as shown by assessee solely on basis of DVO's report. 1310
Dismissing the appeal of Revenue the Court held that; solely on basis of DVO's report which as per catena of decisions, can be said to be opinion of DVO only, no addition can be made with respect to difference between cost of construction determined by DVO and as shown by assessee. Once the addition made by the Assessing Officer is deleted, the necessary consequences would be to delete the penalty imposed under section 271(1)(c). (AY. 2002-03 to 2004-05)
PCIT v. J. Upendra Construction (P.) Ltd. (2015) 377 ITR 383 / 232 Taxman 697 (Guj.)(HC)

1311 **S.69B : Amounts of investments not fully disclosed in books of account – Survey – Unaccounted investment – Retraction of statement without giving reasons – Addition was held to be justified. [S. 133A, 142, 143]**

Dismissing the appeal of Revenue the Court held that where assessee made an admission regarding unaccounted investment during survey and almost after two years, retracted from same on basis that admission was based on coercion and force without giving any reason, same was not acceptable and addition as undisclosed investment was to be upheld.

Navdeep Dhingra v. CIT (2015) 232 Taxman 425 (P&H)(HC)

1312 **S.69B : Amounts of investments not fully disclosed in books of account – No cash element was involved in the sale of flat since the sale consideration as per the agreement was accepted by the appropriate authority.**

The AO alleged that stamp duty paid by the Assessee on sale of flat was received in cash since in normally stamp duty was paid by the buyer in other sale transactions. The same was taxed as concealed income. The CIT(A) confirmed the addition and further held that the agreement value was ₹ 2.11 crore whereas stamp duty value was ₹ 2.44 crore. The Court held that there was no corroboration to the stand of the AO that there was cash element involved in the sale of flat. The value of sale consideration as per the agreement was accepted by the appropriate authority which issued the certificate of clearance under section 269UL(3). (AY. 2003-04)

CIT v. Saffire Hotels (P) Ltd. (2015) 377 ITR 523 / 116 DTR 385 / 276 CTR 219 / 234 Taxman 482 (Bom.)(HC)

1313 **S.69B : Amounts of investments not fully disclosed in books of account – Investment – Cost of construction – Reference to Departmental Valuation Officer – Books of account furnished by assessee not rejected – Burden on Department to prove that there was understatement or concealment of income not discharged – Assessing Officer not empowered to refer matter to Departmental Valuation Officer.**

The assessee constructed a multi-storeyed residential-cum-commercial complex and admitted a total cost of construction as ₹ 41,49,070. The Assessing Officer referred the matter to the Valuation Cell and the Department's Valuer estimated the cost of construction of the complex at ₹ 58,09,000. The assessee's objections to the valuation report were considered by the Assessing Officer and, thereafter, the assessment order was passed treating the difference in valuation to the tune of ₹ 16,61,000. The Commissioner (Appeals) arrived at a cost of construction of ₹ 46,04,145, as against the estimate made by the Departmental Valuation Officer at ₹ 58,09,000. He directed the Assessing Officer to adopt ₹ 46,04,145 as the cost of construction and recompute the unexplained investment.

Held, allowing the appeal, that the books of account furnished by the assessee were never rejected. No explanation was called for from the assessee stating that there was concealment or understatement of amount in the books of account. The initial burden cast on the Department to prove that there was understatement or concealment of income had not been discharged and, therefore, the Assessing Officer was not empowered to refer the matter to the Departmental Valuation Officer or rely on such report. (AY. 1996-97)

Family of SP S.S. SP. Subramanian Chettiar v. ITO (2015) 372 ITR 203 / 232 Taxman 723 (Mad.)(HC)

S.69B : Amounts of investments not fully disclosed in books of account – Addition was held to be justified. 1314

Assessee-company was dealing in medical equipments. Assessing Officer made addition on account of unexplained bank deposit in current account. On appeal dismissing the appeal of assesse the Court held that since amount in question had not been offered in original return as well as revised return, addition made by Assessing Officer was justified. (AY. 1996-97)

Kody Elcot Ltd. v. Jt. CIT (2015) 230 Taxman 420 (Mad.)(HC)

S.69B : Amounts of investments not fully disclosed in books of account – Additions made is allowed as deduction against the sale of property – Proviso of 69C cannot be applied to additions made under section 69B. [S.37(1), 69C, 142A] 1315

Assessee-property developer filed valuation report of approved valuer in respect of construction cost of building at ₹ 1.13 crore while DVO valued same at ₹ 1.71 crore. AO made addition on the basis of valuation Officer. On appeal, the Commissioner (Appeals) accepted the said valuation and held, the said difference in the amount was to be allowed as deduction under section 37(1).

On Revenue's appeal, the Tribunal affirmed the findings of the Commissioner (Appeals) that any investment in a flat being stock-in-trade to the assessee was being held as capital account by the owner. On appeal dismissing the appeal of Revenue the Court held that Section 69C is not attracted to this case. The proviso to section 69C is confined to section 69C only. No such proviso is found in section 69B, therefore the proviso to section 69C cannot be read as proviso to section 69B. In terms of section 69B, the excess amount may be deemed to be the income of the assessee for such financial year. However, when the said excess amount is in the nature of the investment on building and the said building is sold to prospective purchaser, that investment is in the nature of expenditure. Therefore, that unexplained income has to be set off against the expenditure and the net tax could be 'nil'. (AY. 2002-03)

CIT v. Suraj Towers, Vaishnavi Infrastructure (P.) Ltd. (2015) 230 Taxman 306 (Karn.)(HC)

S.69B : Amount of investments not fully disclosed in books of account – Stock statement – Discrepancy – Addition was not justified. 1316

Assessee-firm was engaged in business of export of silk. AO found that stock statement given by assessee to Bank and actual stock lying with it was not tallying, accordingly he made addition. Assessee produced all details of opening stock, purchase and sales made by it, etc. and same were neither disputed nor any discrepancy was found therein and apart from that AO did not produce any material to show that assessee had made purchases out of undisclosed income. Tribunal deleted the addition. On appeal by revenue the Court held that addition was not justified. Appeal of revenue was dismissed. (AY. 2004-05)

CIT v. Nangalia Impex (2015) 229 Taxman 460 (Guj.)(HC)

S.69B : Amount of investments not fully disclosed in books of account – Addition was held to be justified. [S.158B] 1317

In the search proceedings it was found that assessee-company advanced ₹ 17 lakh to its sister concern but said amount was not shown in balance sheet. Investment account

of assessee's sister concern showed a different amount of ₹ 7.5 lakh. Advancing of ₹ 17 lakh came to light only from bank account of sister concern and material found during search and post search enquiry in block assessment, said advance was to be treated as unexplained investment.
Herald Publications (P.) Ltd. v. CIT (2015) 274 CTR 102 / 229 Taxman 103 (Bom.)(HC)

1318 **S.69B : Amount of investments not fully disclosed in books of account – Parties cancelling agreement by marking cross on it – No proper identification of land – No evidence to prove payment in respect of purchased property – Suspicion cannot take place of legal proof – Addition based on cancelled document to be deleted.**
Pursuant to a search and seizure operation a cancelled agreement pertaining to sale of a land was seized and the Assessing Officer held that the assessee purchased the land and made an addition under section 69B of the Income-tax Act, 1961. The Commissioner (Appeals) deleted the addition. On appeal:
Held, dismissing the appeal, that the copy of the agreement for sale seized during the course of search operation had been cancelled by the parties by marking a cross on it. The seized document did not have proper identification of the land proposed to be sold nor was there evidence to show that the document was acted upon by the concerned parties. The seller to the agreement for sale or the witnesses to it were not examined either by the search party or the Assessing Officer. The assessee admittedly was not a party to the agreement for sale and none of the persons related to the assessee was connected with the agreement. No evidence was found during the course of search to prove whether consideration was paid in respect of property purchased by the assessee. During the course of search also, no adverse material was found against the assessee to justify unaccounted investment made in property. The agreement was a cancelled document and did not relate to the assessee directly or indirectly. It was merely the suspicion of the Assessing Officer. Suspicion, whatsoever might be strong, could not take the place of legal proof. Therefore, the Commissioner (Appeals) was justified in deleting the addition. (AY. 2007-08)
Dy. CIT v. R. P. Import and Export P. Ltd. (2015) 38 ITR 436 (Chd.)(Trib.)

Section 69C : Unexplained expenditure, etc.

1319 **S.69C : Unexplained expenditure – Bogus purchases – Survey – Addition of 10% of purchases confirmed by the Tribunal was affirmed. [S.133]**
Assessee was trader in edible oils on semi-whole sale basis. Survey proceedings under section 133 carried out in assessee's proprietary concern. It was a found that assessee purchased edible oils of ₹ 2 crore from 5 different parties. Assessing Officer opined that assessee failed to discharge onus of proving genuineness of aforesaid purchase; he, thus, made addition of 25 per cent of total purchases taking it as 'unexplained purchase'. Commissioner (Appeals) reduced addition to 20 per cent on account of unexplained purchases. Tribunal further reduced said disallowance to 10 per cent of purchases relying on decision of coordinate Bench of Tribunal. On appeal by Revenue dismissing the appeal, the Court held that; even though order passed by Tribunal was non-speaking, yet same was based on Supreme Court decision. Moreover, G.P. rate shown by assessee

in relevant year was better than rate disclosed in subsequent years therefore impugned order of Tribunal did not require any interference. (AY. 1999-2000)
CIT v. Premkumar B. Rathi (2015) 377 ITR 447 / 232 Taxman 638 / 126 DTR 270 / 281 CTR 75 (Guj.)(HC)

S.69C : Unexplained expenditure – Bogus purchases – Estimating the net profit at 6% – Matter set aside as the issue of discrepancy was not dealt with by the Tribunal. 1320
Assessee, a contractor, filed his return declaring certain taxable income. In course of assessment, Assessing Officer found that certain purchases were bogus as there was variation in name of party on voucher and on corresponding bill etc. Assessing Officer thus made addition to assessee's income under section 69C. Tribunal, however, directed Assessing Officer to assess income at a net profit rate of 6 per cent. On appeal by revenue ;since Tribunal had not dealt with discrepancies pointed out by Assessing Officer or with failure of assessee to even prove existence of suppliers, impugned order passed by it was to be set aside and, matter was to be remanded back for disposal afresh. (AY. 2009-10)
CIT v. Narender Kumar Gupta (2015) 232 Taxman 109 (P&H)(HC)

S.69C : Unexplained expenditure – Bogus purchases – On facts addition was held to be justified. [S. 145] 1321
Assessee-firm was engaged in business of zips for shoes etc. During assessment proceedings, Assessing Officer noted that assessee had made purchases from 'G' Enterprises. Proprietor of 'G' Enterprises admitted that he was running a dummy business and firm had not been functioning for last one year. Assessing Officer relying upon said statement, made addition to assessee's income under section 69C in respect of bogus purchases. Tribunal deleted the addition. On appeal by revenue allowing the appeal the Court held that In the present case, jugglery of book entries has been played. The order of Assessing Officer appears reasonable, where he has rightly made the additions pertaining to the bogus purchases. The impugned order passed by the Tribunal is set aside and the order passed by the Assessing Officer is restored. (AY. 2008-09, 2009-10)
ACIT v. Shanti Swarup Jain (2015) 230 Taxman 533 (All.)(HC)

S.69C : Unexplained expenditure – Statement by additional private secretary – Addition was held to be not justified. 1322
During the course of the assessment proceedings, on basis of a statement made by the Additional Private Secretary before enquiry officer. The AO made addition. On appeal, the CIT (A) allowed the appeal holding that the statements being relied upon by the Revenue were not reliable. On Revenue's appeal, the Tribunal upheld the order of the Commissioner (Appeals).On appeal: So far as alleged payment is concerned, the same on facts has been negatived by the CIT(A) and the Tribunal. The finding is not shown to be perverse as it is found that the findings of the CIT(A) and the Tribunal are based on evidence and the decision of the Delhi High Court in JMM MPs Bribery. The filing of charge-sheet by itself does not establish the payment by the assessee to 'S' and particularly when the proceedings itself resulted in acquittal of 'S' by the Trial Court. The State then preferred a revision application against the order of acquittal and

the Delhi High Court in Criminal Revision Petition No. 33 of 2001 in *P.V. Narasimha Rao v. State [2002] Crl. L J. 2401* dismissed the State's application. Thus, there being concurrent findings of fact which are not shown to be perverse, no substantial question of law arises. (AY. 1994-95)
CIT v. Videocon International Ltd. (2015) 378 ITR 606 / 229 Taxman 412 / 121 DTR 286 (Bom)(HC)

1323 **S.69C : Unexplained expenditure – Revenue has not produced any documentary evidence – Deletion of addition was held to be justified.**
In course of assessment proceedings, Assessing Officer noticed that assessee had taken certain loan in cash for purchase of property. He thus made addition in respect of interest paid on said loan in cash under section 69C. Tribunal set aside said addition .It was noted that Revenue had not filed any document or material to show that in fact loan was taken and interest payment was made. Moreover, persons to whom interest was paid, their details and particulars were not ascertained verified and examined in aforesaid circumstances, Tribunal was justified in deleting impugned addition. (AY. 2004-05)
CIT v. Home Developers (P.) Ltd. (2015) 229 Taxman 254 (Delhi)(HC)

1324 **S.69C : Unexplained expenditure – Unaccounted Sales – The entire unaccounted sales cannot be assessed as undisclosed income particularly if the purchases have been accounted for – Only the net profit on such unaccounted sales can be taken as income. [S.133A]**
In a survey conducted under Section 133A, it was noticed that the assessee has not accounted some of the sales in the total turnover. In the statement recorded at the time of survey, the Director of the assessee declared a sum of ₹ 35 lakhs should be offered to tax. However, thereafter, the assessee explained the statement on the basis that the director was not aware of the intricacies and implications of the statement made by him. The AO rejected the assessee's explanation and assessed ₹ 35 lakhs. On appeal the CIT(A) held that the entire ₹ 35 lakhs cannot be assessed as income but only 4% thereof, being the profit earned on sales of ₹ 35 lakhs, could be added to the net profit. This was upheld by the Tribunal. Before the High Court, the Department relied on Section 69C and argued that the entire amount of undisclosed sales had to be brought to tax. HELD by the High Court dismissing the appeal:
We are unable to appreciate how Section 69C of the Act which speaks of unexplained expenditure is all at relevant for this appeal. We are not concerned with any unexplained expenditure in this case. In any view of the matter, the CIT(A) and Tribunal have come to the concurrent finding that the purchases have been recorded and only some of the sales are unaccounted. Thus, in the above view, both the authorities held that it is not the entire sales consideration which is to be brought to tax but only the profit attributable on the total unrecorded sales consideration which alone can be subject to income tax. The view taken by the authorities is a reasonable and a possible view. No substantial question of law arises. (ITA No. 313 of 2013, dated 4-2-2015)
CIT v. Hariram Bhambhani (2015) 92 CCH 46 (Bom.)(HC); www. itatonline.org

S.69C : Unexplained expenditure – Bogus purchases – CENVAT credit – Total purchases cannot be disallowed, only CENVAT credit addition can be made. [S. 143(3)] 1325

Assessee had made purchases from open market and shown same to be made from company H just to avail CENVAT credit. Assessing Officer disallowed the entire purchases. On appeal the Tribunal held that the addition was to be made only on account of such CENVAT credit, and not on account of total purchases. (AY. 2003-04)

Bhushan Power & Steel Ltd. v. Dy. CIT (2015) 155 ITD 99 (Chd.)(Trib.)

S.69C : Unexplained expenditure – inflation of Salary and Wages – Considering the facts addition was restricted to ₹ 8 lakhs. 1326

The Assessing Officer found amount of ₹ 86,57,239 as excess salary paid out of books and made addition of same.

On appeal, the Commissioner (Appeals) reduced the addition to ₹ 43,69,886.

On second appeal the Tribunal held that the, assessee has successfully explained the existence of extra attendance cards in respect of the number of the cards found during the survey but however, at the same time if one consider the case of 26 persons who had left the job in the month of August and September 2008, full explanation is not available. Therefore, inflation of salary and wages cannot be ruled out totally. Considering overall explanation of the assessee and circumstances of the case, ends of justice would meet if a disallowance of ₹ 8 lakh is made in respect of inflation of salary and wages in this case.

Safari Bikes Ltd. v. JCIT (2014) 33 ITR 665 / 166 TTJ 216 / (2015) 67 SOT 257 (Chd.)(Trib.)

S.69C : Unexplained expenditure – Bogus purchase – Hawala dealers – The expenditure on purchases could not be treated as unexplained, that the assessee was not given any opportunity to cross examine the parties despite the fact that assessee had specifically asked the same.[S.143(3)] 1327

The AO had not doubted the genuineness of the purchase but had made the disallowance of ₹ 1.37 crores invoking the provisions of 69C of the Act. AO made the addition as the supplier was declared a hawala dealer by the VAT Department. It was a good starting point for making further investigation and taken it to logical end. However, the addition is not sustainable as the purchases had been made through A/c payee cheques that were duly reflected in the bank statement of the assessee, the assessee had produced register of material purchased, copies of VAT returns, IT returns and confirmation of parties from whom the alleged purchases were supposed to have been made along with their MVAT reports, the assessee was engaged in the process of manufacturing equipment that required steel, the AO had at no stage countered the evidences produced by the assessee, he had not conducted any independent enquiry to establish that the purchases were not genuine, absence of delivery challan was not sufficient to prove non-genuineness of transaction. The assessee had produced the evidence of making payments from his bank account, the source of the said money was not doubted by the AO, the expenditure on purchases could not be treated as unexplained, that the assessee was not given any opportunity to cross-examine the parties despite the fact that assessee had specifically asked the same. Appeal of Revenue was dismissed. (ITA No. 5706/Mum/2013, dt. 13-5-2015) (AY. 2010-11)

ITO v. Paresh Arvind Gandhi (Mum.)(Trib); www.itatonline.org

1328 **S.69C : Unexplained expenditure – Bogus purchases – Genuineness of Purchases – Addition based on assumptions and conjectures relying on statements of third parties u/s. 133A, without affording an opportunity of cross – Examination, is not sustainable in law. [S.37(1)]**

Addition was made by the AO by treating purchases of ₹ 24.73 Crs. as bogus based on the statements of third parties recorded during survey proceedings u/s 133A. The CIT(A) issued a remand order to give opportunity to cross-examine the third parties, however, no opportunity was given for the same in remand proceedings. The CIT(A) and Tribunal held that in absence of any direct evidence showing the impugned purchases are not genuine, addition on the basis of a statement by third parties u/s. 133A is not sustainable. (AY. 2006-07, 2008-09)

Cannon Industries (P) Ltd. v. DCIT (2015) 167 TTJ 82 (Mum.)(Trib.)

1329 **S.69C : Unexplained expenditure – Bogus purchases – Hawala dealers – Addition towards bogus purchases cannot be made solely on the basis of statements of seller before sales-tax authorities. The AO has to conduct own enquiries and give assessee opportunity to cross-examine the seller – Order of CIT(A) deleting the addition was confirmed. [S.143(3)]**

The AO was not justified in making the addition on the basis of statements given by the third parties before the Sales Tax Department, without conducting any other investigation. In the instant case, the Assessing Officer has made the impugned addition on the basis of statements given by the parties before the Sales tax department. The CIT(A) has taken note of the fact that no sales could be effected without purchases. He has further placed reliance on the decision rendered by Hon'ble Gujarat High Court in the case of *CIT v. M. K. Brothers (163 ITR 249)*. The decision rendered by the Tribunal in the case of *ITO v. Premanand (2008)(25 SOT 11)(Jodh.)*, wherein it has been held that where the AO has made addition merely on the basis of observations made by the Sales tax dept and has not conducted any independent enquiries for making the addition especially in a case where the assessee has discharged its primary onus of showing books of account, payment by way of account payee cheque and producing vouchers for sale of goods, such an addition could not be sustained. The CIT(A) has appreciated the contentions of the assessee that he was not provided with an opportunity to cross examine the sellers, which is required to be given as per the decision of Hon'ble Kerala High Court in the case of Ponkunnam Traders (83 ITR 508 & 102 ITR 366). The CIT(A) has analysed the issue in all angles and applied the ratio laid down by the High Courts and Tribunals in deciding this issue. Therefore, the Hon'ble ITAT Appeal held that, of Revenue is not sustained correct. (ITA No. 5920/Mum/2013, dt. 17.03.2015) (AY. 2010-11)

ITO v. Deepak Popatlal Gala (Mum.)(Trib.); www.itatonline.org

1330 **S.69C : Unexplained expenditure – Assessment – Bogus purchases – Hawala dealers – AO is not entitled to treat all purchases as bogus merely because sales-tax department has called the seller a "Hawala dealer". The AO ought to have verified the bank details of the assessee and the seller and other evidence before treating the purchases as bogus. [S.44D, 143(3)]**

The AO has made the addition as some of the suppliers of the assessee were declared Hawala dealer by the Sales tax Department. This may be a good reason for making

further investigation but the AO did not make any further investigation and merely completed the assessment on suspicion. Once the assessee has brought on record the details of payments by account payee cheque, it was incumbent on the AO to have verified the payment details from the bank of the assessee and also from the bank of the suppliers to verify whether there was any immediate cash withdrawal from their account. No such exercise has been done. The CIT(A) has also confirmed the addition made by the AO by going on the suspicion and the belief that the suppliers of the assessee are Hawala traders. The Tribunal found that no effort has been made to verify the work done by the assessee from the Municipal Corporation of Greater Mumbai. The submissions of the Counsel that if there were no purchases, the assessee would not have been in a position to complete the civil work. On civil contract receipts of ₹ 32.05 crores, the assessee has shown gross profit at 14.2% and net profit at 9.72%. Even if for the sake of argument, the books of account are rejected, the profit has to be computed on the sales made by the assessee u/s. 44AD of the Act, the presumptive profit in case of civil contractors is 8% and in case of a partnership firm, a further deduction is allowed in respect of salary and interest paid to the partners. The ratio analysis of the profitability is also in favour of the assessee. Hence the Hon'ble ITAT held that the purchases are supported by proper invoices duly reflected in the books of account. The payments have been made by account payee cheque which are duly reflected in the bank statement of the assessee. There is no evidence to show that the assessee has received cash back from the suppliers. The additions have been made merely on the report of the Sales tax Department but at the same time it cannot be said that purchases are bogus. (ITA No. 2959/Mum/2014, dated 28.11.2014) (AY. 2010-11)
Ramesh Kumar & Co. v. ACIT (Mum.)(Trib.); www.itatonline.org

S.69C : Unexplained expenditure – Bogus purchases – Hawala dealers – Fact that suppliers names appear in the list of hawala dealers of the sales-tax dept and that assessee is unable to produce them does not mean that the purchases are bogus if the payment is through banking channels & GP ratio becomes abnormally high. [S.143(3) 1331
The Tribunal set out the finding of CIT(A) as under "I have also taken into consideration the decision of jurisdictional High Court and ITAT i.e. The *CIT v. Nikunj Eximp Enterprises Pvt, Ltd. Appeal No ITA No. 5604 of 2010* (Hon. Mumbai High Court) and *Balaji Textile Industries (P) Ltd. v. Income Tax Officer (1994) 49 ITD (Bom) 177*. While in the case of Nikunj Eximp Enterprises, the Hon'ble Bombay High Court in its latest judgment has held that once the Sales are accepted, the Purchases cannot be treated as ingenuine in those cases where the appellant had submitted all details of purchases and payments were made by cheques, merely because the sellers/suppliers could not be produced before the AO by the assessee. Further, I have also gone through the judgment in case *Balaji Textile Industries (P) Ltd. v. Income Tax Officer by Hon. ITAT, Mumbai (1994) 49 lTD (BOM) 177* which was made as long back as 1994 and which still holds good in which was held that- "Issuing printed bills for selling the textile goods to the assessee-company at Bhiwandi was not a conclusive proof but it was a *prima facie* proof to arrive to a correct conclusion that the assessee purchased certain goods from certain parties at Bhiwandi. The assessee sold those goods to 'S' and adjusted the sale proceeds against the loan taken by it from that party. The assessee's books of account and the

books of account of 'S' in which the entries of sale and adjustment were made, could not be discarded merely by saying that they were not genuine entries though neither the Assessing Officer nor the Commissioner (Appeals) opined anything in respect of those entries. Further, the purchase of the goods in the month of March 1985 did not make any difference. The assessee might not have carried on any business activities prior to March 1985, but that did not mean that the assessee was not entitled to carry on the business activity in March 1985. They could not be compelled to carry on the business activity throughout the year. There were no good reasons to disbelieve the sales made by the assessee to 'S'. No sales were likely to be effected if there were no purchases. A sale could be made if the goods were available with the seller. From all these facts on record, a reasonable and convincing inference which could be drawn, was that the assessee purchased the textile goods, sold them and adjusted the same towards the loan taken by it. Therefore, the assessee was entitled to get the entire deduction." I have also taken into consideration, the GP Ratio/GP Margin of the appellant in the previous AY as well as subsequent Assessment Year. If the addition made by the AO is accepted, then GP Ratio of the appellant during the present AY will become abnormally high and therefore that is not acceptable because it onus of the A.O. by bringing adequate material on record to prove that such a high G.P. ratio exists in the nature of business carried out by the appellant. Further, it has to be appreciated that (i)Payments were through banking channel and by Cheque, (ii) Notices coming back, does not mean, those Parties are bogus, they are just denying their business to avoid sales tax/VAT etc, (iii) Statement by third parties cannot be concluded adversely in isolation and without corroborating evidences against Appellant, (iv) No cross examination has been offered by AO to the appellant to cross examine the relevant parties (who are deemed to be witness or approver being used by AO against the appellant) whose name appear in the website www.mahavat.gov.in and (v) Failure to produce parties cannot be treated adversely against appellant. "While observing the finding of the CIT(A) the Tribunal dismissed the appeal of revenue. (ITA No. 5246/Mum/2013, dt. 05.03.2015) (AY. 2010-11)
ACIT v. Ramila Pravin Shah (Mum.)(Trib.); www.itatonline.org

Section 70 : Set off of loss from one source against income from another source under the same head of income.

1332 **S.70 : Set-off of loss – One source against income from another source – Same head of income – Colourable device – Short term capital gains, capital loss claimed by assessee as against short term capital gains was to be disallowed. [S.45]**
Assessee earned short-term capital gains from sale of shares in one transaction and in another transaction purchased shares of its subsidiary at premium in one breadth and sold them for a pittance rate of less than a paisa in other breadth, thereby incurring long-term capital loss. Transaction of subsidiary's share sale was entered on immediate next day of accruing short-term capital gains - Further, after sale of subsidiary's shares, assessee infused a capital of ₹ 95 crores into subsidiary claiming to meet subsidiary's RBI norms requirement. High Court by impugned order held that assessee's long-term capital loss claimed on sale of subsidiary's shares was a 'colourable device' to avoid tax

on windfall short-term capital gains earned by assessee in earlier transaction and hence was to be disallowed. Appeal of Revenue was allowed. (AY. 2000-01)
CIT v. Wipro Ltd. (2014) 50 taxmann.com 421 / 227 Taxman 244 (Mag.) (Karn.)(HC)
Editorial: Special Leave Petition filed against impugned order is granted; Wipro Ltd. v. CIT (2015) 231 Taxman 228 (SC)

S.70 : Set-off of loss – One source against income from another source – Same head of income – Though the LTCG on sale of equity shares (subject to STT) is exempt from tax u/s. 10(38), the long-term capital loss on sale of such shares can be set-off against the taxable LTCG on sale of another asset. [S.10 (38), 45, 71] 1333

(i) The main issue is whether Long term capital loss on sale of equity shares can be set off against Long term capital gain arising on sale of land or not, as the income from long term capital gain on sale of such shares are exempt u/s. 10(38). The nature of income here in this case is from sale of Long term capital asset, which are equity shares in a company and unit of an equity oriented fund which is chargeable to STT. First of all, long term capital gain has been defined under section 2(39A), as capital gains arising from transfer of a Long term capital asset. Section 2(14) defines "Capital asset" and various exceptions and exclusions have been provided which are not treated as capital asset. Section 45 is the charging section for any profits or gain arising from a transfer of a capital asset in the previous year i.e. taxability of capital gains. Section 47 enlists various exceptions and transactions which are not treated as transfer for the purpose of capital gain u/s. 45. The mode of computation to arrive at capital gain or loss has been enumerated from sections 48 to 55. Further sub section (3) of section 70 and section 71 provides for set-off of loss in respect of capital gain.

(ii) The whole genre of income under the head capital gain on transfer of shares is a source, which is taxable under the Act. If the entire source is exempt or is considered as not to be included while computing the total income then in such a case, the profit or loss resulting from such a source do not enter into the computation at all. However, if a part of the source is exempt by virtue of particular "provision" of the Act for providing benefit to the assessee, then in our considered view it cannot be held that the entire source will not enter into computation of total income. In our view, the concept of income including loss will apply only when the entire source is exempt and not in the cases where only one particular stream of income falling within a source is falling within exempt provisions.

(iii) Section 10(38) provides exemption of income only from transfer of Long term equity shares and equity oriented fund and not only that, there are certain conditions stipulated for exempting such income i.e., payment of security transaction tax and whether the transaction on sale of such equity share or unit is entered into on or after the date on which chapter VII of Finance (No.2) Act 2004 comes into force. If such conditions are not fulfilled then exemption is not given. Thus, the income contemplated in section 10(38) is only a part of the source of capital gain on shares and only a limited portion of source is treated as exempt and not the entire capital gain (on sale of shares). If an equity share is sold within the period of twelve months then it is chargeable to tax and only if it falls

within the definition of Long term capital asset and, further fulfils the conditions mentioned in subsection (38) of section 10 then only such portion of income is treated as exempt. There are further instances like debt oriented securities and equity shares where STT is not paid, then gain or profit from such shares are taxable.

(iv) Section 10 provides that certain income are not to be included while computing the total income of the assessee and in such a case the profit or loss resulting from such a source of income do not enter into computation at all. However, a distinction has been drawn where the entire source of income is exempt or only a part of source is exempt. Here it needs to be seen whether section 10(38) is source of income which does not enter into computation at all or is a part of the source, the income in respect of which is excluded in the computation of total income. For instance, if the assessee has income from Short term capital gain on sale of shares; long term capital gain on debt funds and long term capital gain from sale of equity shares, then while computing the taxable income, the whole of income would be computed in the total income and only the portion of long term capital gain on sale of equity shares would be removed from the taxable income as the same is exempt u/s. 10(38). This precise issue had come up for consideration before the Hon'ble Calcutta High Court in *Royal Calcutta Turf Club v. CIT (1983) 144 ITR 709 (Cal).*

(v) Though in *CIT v. Hariprasad & Company Pvt. Ltd. (1975) 99 ITR 118 (SC),* the Supreme Court opined that if loss was from the source or head of income not liable to tax or congenitally exempt from income tax, neither the assessee was required to show the same in the return nor was the Assessing Officer under any obligation to compute or assess it much less for the purpose of carry forward, the ratio and the principle laid down by the Apex Court would not apply here in this case, because the concept of income includes loss will apply only when entire source is exempt or is not liable to tax and not in the case where only one of the income falling within such source is treated as exempt. The Hon'ble Apex Court on the other hand, itself has stated that if loss from the source or head of income is not liable for tax or congenitally exempt from income tax, then it need not be computed or shown in the return and Assessing Officer also need not assess it. This distinction has to be kept in mind. Hon'ble Calcutta High Court in Royal Turf Club has discussed the aforesaid decision of the Hon'ble Supreme Court and held that the same will not apply in such cases.

(vi) Thus, we hold that section 10(38) excludes in expressed terms only the income arising from transfer of Long term capital asset being equity share or equity fund which is chargeable to STT and not entire source of income from capital gains arising from transfer of shares. It does not lead to exclusion of computation of capital gain of Long term capital asset or Short term capital asset being shares. Accordingly, Long term capital loss on sale of shares would be allowed to be set off against Long term capital gain on sale of land in accordance with section 70(3). (AY. 2007-08)

Raptakos Brett & Co. Ltd. v. DCIT (2015) 69 SOT 383 (Mum.)(Trib.)

Section 71 : Set-off of loss from one head against income from another.

S.71 : Set off of loss – One head against income from another – Futures & Options (F&O) loss – Treated as short term capital loss – Fresh claim during assessment proceedings – Set-off against business income.[S. 139, 143(3)] 1334

In the ROI, the assessee claimed ₹ 30,60,843 as short term capital loss from Futures & Options (F&O) transactions. The AO treated the same as business loss as against short term capital loss disclosed by the assessee. The assessee claimed that, if at all, the department sought to treat F&O transaction as business income, then loss of ₹ 30,60,843 may be allowed to be adjusted against other income of same year u/s. 71(1). The AO rejected the claim on the ground that the assessee ought to have claimed the same by way of a revised return.

Before the Tribunal, the counsel for the assessee submitted that the assessee was not making any fresh claim, but it was a natural outcome, if the AO treated F&O losses as business loss, then he was required to give full effect and to give set-off with the income from other heads of income of the current year as per the provisions of the Act. Allowing the claim of the assessee, the Tribunal held that it was the duty of the AO, while completing the assessment, to compute the income in accordance with the provisions of the Act, and if while computing the income there was a loss, which needs to be set-off within the statutory provisions then the same had to be given effect to. Further held, that there was no reason that the assessee could not be allowed to claim the set off of loss from F&O transaction with other heads of income, simply because he has not filed the revised return. (ITA No. 923/M/2012 dated 26-11-2014)(AY. 2008-09)

ACIT v. Nadir B. Ajani (Mum.)(Trib.) www.ctconline.org

Section 72 : Carry forward and set off of business losses.

S.72 : Carry forward and set off of business losses – Depreciable assets – Can be set off against gains arising from sale of depreciable asset – Matter remanded to Tribunal. [S. 32, 32(2)(iii)(a), 50] 1335

For the assessment year 1999-2000, the assessee-firm, relying upon the provisions of section 32(2), claimed that the carry forward depreciation loss relating to assessment year 1997-98 was admissible to be set-off against profit and gains arising from business in the relevant year which included short-term capital gains arising from sale of business assets. In support of its claim the assessee relied upon the decision of the Supreme Court in the case of *CIT v. Cocanada Radhaswami Bank Ltd. [1965] 57 ITR 306* and *E.D. Sassoon & Co. Ltd. v. CIT[1972] 86 ITR 757.*

The Assessing Officer, however, rejected the assessee's claim and brought to tax the short-term capital gains to tax.

On appeal, the Commissioner (Appeals) and the Tribunal were of the view that the claim of the assessee that unabsorbed depreciation should be allowed to be adjusted against capital gains was incorrect as sections 32(2)(i) and 32(2)(ii) did not get attracted in instant case.

On appeal to High Court:

The core issue in the instant case is whether in terms of section 32(2)(iii), the assessee will be entitled to set-off the brought forward depreciation loss against capital gains.

That issue, apparently, has not been addressed by the Tribunal in the order in question. All that the Tribunal says in the order is that, though it is abundantly clear that section 32(2)(iii) is operational in the case of the assessee, it only says that unabsorbed depreciation can be carried forward to the successive years. That is not the issue raised in the appeal.

The issue to be decided in the instant case is whether the capital gains arising out of sale of depreciable assets could be set off against the profits and gains of business for the assessment year 1999-2000. That issue, unfortunately, has not been considered by the Tribunal. Furthermore, the decision of the Supreme Court in the case of *CIT v. Cocanada Radhaswami Bank Ltd. (supra) and E. D. Sassoon & Co. Ltd.'s* case (supra) raised in the grounds of appeal by the assessee has also not been adverted to. The decision of the Supreme Court clearly gives a pointer to the issue as to whether the appellant/assessee is entitled to set-off of brought forward depreciation loss as against profits and gains of business arising from sale of depreciable assets for the assessment year 1999-2000.

In this view of the matter, the matter is remanded back to the Tribunal to consider and pass orders on the entire issues raised by the assessee. (AY. 1999-2000)

Southern Travels v. ACIT (2015) 232 Taxman 689 (Mad.)(HC)

Editorial: Judgment of special Bench in Southern Travels v. ACIT (2006) 103 ITD 198 (Chennai)(SB) (Trib.), was set aside.

1336 **S.72 : Carry forward and set-off of business losses – Interest income from the business of leasing, financing etc – Brought forward unabsorbed business loss and depreciation are to be set-off against the assessees income. [S.28(i), 56]**

Interest income earned by the assessee from the business of leasing, financing etc. is taxable as business income notwithstanding the fact that the RBI has refused to register the assessee as an NBFC and therefore, brought forward unabsorbed business loss and depreciation are to be set off against the assessed income. (AY. 2006-07)

Preimus Investment and Finance Ltd. v. DCIT (2015) 171 TTJ 794 (Mum.)(Trib.)

1337 **S.72 : Carry forward and set-off of business losses – Genuineness of transactions – Failure to furnish evidence of non service of notice – Order was set aside and matter was to be remanded back. [S. 131]**

Assessee Company was carrying out various business activities namely, insurance agency, marketing of products, and trading in various commodities. In relevant year, assessee claimed set-off of loss incurred in trading activities of commodities against income earned from insurance and marketing activities. AO having found that notices issued to some of parties with whom assessee allegedly carried out trading transactions of commodities returned undelivered, opined that transactions in question were sham, rejected assessee's claim for set-off of loss. The observation of authorities was premature with regard to the finding of non-existence of the parties because the transaction of assessee was through banking channel. The details of parties including telephone, PAN, TIN were available on record. AO did not furnish assessee any material of non-service of notice to various parties and in such a situation, no adverse inference could be drawn particularly having regard to fact that AO had option for calling attendance of those parties u/s. 131. Order passed by AO was set aside and remanded back for disposal afresh. (AY. 2009-10)

Rajdeep Marketing (P.) Ltd. v. ITO (2015) 152 ITD 463 (Pune)(Trib.)

Section 72A : Provisions relating to carry forward and set off of accumulated loss and unabsorbed depreciation allowance in amalgamation or demerger, etc.

S.72A : Losses – Carry forward and set off of loss in case of amalgamation – No evidence on record to prove that amalgamating company was engaged in business for three or more years as on date of amalgamation – Claim for set off was to be disallowed [S. 72A(2)(a)(i)] 1338

Assessee-company was amalgamated with another company *vide* order of High Court. Assessee claimed for set-off of brought forward depreciation and business loss of amalgamating company for year 2003-04 against its income. CIT(A) allowed the claim by observing that phrase 'engaged in the business' cannot be interpreted narrowly and thus, the amalgamating company was engaged in the manufacturing of ball pen tips for more than three years. On appeal by revenue, the Tribunal held that; there was no evidence on record to prove that amalgamating company was engaged in business for three or more years as on date of amalgamation, therefore assessee's claim for set-off was to be disallowed. (AY. 2006-07)

Dy. CIT v. Unique International (P.) Ltd. (2015) 68 SOT 73 (URO)(Kol.)(Trib.)

Section 73 : Losses in speculation business.

S.73 : Losses in speculation business – Intra day sharing in shares – Jobbing transactions – Matter remanded. 1339

Assessee, a share broker, claimed loss on account of intra-day trading in shares. However, Assessing Officer treated said sum as a speculative loss and disallowed it. Both Commissioner (Appeals) and Tribunal held that it was not a speculative loss as it was a normal business loss. On appeal by Revenue High Court held that there should be express findings recorded as to whether, in fact, intra-day purchases and sales made by assessee were jobbing transactions and consideration had passed. Matter remanded. (AY. 2007-08)

CIT v. Lalit Kumar Poddar (2015) 231 Taxman 816 (Delhi)(HC)

S.73 : Losses in speculation business – Share broker – Trading in derivatives – Loss could not be held as speculative in nature. [S. 43(5)] 1340

Where assessee-company was engaged in broking and trading in stocks and securities, loss suffered by assessee on account of mis-deals on purchase and sale of shares by trading in derivatives in a recognized stock exchange could not be speculative loss and same was to be set off as business loss. (AY. 2008-09)

Anush Shares & Securities (P.) Ltd. v. ACIT (2015) 68 SOT 359 (URO)(Chennai)(Trib.)

S.73 : Losses in speculation business – Loss on account of transactions in shares and transactions in futures and options segment – Explanation to section 73 deeming provision – Applicability of section 73 to proviso to section 43(5) to be examined – Matter remanded.[S. 43(5)] 1341

The assessee incurred a loss in the cash segment of equity market and claimed set off against the profits earned in the futures and options segment. The Assessing Officer held that the Explanation to section 73 of the Act would override the proviso to section

43(5) of the Act and therefore, the loss incurred in the cash segment of share trading should be treated as "speculation loss" and thus rejected the claim of the assessee. The Commissioner (Appeals) confirmed this. On appeal:
Held, that the Explanation to section 73 of the Act was a deeming provision and hence, its applicability had to be examined. Therefore, the Assessing Officer was to examine the matter afresh.(AY. 2008-09)
Centrum Broking Ltd. v. ACIT (2015) 39 ITR 23 / 70 SOT 389 (Mum.)(Trib.)

1342 **S.73 : Losses in speculation business – Derivatives – Brought forward loss from business of dealing in derivatives incurred in assessment years prior to 2006-07 can be set-off against profit of the same business from AY. 2006-07 onwards.**
During the assessment year 2008-09 the assesses earned profit from transactions carried out in derivatives being futures and options. The assessee claimed set-off of loss of earlier years incurred on derivatives transactions out of profit of transactions of similar nature in the current year. AO held that forward contract speculation loss cannot be set off against profit of a non-speculative business of current year. View of AO was confirmed by CIT(A). On appeal the Tribunal held that classification of business for limited purpose of set-off of past losses, into speculative and non-speculative is to be done on uniform basis and losses incurred in the same business in earlier year assessment years are to be treated as eligible for set off against profit of the same business in the subsequent years. Accordingly the claim of assessee was allowed. (ITA no 2295 /Mum/2012 dated 2-12-2014 (AY. 2008-09)
Arvind Kanji Chheda v. ACIT (2015) BCAJ–Feb- 21 (Mum.)(Trib.)

Section 74 : Losses under the head "Capital gains".

1343 **S.74 : Losses under the head Capital gains – Amalgamation and demerger – Benefit of set-off and carry forward of losses under head 'capital gains' in case of amalgamation and demerger is not available.[S. 72A]**
Issue before the Tribunal was whether amalgamated company should be allowed to set-off and carry forward of the losses computed under the head "capital gains" which had arisen to the erstwhile amalgamating companies under the provisions of section 74. Tribunal held that From the perusal of section 74, it is seen that the loss under the head "capital gain" is allowable to an assessee alone. There is nothing mention about the situation and the condition under which such a loss is allowed to be set-off and carried forward in the case of amalgamation, that is, to allow loss or set off loss of one assessee which has merged with another assessee. Likewise, in section 72, the provisions of carried forward and set-off of losses computed under the head "profit and gains of business and profession" of an assessee has been given. Here also, there is no such provision relating to carried forward and set-off of business loss in the cases of amalgamation or demerger.
In order to cover such benefit of carried forward and set-off of accumulated losses under the head 'business income', specific provision was brought in the statute by Finance Act, 1977, by way of insertion of section 72A. Such a provision was brought to overcome the difficulty in the cases where, if a business carried on by one assessee is taken over by another, then the unabsorbed depreciation and business losses could not be set-off and carried forwarded under the scheme of amalgamation within the ambit of section

72. Therefore, the entire code of section 72A, was brought in the statute for extending or relaxing the provisions relating to carried forward and set-off of accumulated business losses and unabsorbed depreciation allowance in the case of amalgamation of companies. A complete code was enacted and certain terms and conditions were laid down under which such a benefit could be given under the scheme of amalgamation. The said provision of section 72A was amended from time-to-time so as to include certain more conditions or to relax such conditions. However, the entire code of section 72A was only restricted to carried forward of accumulated losses and unabsorbed depreciation which are to be set-off while computing the income under the head "profit and gain of business or profession" and not for any other head of income including losses computed under the head 'capital gains or speculation business'. Section 72A, envisages several terms and conditions and the circumstances under which the business loss or depreciation is allowed to be set-off or carried forward. Specific Rule 9C under Income-tax Rules, 1962, has also been enacted for this purpose. Thus, once the legislature has enacted a different code all together for a specific purpose and intention, then such a code laying down the terms and conditions and the circumstances, cannot be imported or read into other general provisions or sections.

The intention of legislature for enacting a particular statute or provision has to be kept in mind while interpreting a particular provision of the Act. In the cases of amalgamation wherever the statute has provided certain conditions or benefits or restrictions, the same has been provided categorically. For e.g., section 47, italic dealing with transactions not regarded as transfer, has provided specific clauses (vi) to (vid) for the cases of amalgamation and demerger. It is not the role of the Courts specifically the Tribunal to read such a specific provisions into general provisions. The *casus omissus* cannot be supplied by the Courts i.e., the Tribunal is not empowered to read down the provision of section 72, by importing the provisions of section 72A, into the said section. What is apparent from the clear language of the section and intention of the legislature has to be inferred and is to be applied. Had the legislature intended to allow set-off and carry forward of loss of capital gains in the case of amalgamation or demerger, the legislature could have provided specifically. Thus, section 74 cannot be read or interpreted so as to give benefit of set-off and carried forward of losses under the head 'capital gains' in the case of amalgamation and demerger, sans any specific provision therein. No case laws to the contrary has been brought by the assessee. Thus, the view taken by the AO and confirmed by the CIT(A) is legally correct. (AY. 2006-07) *Clariant Chemicals (I) Ltd. v. Addl.CIT (2015) 152 ITD 191 (Mum.)(Trib.)*

Section 79 : Carry forward and set-off of losses in the case of certain companies.

S.79 : Carry forward and set-off losses – Change in shareholdings – Companies which public are not substantially interested – As the purpose of the provision is to prevent misuse of losses by transferring ownership, it should be restricted to cases of transfer of 'beneficial shareholding'. A transfer of shares of the loss-making company by the shareholder-company to its subsidiary is not hit – Loss as arrived to be carried forward. 1344

Upto the assessment year 2000-01, all the shares of the respondent-Company were held by AMCO Batteries Limited (ABL). In the assessment year 2001-02, the holding of ABL

was reduced to 55% and the remaining 45% shares were transferred to a subsidiary of ABL, namely AMCO Properties and Investments Limited (for short 'the APIL'). In the assessment year 2002-03, ABL further transferred 49% of its remaining 55% shares to Tractors and Farm Equipments Limited (for short 'the 'TAFE') and consequently ABL retained only 6% shares and its subsidiary APIL held 45% shares and the remaining 49% shares were with TAFE. Similar shareholding continued for the assessment year 2003-04. The Tribunal held that 51% of the voting power was beneficially held with the ABL during the assessment years 2002-03 and 2003-04 also, and would thus be entitled to carry forward and set-off of business losses for the previous years. The High Court had to consider whether the Tribunal was correct in holding that the assessee would be entitled to carry forward and set-off of business loss despite the assessee not owning 51% voting powers in the company as per Section 79 of the Act by taking the beneficial shareholding of M/s. Amco Properties & Investments Ltd. HELD by the High Court:

(i) Section 79 provides that where there is a change in shareholding of a Company, no loss incurred in any year prior to the previous year shall be carried forward and set-off against the income of the previous year, unless on the last day of the previous year the shares of the Company carrying not less than 51% of the voting power were beneficially held by persons who beneficially held shares of the Company carrying not less than 51% of the voting power on the last day of the year or years in which the loss was incurred.

(ii) The fact that ABL is the holding Company of APIL, which is the wholly owned subsidiary of ABL and that Board of Directors of APIL are controlled by ABL, is not disputed. The submission of the learned counsel for the respondent-assessee that the shareholding pattern is distinct from voting power of a Company, has force. Section 79 of the Act specifies that "not less than 51% of the voting power were beneficially held by persons who beneficially held shares of the Company carrying not less than 51% of the voting power." Since the ABL was having complete control over the APIL, which is the wholly owned subsidiary of ABL, in our view, even though the shareholding of ABL may have reduced to 6% in the year in question, yet by virtue of being the holding Company, owning 100% shares of APIL, the voting power of ABL cannot be said to have been reduced to less than 51%, because together, both the companies had the voting power of 51% which was controlled by ABL.

(iii) The purpose of Section 79 of the Act would be that benefit of carry forward and set-off of business losses for previous years of a company should not be misused by any new owner, who may purchase the shares of the Company, only to get the benefit of set-off of business losses of the previous years, which may bear profits in the subsequent years after the new owner takes over the Company. For such purpose, it is provided under the said Section that 51% of the voting power which was beneficially held by a person or persons should continue to be held, then only such benefit could be given to the Company. As we have observed above, though ABL may not have continued to hold 51% shares, but Section 79 speaks of 51% voting power, which ABL continued to have even after transfer of 49% shares to TAFE, as it controlled the voting power of APIL, and together, ABL had 51% voting power. Meaning thereby, the control of the company remained with ABL as the

change in shareholding did not result in reduction of its voting power to less than 51% (*Commissioner of Income Tax v. Italindia Cotton Private Limited (1988) 174 ITR 160 (SC)* referred)(AY. 1999-2000 to 2003-04))
CIT v. AMCO Power Systems Ltd. (2015) 379 ITR 375 / 127 DTR 193 / 281 CTR 332 / 235 Taxman 521 (Karn.)(HC)

S.79 : Carry forward and set off losses – Change in shareholdings – Companies which public are not substantial interested – Amalgamation – Where there was no change in shareholding pattern on date of allotment of shares, set-off of business loss would be allowed. 1345
Assessee-company claimed business loss pursuant to an amalgamation. However, Assessing Officer disallowed same by holding that there was a change in shareholding pattern of assessee-company. Dismissing the appeal of Revenue the Court held that where there was no change in shareholding pattern on date of allotment of shares, set off of business loss would be allowed. (AY. 1990-91)
Dy. CIT v. Chemstar Organics (India) (P.) Ltd. (2015) 230 Taxman 197 (Guj.)(HC)

Section 80 : Submission of return for losses.

S.80 : Return for losses – Return was filed after expiry of time extended by Assessing Officer – Not entitle to carry forward and set-off business loss. [S.72, 73, 74, 139(4)] 1346
Assessee filed returns declaring certain income after expiry of time extended by Assessing Officer for filing return. Assessments were, however, made at net loss. Assessee company was not entitled to carry forward and set off business loss determined and assessed by Assessing Officer.(AY.1985-86, 1986-87)
Peerless General Finance & Investment Co. Ltd. v. CIT (2015) 378 ITR 718 / 231 Taxman 714 (Cal.)(HC)
Editorial : Refer Peerless General Finance & Investment Co. Ltd. v. CIT (2003) 85 ITD 215 (TM)(Kol.)(Trib.)

Section 80E : Deduction in respect of interest on loan taken for higher education.

S.80E : Interest loan – Higher education – For claiming deduction there is no condition that higher education should be in India only – Interest paid on studying at USA was held to be allowable. 1347
Assessee's son was taking higher education in Washington, USA, the AO disallowed claim of deduction u/s. 80E on ground that educational institute was not authorised by any of authorities as mentioned in S. 80E (3)(c). CIT(A) also confirmed the addition. On appeal Tribunal held that nowhere S. 80E provides that higher education should be taken in India only and not abroad. There was no such stipulation u/s. 80E that education should be in India only. If there had been such intention by legislature, it would be definitely and specifically mentioned in statutory provision. Therefore, if legislature wanted education in India itself for availing of deduction, legislature would have specifically stated so in statutory provision itself. Apparently, son of assessee was pursuing his MS Electrical Engineering in USA after completing his Secondary

Education examination or its equivalent hence interest expenditure was allowed. (AY. 2009-10)
Nitin Shantilal Muthiyan v. Dy. CIT (2015) 154 ITD 543 / 128 DTR 68 / 43 ITR 335 / (2016) 175 TTJ 124 (Pune)(Trib.)

Section 80G : Deduction in respect of donations to certain funds, charitable institutions, etc.

1348 **S.80G : Donations for charitable purposes – Rejection of application for approval without giving reasons was held to be not valid. [S. 80G(5)(vi). Rule. 11AA]**
Allowing the appeal the Court held that the order of rejection of renewal of recognition was bereft of reasons. The order of rejection being not a speaking order and this having been affirmed by the Tribunal in a perfunctory manner, both orders were liable to be set aside. In view of the fact that the objections were filed by the assessee to the rejection proposed by the Commissioner indicating that it had taken steps to fulfil the objects of the trust by not only constructing "Samudaya Bhavana" but also giving medical treatment by its "Mumbai Samithi" apart from distributing books to the needy, these were all aspects which were required to be examined by the Commissioner, and the rejection of application was not valid – Matter remanded to the Commissioner.
Sri Narayana Guru Prasaditha Sangha v. CIT (2015) 379 ITR 450 (Karn.)(HC)

1349 **S.80G : Donations for charitable purposes – Renewal – Objects religious in nature – Concession was provided to all persons irrespective of their caste, creed or religion – Entitled exemption. [S. 80G(5)]**
Renewal of approval denied to institution on ground objects religious in nature. Tribunal finding training, medical care and concession provided to all persons irrespective of their caste, creed or religion. Findings not shown to be illegal or perverse in any manner. Assessee is entitled to exemption. (AY. 2012-13)
CIT v. Christian Medical College (2015) 374 ITR 17 / 233 Taxman 512 (P&H)(HC)
Editorial : Order in Christian Medical College v. CIT (2013) 27 ITR 308 (Chd.)(Trib.) is affirmed.

1350 **S.80G : Donations for charitable purposes – It is mandatory that if application for approval under section 80G is not disposed off within six months from date on which application is made, Commissioner has no jurisdiction to pass an order either granting approval or rejecting it – Matter was set aside. [S. 2(15); 11AA]**
The assessee-trust, running hostel for students was treated as a charitable purpose and was given section 80G benefit up to 31-3-2008. It filed application for renewal of the recognition granted under section 80G on 31-3-2008. The DIT(E) rejected the renewal on the ground that the trust's activity did not come within the scope of section 2(15) as amended from 1-4-2009. On appeal, the Tribunal upheld the order of the DIT(E).
On appeal to the High Court, the assessee contended that the order of the DIT(E) was passed beyond period prescribed under the law and, therefore, was invalid. On appeal allowing the appeal the Court held that from the provisions of Rule 11AA, it is clear that the Commissioner shall pass an order either granting the approval or rejecting the

application within six months from the date on which such application was made. Therefore, it is mandatory that if the application is not disposed off within six months from the date on which the application is made, the Commissioner has no jurisdiction either to pass an order granting the approval or rejecting it. It is not in dispute that the Commissioner did not pass any order within the period prescribed. He has passed an order, beyond the period prescribed under the aforesaid rule. Therefore, on the date the order was passed, the Commissioner had no jurisdiction. Therefore, it is an order passed without jurisdiction. Therefore, the impugned orders passed by both the authorities are set-aside. However, liberty is reserved to the assessee to make a fresh application for benefit of section 80G. If such an application is made, the authority shall consider the said application on merits. (AY. 2009-10)
Maheshwari Foundation v. DIT (2015) 231 Taxman 1 (Karn.)(HC)

S.80G : Donations for charitable purposes – At stage of registration, extent and nature of activities were not required to be examined, recognition under section 80G(5) was to be granted to assessee. [S.12AA, Form No. 10G] 1351
The assessee-Trust had made an application, in Form No. 10G for approval u/s. 80G(5). The main objects of the trust as per the trust deed are educational activities. In order to verify the application, the trust was asked to explain as to how its activities are in accordance with its objects.
It was submitted that the main activity of the trust was Arthik Unnati Scheme. On going through the details produced, it was seen that the trust was providing unskilled manpower, specially security personnel to some co-operative banks. The trust was asked to provide details of Arthik Unnati Scheme and to explain as to how that activity was a charitable activity. Thereafter, the trust had made written submissions on the issue. Thereafter, after considering the relevant material on record, the application made by the assessee trust seeking approval under section 80G(5), was rejected.
Against the said order, the assessee trust had preferred an appeal before the Tribunal which was allowed. On appeal by Revenue, dismissing the appeal the Court held that; since at stage of registration, extent and nature of activities were not required to be examined, recognition under section 80G(5) was to be granted to assessee.
CIT v. Arvindbhai Maniar Charitable Foundation (2015) 231 Taxman 908 (Guj.)(HC)

S.80G : Donations for charitable purposes – At time of granting approval what is to be examined is object of trust – Order of Tribunal was affirmed. 1352
Assessee-trust filed an application for recognition under section 80G(5). Revenue authorities rejected said application on ground that assessee failed to spend 85 per cent of amount received in earlier assessment years. Tribunal, however, allowed assessee's application. On appeal the Court held that at time of granting approval under section 80G, what is to be examined is object of trust and so far as aspect of income is concerned, same can be very well-examined by Assessing Officer at time of framing assessment, therefore, impugned order of Tribunal was to be confirmed.
CIT v. Pujya Shri Jalarambapa & Matushri Virbaima Charitable Trust (2015) 229 Taxman 534 (Guj.)(HC)

1353 **S.80G : Donations for charitable purposes – Trust registered u/s. 12AA and fulfilling conditions specified in s. 80G – Entitled to approval. [R.11AA]**

Allowing the appeal of assessee the Tribunal held that, the assessee Trust was established only for charitable purposes for the benefit of the public at large without any discrimination with regard to religion, caste or language, and its objects were charitable in nature and there was no intention of earning profit at any point of time by it or any of its trustees. None of the reasons given by the Commissioner for rejecting the claim of the assessee u/s. 80G, had any merit and they were unsustainable in law. The assessee had complied with all the conditions for grant of benefit u/s. 80G as detailed in the provision of s. 80G(5) r.w. Rule 11AA of the Income-tax Rules, 1962. The assessee was entitled to the benefit of approval u/s. 80G. However, in case there was any discrepancy in the maintenance of supporting documentary evidence for expenses in the form of vouchers etc. to prove the genuineness of the expenses claimed by the assessee, the Assessing Officer was to be at liberty to make suitable disallowance, wherever so required according to law, while framing the assessment in the case of the assessee. The Commissioner (E) was directed to grant the benefit of section 80G to the assessee-trust.
Keshav Madhav Dham Trust v. CIT (2015) 41 ITR 77 (Delhi)(Trib.)

1354 **S.80G : Donations for charitable purposes – Conditions precedent – uplifment of Sikh community – Not entitled to approval. [S.80G(5)]**

Assessee society was created only for upliftment of Sikh community by way of imparting various types of education. A non-Sikh could not become a member of General Council of assessee society. It was held that since assessee society was not doing any charitable work for upliftment of general community, it could not be entitled to approval under section 80G(5).
Sangat Sahib Bhai Pheru Sikh Educational Society v. CIT (2014) 103 DTR 316 / 162 TTJ 763 / (2015) 67 SOT 306 (Asr.)(Trib.)

1355 **S.80G : Donation for charitable purposes – If objects charitable no right to deny approval – Registration under section 12AA is sufficient proof – Rejection of application for grant of approval was held to be not proper. [S.12AA]**

The assessee, registered under the Andhra Pradesh Societies Registration Act, 2001, was granted registration under section 12AA of the Act. It filed an application in Form 10G for approval under section 80G(5)(vi) of the Act. The DIT(E) noted that at the time of granting of registration, the assessee had stated that the society was in the process of acquiring land for establishing its activities but although the assessee had received corpus fund of ₹ 1.19 crore and of ₹ 10.80 crore towards advances for advertisement, no land had been registered in the name of the assessee. Therefore, the Director of Income-tax (E) refused to grant approval under section 80G(5)(vi). On appeal by the assessee:
Held, allowing the appeal, that there was absolutely no allegation by the Director of Income-tax (E) that the assessee had not fulfilled any of the conditions of clauses (i) to (v) of section 80G(5). Further, there was no dispute that the assessee was a charitable institution with charitable objects, as the Director of Income-tax (E) himself had granted registration to the assessee under section 12AA. Therefore, the Director of Income-tax (E) was not correct in rejecting the assessee's application for grant of approval under

section 80G(5). Moreover, the assessee submitted that the land had also been registered in the name of the society. Therefore, the order of the Director of Income-tax(E) was to be set aside.
Sri Ramanuja Sahasrabdi v. DIT (E) (2015) 37 ITR 303 / 68 SOT 320 (URO)(Hyd.)(Trib.)

Section 80GGB : Deduction in respect of contributions given by companies to political parties.

S.80GGB : Contributions given by companies to political parties – Quantum of deduction – Restricted quantum of such deduction equal to 5 per cent of average profits of three immediately preceding financial years. [Companies Act, 1956, Ss. 293A, 349, 350] 1356
During relevant year, assessee made donation to a political party, Amount donated was claimed as deduction in accordance with provision of chapter VIA. AO opined that donations to political parties were admissible as deduction u/s. 80GGB subject to provision of s. 293A of Companies Act, 1956 which restricted quantum of such deduction equal to 5 per cent of average profits of three immediately preceding financial years of a company. Accordingly, assessee's claim for deduction was denied to a substantial extent. In terms of Explanation to s. 80GGB provides that for the purpose of section, the word contribute with its grammatical variation has the meaning assigned to it u/s.293A of the Companies Act. The heading of S. 293A of the Companies Act clearly indicates that the section has been introduced to restrict the scope of contributions that can be made to political parties. As per proviso to the said section, in case of a company which has been in existence for not less than three financial years, the aggregate of the contribution made, directly or indirectly in any financial year shall not exceed five per cent of its average net profits determined in accordance with the provision of s. 349 and 350 during the three immediately preceding financial years. Thus, section denotes the amount which a company can legally contribute to a political party or trade union. Consequently, the Explanation to sec. 80GGB was intended to restrict the quantum of such contribution eligible for deduction only to the extent that is admissible under sec.293A of the Companies Act. Therefore, the contention of the assessee that the explanation provided to the said section which refers to S. 293A of the Companies Act, 1956 was limited to the grammatical meaning of the word used in the body of the section 'Contribute' and in no way defines the admissibility of deduction with reference to quantum of the contribution. (AY. 2009-10)
Rajdeep Marketing (P.) Ltd. v. ITO (2015) 152 ITD 463 (Pune)(Trib.)

Section 80HH : Deduction in respect of profits and gains from newly established industrial undertakings or hotel business in backward areas.

S.80HH : Newly established industrial undertakings – Manufacture of article – Assembling of cassettes from finished components amounts to manufacture – Entitled to deduction. [S.80I, 80IA] 1357
Dismissing the appeal of Revenue the Court held that; it was evident that both the Commissioner (Appeals) and the Tribunal carried out an elaborate factual analysis about

the existence of manufacturing activity at the N and M units. Based on this analysis, they concurrently ruled in favour of the assessee. The fact that the assessee claimed and was granted MODVAT credit under Rule 57H of the Central Excise Rules at the relevant time itself was indicative that for purposes of excise, the assembling of cassettes amounted to manufacture. The material in the form of factory register, employees' rolls, periodic sales tax and excise returns, evidence of electricity payments, etc., was decisive enough for both the Commissioner (Appeals) and Tribunal to be satisfied that in fact the two units in question functioned. The assessee was entitled to the special deduction under section 80HH, section 80-I and section 80-IA. (AY. 1994-95, 1995-96)
CIT v. Tony Electronics Ltd. (2015) 375 ITR 431 / 128 DTR 281 (Delhi)(HC)

1358 **S.80HH : Newly established industrial undertakings – Backward areas – No bar to allow assessee separate relief under sections 80HH and 80I. [S. 80I]**
There is no bar to allow assessee separate relief under sections 80HH and 80-I. (AY. 1990-91 to 1994-95)
CIT v. Harsiddh Specific Family Trust (2015) 230 Taxman 613 (Guj.)(HC)

1359 **S.80HH : Newly established industrial undertakings – Interest earned on deposits – Interest on deposit made in relation to business activity alone eligible for deduction. [S. 80I]**
The assessee was an exporter and carried on business domestically. It claimed deduction in respect of interest on deposits under sections 80HH and 80-I of the Act. On appeal : Held, dismissing the appeal, (i) that it was not clear whether the interest claimed by the assessee was on any specific deposit or otherwise. If the interest which was quantified at ₹ 1,68,466 was from any deposit made in relation to the business activity referred to under section 80-I it shall qualify for deduction and otherwise not. (AY. 1994-95)
CIT v. Godavari Drugs Ltd. (2015) 371 ITR 379 (T&AP)(HC)

1360 **S.80HH : Newly established industrial undertakings – Back ward areas – Failure to furnish certificate – Denial of deduction was held to be justified. [S.80-I]**
Where assessee claimed deductions under sections 80-HH and 80-I, but never submitted required certificates and particulars, no deduction could be allowed. (AY. 1985-86)
U.P. State Handloom Corpn. Ltd. v. CIT (2015) 229 Taxman 251 (All.)(HC)

1361 **S.80HH : Newly established industrial undertakings – Back ward areas – Carry forward – Entitled to claim deduction under two distinct provisions of chapter VI-A-two sections 80HH and 80-I independent of set off and carry forward provisions. [S.80AB, 80B 80I]**
The assessee claimed deductions from the incomes covered by respective sections, separately. While in respect of one source of income it incurred losses, in respect of others it earned profits. The deductions sought to be made by the assessee were from the activity that yielded profits.
The AO combined income from both the categories and set off the loss against the profit of other. Claim of assessee was allowed by CIT(A) and Tribunal. On appeal High Court held that, Both the provisions occur in heading C of Chapter VI-A. Section 80AB deals with deductions of that nature. Therefore, it needs to be seen as to whether section 80AB is

suggestive of any mechanism for clubbing of the incomes of various sources covered by heading C. A close perusal of section 80AB discloses that, for the purpose of deduction under a particular section, it is only the income of the nature provided for only under that section, which shall be deemed to be income derived or received by the assessee. The provision does not mandate the clubbing of the incomes from different sources.
Be that as it may, this Court, as of now is faced with two precedents which cover the same factual background and similar legal, principles. Since both the precedents are from the Supreme Court, they are equally binding upon this Court. The only exercise that is to be undertaken is, to choose one of them, as per the settled principles of law.
CIT v. Premier Explosive Ltd. (2015) 373 ITR 177 / 273 CTR 441 / 228 Taxman 179 (Mag.) (AP.)(HC)

S.80HH : Newly established industrial undertakings – Assessee granted deductions for prior years – Denial of deduction on ground no process of manufacturing involved in relevant assessment year – Not justified. [S.80I] 1362
Held that for the assessment years 1989-90 and 1990-91, the Assessing Officer had allowed the deductions. However, for the assessment year 1992-93, the deduction could not be denied on the ground that no process of manufacturing was involved. (AY 1992-93)
CIT v. Shree Processors P. Ltd. (2015) 370 ITR 511 / 229 Taxman 633 / 116 DTR 206 (T&AP)(HC)

S.80HH : Newly established industrial undertakings – Manufacture of cold rolled strips – Interest on belated payment – Part of consideration and partakes of the character of price – Interest earned from trade debtors to be treated as profits derived from industrial undertaking – Entitled to deduction. 1363
The assessee, an industrial undertaking manufacturing cold rolled strips, it claimed the deduction under section 80HH of a sum representing interest on belated payment by purchasers of the product manufactured by it. The Assessing Officer disallowed the deduction treating it as not qualified under section 80HH. However, the appellate authorities allowed the claim under section 80HH. On appeal:
Held, interest earned from trade debtors on account of delayed payment should be treated as profits derived from the industrial undertaking of the assessee for the purpose of computing the relief under section 80HH. (AY. 1993-94)
CIT v. Surana Strips Ltd. (2015) 370 ITR 469 / 232 Taxman 283 (T&AP)(HC)

S.80HH : Newly established industrial undertakings – Computation – S. 80HH and 80-I are independent – Deductions can be claimed in both sections – Entitled to deduction without suffering deduction u/s. 80HH. [S.80HH(9), 80-I] 1364
The benefits under section 80HH and section 80-I are independent, and consequently, there is no question of giving effect to section 80HH(9) and, thereafter, proceeding to bring the balance amount for the purposes of tax or benefit under section 80I. Assessee is entitled to deduction without suffering deduction u/s. 80HH.(AY. 1989-90)
CIT v. Unipatch Rubber Ltd. (2015) 370 ITR 685 / 114 DTR 81 / 232 Taxman 516 (Mag.)/ 274 CTR 25 (Delhi)(HC)

Section 80HHC : Deduction in respect of profits retained for export business.

1365 **S.80HHC : Export business – Total turnover – Proceeds generated from sale of scrap not includible in "total turnover".**

Allowing the appeal of assessee the Court held that proceeds generated from sale of scrap not includible in "total turnover". Referred *CIT v. Punjab Stainless Steel Industries (2004) 364 ITR 144 (SC)*(AY. 1999-2000)(AY. 1999-2000)

Mahavira Cycle Industries v. CIT (2015) 379 ITR 357 / (2016) 283 CTR 239 (SC)

1366 **S.80HHC : Export business – Positive profit from export business – Loss from export business – Deduction is not allowable.[S.80AB]**

Deduction is not available if the net result of export business is loss, to avail of the benefit there has to be positive income from the export business. (AY. 1987-88)

CIT v. Harrison Malayalam Ltd. (2015) 373 ITR 162 / 278 CTR 175 / 120 DTR 233 / 233 Taxman 507 (SC)

Editorial: CIT v. Harrisons Malayalam Ltd. (2004) 266 ITR 516 / 188 CTR 469 (Ker.) (HC), is reversed.

1367 **S.80HHC : Export business – Conditions under third and fourth provisos to S. 80HHC inserted by Taxation Laws (Second Amendment) Act, 2005 would not operate retrospectively and, for the period prior to that, cases of exporters having a turnover below ₹ 10 crore and those above ₹ 10 crore would be treated similarly. [S. 28(iiid), 28(iiie)]**

Amendment to S. 80HHC(3) was made by the Taxation Laws (Second Amendment) Act, 2005 with retrospective effect i.e. with effect from 1st April 1998 (AY 1998-99 onwards). By this amendment, benefit of deduction u/s. 80HHC was also extended to income taxable u/s. 28(iiid) and 28(iiie). Such benefit under the amendment was carved out for two categories of exporters, namely,

(i) those whose export turnover was less than ₹ 10 crores during the previous year and (ii) those whose export turnover was more than ₹ 10 crores during the previous year. Insofar as entitlement of these benefits to exporters having turnover of more than ₹ 10 crores was concerned, the amendment provided that deduction would be available only if the exporter had satisfied two conditions stipulated in the third and fourth proviso to the said amendment, i.e., the assessee has necessary and sufficient evidence to prove that:

a) he had an option to choose either the Duty Drawback or the Duty Entitlement Pass Book Scheme, being the Duty Remission Scheme; and
b) the rate of Drawback Credit attributable to the customs duty was higher than the rate of credit allowable under the Duty Entitlement Pass Book Scheme, being Duty Remission Scheme.

The assessees, being exporters falling under the second category (i.e., whose exports were greater than 10 crore), filed a writ petition challenging the conditions mentioned in the third and fourth proviso to S. 80HHC(3) contending that these conditions are severable and therefore these two conditions should be declared *ultra vires* and severed. The High Court decided the issue in favour of the writ petitioners by concluding that the operation of the above stated conditions under third and fourth proviso to S. 80HHC could be given effect from the date of amendment and not in respect of

earlier assessment years on the basis that, the retrospective amendment should not be detrimental to any of the assesses having an export turnover of more than 10 crore and whose assessments were still pending. On a special leave petition filed by the Department, the Supreme Court concurred with the judgment given by the High Court, and gave a direction that conditions stipulated in the third and fourth proviso to S. 80HHC would not operate retrospectively and cases of exporters having a turnover below ₹ 10 crore and those above ₹ 10 crores would be treated similarly during the period prior to the amendment (i.e. 1 April, 2005).

CIT v. Avani Export (2015) 119 DTR 352 / 232 Taxman 357 / 232 Taxman 357 / 277 CTR 460 (SC)

Editorial: Avani Exports v. CIT (2012) 252 CTR 473 / 74 DTR 97 (Guj.)(HC)

S.80HHC : Export business – Losses in export business – Computation provision is not attracted – It is a pre-requisite that there must be profits from the export business-If the exports business has suffered a loss, deduction cannot be allowed from domestic business. 1368

The Supreme Court had to consider two facets of s. 80HHC: (i) whether the view that deduction is permissible under Section 80HHC only when there are profits from the exports of the goods or merchandise is correct or it is open to the assessee to club the income from export business as well as domestic business and even if there are losses in the export business but after setting-off those losses against the income/profits from the business in India, still there is net-profit of the business, the benefit under Section 80HHC will be available? (ii) whether, while applying the formula, we have to see what would comprise "total turnover"? HELD by the Supreme Court:

(i) It stands settled, on the co-joint reading of IPCA (2004) 12 SCC 742 and A.M. Moosa (2007) 9 SCR 831, that where there are losses in the export of one type of goods (for example self-manufactured goods) and profits from the export of other type of goods (for example trading goods) then both are to be clubbed together to arrive at net-profits or losses for the purpose of applying the provisions of Section 80HHC of the Act. If the net result was loss from the export business, then the deduction under the aforesaid Act is not permissible. As *a fortiori*, if there is net profit from the export business, after adjusting the losses from one type of export business from other type of export business, the benefit of the said provision would be granted.

(ii) In the assessee's case, in so far as export business is concerned, there are losses. The assessee's argument relying upon Section 80HHC(3)(b) to contend that the profits of the business as a whole i.e. including profits earned from the goods or merchandise within India will also be taken into consideration and that the losses in the export business, but profits of indigenous business outweigh those losses and the net result is that there is profit of the business, then the deduction under Section 80HHC should be given is not acceptable. From the scheme of Section 80HHC, it is clear that deduction is to be provided under sub-section (1) thereof which is "in respect of profits retained for export business". Therefore, in the first instance, it has to be satisfied that there are profits from the export business. That is the pre-requisite as held in IPCA and A.M. Moosa as well. Sub-section (3) comes into picture only for the purpose of computation of deduction. For such

an eventuality, while computing the "total turnover", one may apply the formula stated in clause (b) of sub-section (3) of Section 80HHC. However, that would not mean that even if there are losses in the export business but the profits in respect of business carried out within India are more than the export losses, benefit under Section 80HHC would still be available. In the present case, since there are losses in the export business, question of providing deduction under Section 80HHC does not arise and as a consequence, there is no question of computation of any such deduction in the manner. (AY. 1989-90).

Jeyar Consultant & Investment Pvt. Ltd. v. CIT (2015) 373 ITR 87 / 117 DTR 369 / 276 CTR 225 / 231 Taxman 273 (SC)

1369 **S.80HHC : Export business – Interest and miscellaneous income – Matter remanded to Assessing Officer to work out deduction in light of Supreme Court decision.**

The order of the Tribunal was set aside and the matter was remanded to the Assessing Officer to work out the deduction in the light of the decision in *ACG Associated Capsules Pvt. Ltd. v. CIT [2012] 343 ITR 89 (SC)* (AY. 2000-01)

Banco Products (I) Ltd v. Dy. CIT (2015) 379 ITR 1 / (2016) 131 DTR 201 (Guj.)(HC)

1370 **S.80HHC : Export business – Supporting manufacturer – Transfer of export incentive to supporting manufacturer by exporter – Eligible to deduction.**

The assessee was engaged in the business of export of marine food products as a supporting manufacturer. It claimed deduction under section 80HHC as well as the export turnover with regard to the goods exported as a supporting manufacturer. The Assessing Officer held that the export turnover should not be included for the purpose of claiming deduction under section 80HHC of the Act. Accordingly, the Assessing Officer restricted the claim of deduction claimed under section 80HHC. The Commissioner (Appeals) held that the assessee was entitled to the deduction and thus was confirmed by the Tribunal. On appeal to the High Court:

Held, that the export house received export orders and the orders were passed on to the assessee for execution. The assessee exported the goods directly to the foreign constituents, for which it received both payment and export incentives directly from the Government. The assessee had also submitted a disclaimer certificate from the export house before the Assessing Officer in terms of section 80HHC(4A). The assessee was entitled to the deduction. (AY 1994-95)

CIT v. Devi Marine Food Exports Ltd. (2015) 378 ITR 666 (Mad.)(HC)

1371 **S.80HHC : Export business – Zinc Oxide – Matter set aside to consider whether exported goods were mineral.**

Assessee claimed deduction under section 80HHC on account of export of Zinc Oxide. Tribunal allowed the claim. On appeal by Revenue allowing the appeal of Revenue the Court held that matter was to be remanded back to Tribunal with a direction to decide issue whether exported goods were a 'mineral' and, therefore, not eligible for deduction in terms of section 80HHC(2)(b)(ii). (AY. 1991-92)

CIT v. Subhash Chand Rastogi (2015) 232 Taxman 492 (Delhi)(HC)

S.80HHC : Export business – Sales tax and excise duty cannot form part of total turnover. 1372

For computing allowable deduction sales tax and excise duty cannot form part of total turnover. (AY. 1993-94 to 1997-98)

CIT v. Motor Industries Co. Ltd. (2015) 231 Taxman 539 (Karn.)(HC)

S.80HHC : Export business – Interest income – 90 percent of net interest which included in profit of business was to be deducted. 1373

Where assessee which was manufacturer of motor spares, had also interest income, 90 per cent net interest which included in profit of business of assessee as computed under head 'profit and gains of business or profession' was to be deducted under section 80HHC for determining profits of business.(AY. 1993-94 to 1997-98)

CIT v. Motor Industries Co. Ltd. (2015) 231 Taxman 539 (Karn.)(HC)

S.80HHC : Export business – Nexus between activity of export and development work – Consideration received of development work was liable to be deducted in computing profits of business. 1374

Assessee was in business of export. Where there was immediate nexus between activity of export and development work undertaken by assessee, consideration received from foreign enterprise in respect of said development work was liable to be deducted in computing profits of business under section 80HHC. (AY. 1993-94 to 1997-98)

CIT v. Motor Industries Co. Ltd. (2015) 231 Taxman 539 (Karn.)(HC)

S.80HHC : Export business – Sale of scrap – Cannot be included in total turnover. 1375

For purpose of income generated from sale of scrap cannot be included in total turnover. (AY. 1993-94 to 1997-98)

CIT v. Motor Industries Co. Ltd. (2015) 231 Taxman 539 (Karn.)(HC)

S.80HHC : Export business – Profit derived from export – Interest income – Income from other sources – Where the interest earned does not have direct and proximate nexus with the income from the business of export interest income cannot be deducted as income from export it has to be assessed under the head income from other sources – Earning of interest income from foreign exchange is not necessary. [S.56, 80HHC (3) (a)] 1376

The assesse is a 100 per cent export firm. It claimed deduction under section 80HHC on the interest income earned on the surplus funds. The AO disallowed the claim which was confirmed by the Tribunal. On appeal the Court held that; where the interest earned does not have direct and proximate nexus with the income from the business of export interest income cannot be deducted as income from export it has to be assessed under the head income from other sources. The amendment in section 80HHC by way of insertion of sub S. (4B), excluding interest income for the purpose of deduction under section 80HHC will also affect the deduction of interest income under section 80HHC, for the period prior to the amendment, in as much as the applicability of the principle of direct and proximate nexus the business income will apply both to the provisions of the Act prior to and after the amendment, which came in to effect by the Finance Act,

1992, w.e.f. 1st April 1992. The earning of the income convertible from foreign exchange by way of interest is not necessary so long as the interest is derived from business of export, and has direct and proximate nexus, with the income earned out of the profits retained for export business. The earning of interest income from foreign exchange is not a test for determining as to whether deduction is allowable in respect of the income derived from the profits retained for export business. Questions were answered against the assesse.(AY. 1989-90)
Reliance Trading Corporation v. ITO (2015) 376 ITR 53 / 278 CTR 113 (FB)(Raj.)(HC)
Kirti Chand Dhadda v. UOI (2015) 376 ITR 53 / 278 CTR 113 (FB)(Raj.)(HC)
Pawan Enterprises v. ACIT (2015) 376 ITR 53 / 278 CTR 113 (FB)(Raj.)(HC)
Vallabh Das Khandelwal v. ACIT (2015) 376 ITR 53/ 278 CTR 113 (FB)(Raj.)(HC)
Editorial: Reliance Trading Corporation v. ITO (2001) 73 TTJ 851 (Jaipur)(Trib.) is affirmed.

1377 **S.80HHC : Export business – Supporting manufacturer – Not necessary that exporter should have earned profit – Requisite certificate filed during assessment proceedings – Entitled to deduction.**
The assessee exported rice to Cambodia through State Trading Corporation of India as a supporting manufacturer and, therefore, claimed deduction under section 80HHC of the Act. The assessee produced a letter dated November 28, 2003, from the State Trading Corporation to the effect that the Corporation had not claimed any export benefit on the exports. A certificate of disclaimer from the State Trading Corporation in the prescribed Form 10CCAB and the bill of lading were also filed before the Assessing Officer. The Assessing Officer disallowed the claim on the ground that the State Trading Corporation had declared loss. The Tribunal allowed the claim. On appeal to the High Court :
Held, dismissing the appeal, (i) that the assessee was entitled to the special deduction under section 80HHC.
(ii) That the Tribunal was justified in granting the relief to the assessee relying upon the certificate produced in the course of the proceedings.(AY. 2003-04)
CIT v. Shamanpur Kallappa and Sons (2015) 373 ITR 373 (Karn.)(HC)

1378 **S.80HHC : Export business – Washing and chipping would result in converting quartz and feldspar into processed minerals – Assessee entitled to special deduction – Effect of amendment of section 80HHC in 1991.**
The assessee was an exporter of ores, quartz, feldspar, etc. It claimed deduction under section 80HHC in respect of profits retained for export business. The Assessing Officer, disallowed the special deduction on the ground that feldspar exported by the assessee and the consequent benefit under section 80HHC would be available only if such mineral is exported in the pulverised and micronised form. He rejected the assessee's plea that the goods exported would fall under item (x) of the Twelfth Schedule together with the Explanation as a cut and polished mineral. The Commissioner (Appeals) took the view that the assessee did not export feldspar in pulverised or micronised form but the nature of goods exported would fall under the definition as a mineral and would satisfy the requirement of processed mineral or ore as defined under item (x) of the Twelfth Schedule, namely, cut and polished mineral. He further held that quartz and feldspar are minerals and if one of the conditions of Twelfth Schedule is satisfied, the

benefit of section 80HHC would automatically apply. This was upheld by the Tribunal. On appeal High Court also affirmed the order of Tribunal. (AY. 1991-92 to 2001-02)
CIT v. Kalpana Agencies (2015) 373 ITR 486 / 127 DTR 362 / 281 CTR 491 (Mad.)(HC)

S.80HHC : Export business – Computation – In determining business profits for the deduction under section 80HHC the unabsorbed business loss of earlier years under section 72 should be set off. [S. 72, 80AB] 1379
Following the ratio in *CIT v. Shirke Construction Equipment Ltd. (2007) 291 ITR 380 (SC)*, held that Section 80AB of the Act specified that profits are those as determined for the purpose of the Act, will apply for determining profits from export business for the propose of the deduction under Section 80HHC. In determining business profits for the deduction under section 80HHC the unabsorbed business loss of earlier years under section 72 should be set off. Appeal of revenue was allowed. (AY. 1990-91)
Dy. CIT v. Chemstar Organics (India) (P.) Ltd. (2015) 230 Taxman 197 (Guj.)(HC)

S.80HHC : Export business – Amount received by assessee on sale of DEPB credit – Expenditure cannot be set off against income for purpose of calculating deduction under section 80HHC. 1380
Expenditure cannot be set off against income for purpose of calculating deduction under section 80HHC. (AY. 1997-98)
United Phosphorus Ltd. v. Addl. CIT (2015) 230 Taxman 596 (Guj.)(HC)

S.80HHC : Export business – Gross profit minus expenditure incurred for earning such profit which should be excluded. 1381
When certain profit is to be excluded from claim of deduction under sections 80HH, 80-I and 80HHC, it is not gross profit but net thereof, that is, gross profit minus expenditure incurred for earning such profit which should be excluded .Appeal of revenue was dismissed. (AY. 1998-99)
CIT v. Nirma Ltd. (2015) 229 Taxman 535 (Guj.)(HC)

S.80HHC : Export business – Interest from business debtors is to be included for purpose of calculation of deduction.[S. 80HH] 1382
Interest from business debtors is to be included for purpose of calculation of deduction under sections 80HH and 80HHC. (AY. 1998-99)
CIT v. Nirma Ltd. (2015) 229 Taxman 535 (Guj.)(HC)

S.80HHC : Export business – Total turnover of all business – Held in favour of revenue. 1383
Word business means all businesses carried on by assessee and it is not limited to export-oriented unit only, and Assessing Officer was, therefore, justified in allowing deduction under section 80HHC by taking profit of business and total turnover of all businesses of assessee.
CIT v. Itarsi Oil & Flour Mills (2014) 270 CTR 318 / 229 Taxman 537 (Chhattisgarh)(HC)

1384 **S.80HHC : Export business – Gains on account of fluctuations on account of exchange rates – Eligible for deduction – Import duty entitlement benefit partakes of the character of amounts covered by clause (iii) of section 28 – Excludible from total turnover. [S. 28(iii)]**

That by its very nature, the consideration for the exported goods is received in foreign exchange. The fluctuations on account of exchange rates would have their own impact on the income of the assessee. The resultant amount on account of the fluctuation of foreign exchange shall be treated as profit, that becomes eligible for deduction. Clause (b) of the Explanation to section 80HHC defines export turnover. It represents nothing more than the actual sale proceeds of exported goods. The incentives of duty exemption on imported goods could not be treated as sale consideration for the exported goods and could not become part of the export turnover. The amounts mentioned in the proviso could not be also added to the total turnover for the purpose of section 80HHC. The import duty entitlement benefit partakes of the character of the amounts covered by clause (iii) of section 28. By operation of the proviso to clause (ba) of the Explanation to section 80HHC it gets excluded from the total turnover. (AY. 1994-95)

CIT v. Godavari Drugs Ltd. (2015) 371 ITR 379 (T&AP)(HC)

1385 **S.80HHC : Export business – Interest – Income from other sources – LC opening assessable as business income.[S. 28(i), 56]**

Assessee company was engaged in business of export of iron ore, cashew kernels and marine products. Assessee carried out money market operation as one of its business activities. Assessee had received interest in respective previous years on FDR in banks and inter-corporate deposits. These deposits were utilized for providing security for obtaining short-term loans or as a deposit towards LC opening. Interest received by assessee was having direct or proximate relationship with their main business activity and as such, same had to be treated as 'business income' eligible for deduction under section 80HHC. (AY. 1991-92 to 1995-96)

CIT v. V.S. Dempo & Co. Ltd. (2015) 228 Taxman 181 (Mag.)(Bom.)(HC)

1386 **S.80HHC : Export business – Computation – Pharmaceuticals company – Assessee processing raw materials supplied to it by other manufacturing companies and handing over end products to such companies – Conversion charges – Not deductible for purpose of determining "profits of the business".**

The assessee manufactured drugs for being sold and used in India and also exported them outside India. In the ordinary course, it acquired raw materials, manufactured drugs according to its own expertise and marketed the products. In addition to such activity, it undertook to process the raw materials supplied to it by the other manufacturing companies and handed over the end products to such companies, and levied conversion charges. The Assessing Officer, for the assessment year 1992-93, deducted the conversion charges from the profits and gains of business or profession for the purpose of determining the profits of the business. This was confirmed by the appellate authorities. On a reference:

Held, that if the amount had anything to do with the activity of manufacturing though not of export goods, deduction thereof cannot be made. Otherwise, the proportion of the profit earned through export to the total profit would get disturbed. Therefore, the

amounts that can be treated as falling in the category of brokerage, commission, interest, rent, charges occurring in clause (baa) of Explanation to section 80HHC are only those items, which are unrelated to, and other than the amounts forming part of the total turnover of the business carried on by the assessee occurring in section 80HHC(3). Since the conversion charges were earned through the activity of manufacturing though for the benefit of other customers, the question of deducting the conversion charges from the general profits, in the context of arriving at the profits from business under the clause did not arise. (AY.1992-93)

Aurobindo Pharma Ltd. v. CIT (2015) 370 ITR 216 (T&AP)(HC)

S.80HHC : Export business – Industrial undertaking – Manufacture of gold jewellery on job work basis – Job workers undertaking work under supervision and control of assessee and direction – Constitute manufacturing activity – Entitled to deduction. 1387

Held, dismissing the appeal, that the assessee was engaged in processing of goods or merchandise as the activity of converting raw gold into jewellery or ornaments amounted to processing, if not manufacture of goods or merchandise. Jewellery had distinctive name, character and use and was a different and new commercially saleable product. The factual findings of the Tribunal were that after buying gold from MMTC, it was handed over to the job workers with design and directions to make jewellery and ornaments. The work undertaken by the job workers was under the supervision and control of the assessee. The assessee had paid labour charges to the artisans. Thus, the factual finding recorded was that the assessee had handed over gold to the artisans and received the gold in the form of jewellery and ornaments as per the assessee's directions and instructions. Therefore, section 80HHC(3)(a) would be applicable in view of the factual finding recorded by the Tribunal that the work was undertaken by the job workers under the supervision and control of the assessee and under its directions. Therefore, assessee was entitled to section 80HHC deduction. (AY. 1998-99)

CIT v. Harig India Ltd. (2015) 370 ITR 424 / 230 Taxman 171 / 115 DTR 169 / 275 CTR 369 (Delhi)(HC)

S.80HHC : Export business – Term deposit placed with bank as condition for availing of credit facility – Interest earned from deposit – Assessable as business income – Eligible deduction – Tribunal was directed to consider the document of bank produced before the Tribunal. [S. 28(i), 56] 1388

The assessee, a 100% export oriented unit doing export business in cotton fabrics, placed a certain fixed deposit with the bank and treated the interest earned from the deposit as business income and claimed deduction under section 80HHC. The Assessing Officer excluded the interest earned out of the deposit from the head "Business income" and treated the interest under the head "Income from other sources" and recomputed the income under section 80HHC.

Held, allowing the appeal, that condition No. 6 as found in the bank's letter made it absolutely necessary for the assessee to make a term deposit of ₹ 15 lakhs for the purpose of availing of the credit facility. Therefore, for all purposes, the deposit made by the assessee should be deemed to be a deposit made for the purpose of business and the interest earned from such deposit should be treated as business income. However, the assessee did not pursue the matter sincerely before the Tribunal but remained *ex*

parte. Therefore, the matter was remanded to the Tribunal for consideration afresh in the light of the document. (AY. 1994-95)
Premier Enterprises v. DCIT (2015) 370 ITR 465 (Mad.)(HC)

1389 **S.80HHC : Export business – Sale proceeds of DEPB is eligible deduction.**
Export incentives in form of sale proceeds of DEPB are eligible for deduction under section 80HHC. (AY 2003-04, 2005-06)
Aditya Birla Nuvo Ltd. v. ACIT (2015) 68 SOT 403 (Mum.)(Trib.)

1390 **S.80HHC : Export business – Unabsorbed depreciation is to be adjusted from current year's income from business or profession for purpose of calculating deduction.**
Unabsorbed depreciation is to be adjusted from current year's income from business or profession for purpose of calculating deduction. (AY. 2003-04)
Aditya Birla Nuvo Ltd. v. ACIT (2015) 68 SOT 403 (Mum.)(Trib.)

1391 **S.80HHC : Export business – Deduction is to be allowed on profits from business or profession before allowing deduction under section 10B. [S.10B]**
Deduction is to be allowed on profits from business or profession before allowing deduction under section 10B. (AY 2003-04, 2005-06)
Aditya Birla Nuvo Ltd. v. ACIT (2015) 68 SOT 403 (Mum.)(Trib.)

Section 80HHE : Deduction in respect of profits from export of computer software, etc.

1392 **S.80HHE : Export business – Claim under section 80HHE in one assessment year – Not a bar to claiming benefit under section 10A in respect of same unit in a succeeding assessment year. [S.10A]**
Dismissing the appeal of Revenue, the Court held that the making of a claim under section 80HHE in one assessment year would not preclude an assessee from claiming the benefit under section 10A in respect of the same unit in a succeeding assessment year. The purpose of section 80HHE(5) was to avoid double benefit but that would not mean that if for a particular assessment year the assessee wanted to claim a benefit only under section 10A and not section 80HHE, that would be denied to the assessee. (AY. 2000-01, 2002-03)
PCIT v. E-Funds International India P. Ltd. (2015) 379 ITR 292 (Delhi)(HC)

1393 **S.80HHE : Export business – Computer software – Expenditure incurred in foreign exchange for providing said services. Said expenditure could not be excluded in computing export turnover as well as total turnover for purpose of deduction.**
Assessee-company was engaged in business of export of computer software. Software engineers were deputed abroad, who had to do testing, installation and monitoring of software supplied to client. Therefore, expenditure was incurred in foreign exchange for providing said services. Said expenditure could not be excluded in computing export turnover as well as total turnover for purpose of deduction. (AY. 1993-94 to 1997-98)
CIT v. Motor Industries Co. Ltd. (2015) 231 Taxman 539 (Karn.)(HC)

S.80HHE : Export business – Computer software total turnover – Entire business of assessee need not be taken only that particular unit was to be taken. 1394
Term 'total turnover' as accruing in section refers only to business carried under section 80HHE and, therefore, while computing 'total turnover' for purpose of computation of deduction under section 80HHE, business profits of entire business of assessee need not be taken; only that of section 80HHE units should be taken. (AY. 2001-02)
CIT v. Infosys Technologies Ltd. (2015) 229 Taxman 335 (Karn.)(HC)

S.80HHE : Export business – Computer software – Export turnover – Total turnover – Expenditure due to exchange rate variation arising in foreign currency and exchange variation EEFC was not deductible either from export turnover or total turnover while computing deduction. 1395
Expenditure due to exchange rate variation arising in foreign currency and exchange variation EEFC was not deductible either from export turnover or total turnover while computing deduction.(AY. 2001-02)
CIT v. Infosys Technologies Ltd. (2015) 229 Taxman 335 (Karn.)(HC)

S.80HHE : Export business – Computer software – Actual expenses – Export turnover – Total turnover – Providing technical services outside India – Matter remanded. 1396
Tribunal held that while computing deduction, expenditure towards travelling as well as professional charges, maintenance allowance and other expenses in foreign currency was not deductible either from export turnover or total turnover. Court held that actual expenditure, if any, incurred in foreign exchange in providing technical services outside India should be excluded, if it is case of providing technical services outside India in connection with development of computer software. Matter remanded. (AY. 2001-02)
CIT v. Infosys Technologies Ltd. (2015) 229 Taxman 335 (Karn.)(HC)

Section 80I : Deduction in respect of profits and gains from industrial undertakings after a certain date, etc.

S.80I : Industrial undertakings – Other industrial undertaking on hire and uses – Manufacture of pulses – Eligible deduction. 1397
Allowing the appeal of assessee the Court held that where assessee takes an industrial undertaking on hire and uses it for purpose of its manufacturing activity, it is still eligible to claim deduction. Court also observed that none of the clauses prohibit the assessee from taking other industrial undertaking on hire and use it for the purpose of his manufacturing activity.
Vijay Udhyog v. CIT (2015) 232 Taxman 815 (Bom.)(HC)

S.80I : Industrial undertakings – Other income – Eligible deduction. 1398
Court held that the Tribunal found from the details of the amounts under the head "details of miscellaneous income" shown in the profit and loss account that the Assessing Officer had for the purpose of working out the deduction under section 80I of the Income-tax Act, 1961, in the next assessment year granted the benefit. The income had nexus with the industrial activity of the assessee. In the circumstances, the Assessing Officer was directed to consider these items under the head "Other income" and not to exclude

them for the purpose of deduction under section 80I. Once the Assessing Officer had worked out the details on the basis of items disclosed in the profit and loss account, then the directions given to him and issued in terms of the Tribunal's order did not raise any substantial question of law. Thus, the Tribunal was right in law in directing the Assessing Officer not to exclude from the profits and gains items of other income while working out the deduction under section 80-I. (AY. 1986-87, 1987-88)
CIT v. Dharamsi Morarji Chemicals Co. Ltd. (2015) 373 ITR 545 (Bom.)(HC)

1399 **S.80I : Industrial undertakings – Bajra seeds – Manufacture – Eligible deduction.**
Where bajra seeds after treatment with poisonous chemicals got rendered unfit for human consumption and, was a different article or thing than raw bajra fit for human consumption, said activity would be an activity of manufacturing and production of seeds.)(AY. 1991-92 to 2005-06)
New Nandi Seeds Corporation v. CIT (2015) 230 Taxman 196 (Guj.)(HC)

1400 **S.80I : Industrial undertakings – Advance licence – Pass book benefit – Profit on sale of import licence – Not derived from industrial undertaking – Not eligible deduction. [S.80IA]**
Income from Advance Licence Benefit Receivable, Pass Book Benefit receivable and profit on sale of import licence is not derived from industrial undertaking and thus not eligible for deduction under sections 80I and 80IA. (AY. 1997-98)
United Phosphorus Ltd. v. Addl. CIT (2015) 230 Taxman 596 (Guj.)(HC)

1401 **S.80I : Industrial undertakings – Interest received from customers due to late payment beyond credit period – Business income – Entitled to deduction.**
Held that the assessee was entitled to the benefit under section 80I on interest received from the customers due to late payment beyond the credit period. (AY. 1989-90, 1990-91)
CIT v. Kelvinator of India Ltd. (2015) 371 ITR 51 / 275 CTR 1 / 114 DTR 297 (Delhi)(HC)

1402 **S.80I : Industrial undertakings – Interest on fixed deposits, bank guarantees, deposits and miscellaneous receipts not entitled to deduction.**
Held that the assessee was not entitled to the benefit on interest on fixed deposits, bank guarantees, deposits and miscellaneous receipts. The assessee would be entitled to claim a limited benefit of the expenditure of the net interest. The matter was remitted to the Assessing Officer to this limited extent to enable the assessee to prove the nexus. (AY. 1989-90, 1990-91)
CIT v. Kelvinator of India Ltd. (2015) 371 ITR 51 / 275 CTR 1 / 114 DTR (Delhi)(HC)

1403 **S.80I : Industrial undertakings – Depreciation allowance and development rebate for past assessment years fully set-off against total income for those assessment years – Not to be notionally carried forward and set-off against income of current year. [S. 32 33, 80B(5), 80I(6), 154]**
The assessee was engaged in the business of manufacturing and selling of abrasives, refractories, grinding wheels, etc. The Assessing Officer, for the assessment year 1992-93, allowed the deduction under section 80-I. Subsequently, he passed an order of

rectification under section 154 notionally carrying forward the losses of the earlier years and setting off the losses against the profits available during the assessment year 1992-93. Since the deduction under section 80-I was negatived for the assessment year 1992-93, he withdrew the deduction for the assessment year 1993-94 also. The Commissioner (Appeals) confirmed the order of the Assessing Officer. The Tribunal held that the losses should be notionally carried forward and set-off against the profit generated by the industrial undertaking during the relevant assessment year. On appeals :
Held, allowing the appeals, that the losses incurred by the industrial undertaking claiming deduction under section 80-I, which had been already set off against the profits of the industrial undertaking, should not be notionally carried forward and set off against the profit generated by the industrial undertaking during the relevant assessment year for determining the deduction under section 80-I. Appeal of assessee was allowed on merits. (AY. 1992-93)
Carborundum Universal Ltd v. JCIT (2015) 371 ITR 275 / 59 taxmann.com 435 (Mad.) (HC)
Editorial: SLP of department was dismissed on account of low tax effect JCIT v. Carborundum Universal Ltd. (2015) 234 Taxman 773 (SC)

Section 80IA : Deductions in respect of profits and gains from industrial undertakings or enterprises engaged in infrastructure development, etc.

S.80IA : Industrial undertakings – Wind mill power generation – Losses and other deductions set-off against income of previous year cannot be taken into consideration. 1404
Dismissing the appeal of Revenue the Court held that; the assessee's business undertaking was wind mill power generation/hosiery goods, etc., and having exercised its option and its losses having been set-off already against other income of the business enterprise the assessee was entitled to the special deduction under section 80-IA.(AY 2010-11)
CIT v. Kongoor Textile Process (2015) 377 ITR 559 (Mad.)(HC)

S.80IA : Industrial undertakings – Initial assessment year – Assessee starting its hotel business in previous year relevant to assessment year 1999-2000 – Initial assessment year is 1999-2000. 1405
Held, dismissing the appeal, that the term "initial assessment year" has been defined for the purposes of section 80-IA of the Income-tax Act, 1961 as the assessment year relevant to the previous year in which the hotel has started functioning its business. The hotel had started business in the previous year relevant to the assessment year 1999-2000. Therefore, even if the approval of the authority was with effect from April 12, 1999, the Tribunal could have decided the issue only in the light of the definition of the term "initial assessment year" contained in section 80-IA of the Act. If that be so, the view taken by the Tribunal that the initial assessment year was 1999-2000 could not be faulted. The assessee could have claimed the benefit of section 80-IA only after approval had been granted by the prescribed authority and that approval was only with effect from April 12, 1999. However, that did not enable the assessee or the Tribunal to postpone the initial assessment year which term is statutorily prescribed

and fixed. On the other hand, if the prescribed authority had wrongly fixed the date of commencement of the business, it was for the assessee to get that error committed rectified in appropriate proceedings, which had not been done by the assessee. (AY. 2009-10)

Escapade Resorts P. Ltd. v. ACIT (2015) 377 ITR 322 / 128 DTR 215 (Ker.)(HC)

Editorial: Order in Escapade Resorts P. Ltd. v. A CIT [2015] 37 ITR 766 (Cochin)(Trib.) was affirmed.

1406 **S.80IA : Industrial undertakings – Wind mill power generation – Losses incurred by assessee had already been set off against other income of business enterprise, profit earned by it would be eligible for deduction.[S.32]**

Assessee-was engaged in wind mill power generation and textile exports. It claimed deduction under section 80-IA. Tribunal allowed assessee's claim. On appeal dismissing the appeal of Revenue the Court held that since losses incurred by assessee had already been set off against other income of business enterprise, profit earned by it would be eligible for deduction. (AY. 2010-11)

CIT v. Mallow International (2015) 373 ITR 337 / 232 Taxman 281 (Mad.)(HC)

CIT v. Sunrise Knitting Mills (2015) 373 ITR 337 (Mad.)(HC)

1407 **S.80IA : Industrial undertakings – Wind mill power generation – Where assessee's losses had already been set off against income of business enterprise, assessee would be eligible for said deduction.**

Assessee was in business of windmill and claimed deduction under section 80-IA. Assessing Officer disallowed same by holding that assessee company incurred loss in earlier year. Tribunal allowed the claim of assessee. On appeal by Revenue, dismissing the appeal the Court held that where assessee's losses had already been set off against income of business enterprise, assessee would be eligible for said deduction. (AY. 2010-11)

CIT v. Eastman Exports Global Clothing (P.) Ltd. (2015) 232 Taxman 515 (Mad.)(HC)

CIT v. Eastman Exports Global Clothing (P.) Ltd. (2015) 371 ITR 1 / 229 Taxman 449 (Mad.)(HC)

1408 **S.80IA : Industrial undertakings – Deeming provision – Power generation – Loss in year earlier to initial assessment year already absorbed against profit of other business-Not to be notionally brought forward and set-off against profits in current year.**

The assessees were engaged in the business of generation of power. They claimed deduction in respect of profits derived from the operation of windmills under section 80-IA of the Act. The Assessing Officer disallowed the assessees' claim under section 80-IA on the ground that the carried forward loss of the earlier years should be set off before computing the profit for the current year. The Commissioner (Appeals) reversed the order of the Assessing Officer. The Tribunal, following the decision of the jurisdictional High Court confirmed the order of the Commissioner (Appeals) allowing the claims of the assessee. On appeals:

Held, dismissing the appeals, that the assessees having exercised their option and their losses having been set-off already against other income of the business enterprise, the

assessees in each of the appeal fell within the parameters of section 80-IA. Followed, *Velayudhaswamy Spinning Mills P. Ltd. v. ACIT [2012] 340 ITR 477 (Mad.)(HC).*
CIT v. Eastman Exports Global Clothing P. Ltd. (2015) 371 ITR 1 / 229 Taxman 449 (Mad.) (HC)

S.80IA : Industrial undertakings – Approval of industrial park – Denial of approval by CBDT was held to be justified as the assessee has not provided correct facts in the application.[S.119, Constitution of India Art, 226] 1409

Petitioner applied to CBDT for approval of its Industrial Park (project) under section 80IA. CBDT had denied approval under section 80IA. The assessee filed the writ petition. Dismissing the petition the court held that; in view of conduct of petitioner in putting before Authority figures of allocable area of industrial units which when confronted with were substituted with new figures, coupled with fact that grievances of petitioner being factual which were not shown in any manner to be perverse and/or arbitrary, exercise of writ jurisdiction was not warranted. The Court also observed that When applicant seeks benefit of deduction under section 80-IA, it must state correct facts at very first instance and not when authorities point a flaw in figures given of allocable area of industrial unit; an applicant for a benefit of exemption must on face of it be able to show that conditions of deduction have been completely satisfied by him. (AY. 2011-12)
Balwas Realty & Infrastructure (P.) Ltd. v. CBDT (2015) 232 Taxman 282 (Bom.)(HC)

S.80IA : Industrial undertakings – Employment of specified number of employees – Contract workers – Assessee controlling not only work to be done by contract workers but also manner of doing work – Contract workers employees for purposes of section 80IA(2)(v) – Entitled to deduction. [S.80IA(2)(v)] 1410

Out of twelve persons engaged in the unit of the assessee, six were on contract basis but they were working for the assessee under the direction of the assessee. In other words, the assessee was controlling not only the work to be done by these persons but also the manner of doing the work. Thus, these contract persons would have to be counted for the purpose of section 80IA(2)(v) and the assessee would get the benefit of deduction under section 80IA. (AY. 1997-98)
Sai Computers P. Ltd. v. JCIT (2015) 375 ITR 285 (All.)(HC)

S.80IA : Industrial undertakings – Backward area – Separate unit – Interest received from debtors for late payment of sale consideration – Eligible deduction. [S.80IA(10)] 1411

Assessee-company claimed that its unit was located in industrially backward area, therefore, profits and gains of said unit would be eligible for 100 per cent deduction under section 80IA. AO has disallowed the claim. In appeal Tribunal allowed the claim of assessee. Appeal by Revenue dismissing the appeal the Court held that; where assessee had maintained separate accounts for each unit and further Assessing Officer could not prove that business between eligible unit and other units of assessee were so arranged that business transaction between them produced more profit to eligible business, assessee would be entitled for deduction under section 80IA. Court also held that while computing deduction under section 80IA, interest received from trade debtors

towards late payment of sale consideration was to be included in profits of industrial undertaking.(AY. 1996-97, 1997-98)
CIT v. Translam Ltd. (2015) 231 Taxman 901 (All.)(HC)

1412 **S.80IA : Industrial undertakings – Wind mill – Power generation – Initial assessment year – Loss was set-off against other income of business enterprise – Profit earned during the year is eligible deduction.**
Assessee was engaged in wind mill power generation. Assessee's claim for deduction under section 80IA was rejected by Assessing Officer by notionally adjusting the depreciation claim which was set-off in earlier years against other income. Tribunal, however, allowed assessee's claim Dismissing the appeal of revenue the Court held that since losses incurred by assessee had already been set-off against other income of business enterprise, profits earned by its industrial undertaking would fall within parameters of section 80IA, therefore, Tribunal was justified in allowing assessee's claim. (AY.2010-11)
CIT v. R. Yuvaraj (2015) 231 Taxman 609 / (2016) 384 ITR 521 (Mad.)(HC)

1413 **S.80IA : Industrial undertakings – Derived from – Import licence for procuring raw material for manufacturing finished products for exports – Sale of import licence has no nexus with business of manufacturing and sale of finished products – Not entitled to deduction.**
Held, the profits derived from sale of the licence could be treated as incidental and not direct. It was not the case of the assessee that the sale of licences was its business. If the assessee had derived any profits or gains from the sale of licences, it could be treated as income from sources other than the actual conduct of the business and the sale of licences, in any case, could not be treated as a part of the gross total income from business. The submission that the sale of licences had direct nexus or connection with the business of the undertaking must be rejected. Merely because the licences were obtained for procuring the raw material for manufacturing finished products for its exports, that did not mean that the sale of import licences had nexus with the business of manufacturing and sale of finished products. (AY. 1993-94 to 1996-97)
Deccan Industrial Products v. ACIT (2015) 375 ITR 256 (T&AP)(HC)

1414 **S.80IA : Industrial undertakings – Generation of power – Windmills – Losses and other deductions set off against income of previous year – Entitled to deduction.**
Held, dismissing the appeal, that all the business undertakings were windmills and they had claimed the benefit of deduction under section 80-IA of the Act for the assessment year 2010-11 and subsequent years as well. Having exercised their option and their losses having been set off already against other income of the business enterprise, the assessees fell within the parameters of section 80-IA. They were entitled to special deduction under section 80IA. (AY. 2010-11)
CIT v. Poppy's Knitwear P. Ltd. (2015) 373 ITR 455 / 234 Taxman 407 (Mad.)(HC)

S.80IA : Industrial undertakings – Industrial park – Infrastructure facility – Competent authority certifying work completion and fitness for occupation – Central Board of Direct Taxes not an appellate authority to sit in judgment over certificates or their contents – Plot developed for composite use – Authority to see location of units and its industrial activity and whether that could qualify as industrial park and for which requisite certificate whether issued – Entitled to deduction. [S.80IA(4)(iii), Industrial Park Scheme, 2008, paras. 2(b), (h), 4(1)] 1415

The assessee executed a declaration with a view to develop land for constructing an Information and Technology Park. The assessee preferred an application under section 80-IA(4)(iii) for approval of the Information Technology Park under the Industrial Park Scheme, 2008 but the same was rejected on the ground that assessee failed to obtain occupation certificate for the entire building from the competent authority.

The High Court observed that there was no legal position which prohibited grant of certificate phase wise or stage wise based on the completion of construction of areas. The High Court held that there was no other requirement which remained to be complied with and it was not for the Board to probe by whom the industrial park was going to be used, etc. and hence sent the matter back for fresh application of facts and details provided by the assessee.

Techniplex v. CBDT (2015) 374 ITR 722 / 232 Taxman 248 / 277 CTR 114 / 118 DTR 185 (Bom.)(HC)

S.80IA : Industrial undertakings – Infrastructure development – Losses of assessment years before the initial assessment year already absorbed against profit of other business cannot be notionally brought forward and set off against profits of eligible business. 1416

The High Court following the decision of *Velayudhaswamy Spinning Mills Pvt. Ltd. v. ACIT (2010) 231 CTR 368* dismissed the appeal of the Revenue and held that since the assessee had claimed the benefit of deduction u/s. 80-IA and their losses were set off already against other income of the business enterprise, the assessee fell within the parameters of section 80-IA and losses could not be notionally brought forward for set off against eligible business income.

CIT v. Sri Ranganathar Industries (P) Ltd. (2015) 118 DTR 285 (Mad.)(HC)

S.80IA : Industrial undertakings – Infrastructure development – Joint venture or special private venture – Entitle deduction. 1417

Where total income of assessee includes any profit and gains from enterprises, i.e., Joint venture or special private venture, carrying on defined business of developing or operating or maintaining any infrastructure, it would be entitled to deduction under section 80IA(4). (AY. 2005-06)

CIT v. PNC Construction Co. Ltd. (2015) 230 Taxman 193 (All.)(HC)

S.80-IA : Industrial undertakings – Infrastructure development – Container Freight Station (CFS) is part of inland port – Eligible deduction. 1418

Container Freight Station (CFS) is part of inland port and, therefore, is an infrastructure facility as defined in Explanation to section 80IA(4)(i). (AY. 2009-10)

CIT v. A. L. Logistics (P.) Ltd. (2015) 374 ITR 609 / 230 Taxman 194 / 279 CTR 317 (Mad.) (HC)

1419 **S.80IA : Industrial undertakings – Scrap – To be included for purpose of calculation of deduction. [S.80HH]**
Income on account of sale of various items of scrap is to be included for purpose of calculation of deduction under sections 80IA and 80HH. (AY. 1998-99)
CIT v. Nirma Ltd. (2015) 229 Taxman 535 (Guj.)(HC)

1420 **S.80IA : Industrial undertakings – Lease agreement with port authorities – Entitled deduction even though assets were not transferred to Government – Circular was held to be applicable in respect of initial assessment year 2000-01 – Eligible deduction.**
Assessee was an inland storage facility provider. As per lease agreement with Port Trust Authorities, Port Trust could repossess entire infrastructure facility and assessee had an obligation to transfer facility on receiving such compensation as may be determined by Authorities. Assessee claimed deduction under section 80IA opting 2000-01 as initial assessment year. Assessing Officer accepted claim of assessee for assessment year 2000-01. However, he disallowed claim for current years on ground that assessee did not transfer assets to Government as required under section 80-IA(4). However Circular No.793 dated 23-6-2000 which stated that asset had to be transferred was applicable from assessment year 2001-02 onwards. Thereafter, CBDT issued Circular No. 10, dated 16-12-2005, withdrawing condition of transfer of assets to government or local authority. assessee would be entitled for deduction under section 80-IA for current years also.
CIT v. Suraj Agro Infrastructure (India) (P.) Ltd. (2015) 229 Taxman 191 (Mad.)(HC)

1421 **S.80IA : Industrial undertakings – Manufacture of article – Processing of plain glazed ceramic tiles, amounts to manufacture – Entitled to deduction.**
Dismissing the appeal of revenue the Court held that, it was clear from the Excise Tariff Rules, that Parliament had recognised printing on glazed tiles as manufacturing activity. The whole industry set up by the assessee was for processing plain glazed ceramic tiles. The process included application of chemical and other materials like glazes, colours, mediums, glass, luster, etc., and burning at a very high degree of controlled temperature with the help of the kiln which employed the single fast fired technology, which was the latest development in the ceramic industry. Before that, designing and preparation of a photomechanical film, preparation of screens, colour recipe-formulation, automatic screen printing and spray application, three dimensional glass-embossing and single-fast-firing were undertaken and the object of this process of printing resulted in decorating or painting the glazed tiles which constituted a distinct and different article in the market. Entitled to deduction. (AY. 2000-01, 2001-02, 2002-03)
CIT v. Murudeshwar Decor Ltd. (2014) 227 Taxman 29 (Mag.) / (2015) 370 ITR 626 / 278 ITR 356 / 122 DTR 24 (Karn.)(HC)

1422 **S.80IA : Industrial undertakings – Employment of 10 or more workers – Only skilled workers to be counted and not sweepers, clerks etc. [S.158BC]**
Court held that for calculating skilled and unskilled workers who work on machine or otherwise actually participate in manufacturing process need to be counted to find out

the number of 10 or more workers, however sweepers, clerks, etc. have to be excluded for the purpose of finding out 10 or more workers (AY. 1999-2000)
Herald Publications (P) Ltd. v. CIT (2015) 274 CTR 102 / 229 Taxman 103 / 114 DTR 98 (Bom.)(HC)

S.80IA : Industrial undertakings – Infrastructure development – Wind mill – Power generated consumed by assessee – Income eligible for deduction. 1423
Court held that the assessee was entitled to claim of deduction under section 80IA in respect of income relatable to power generated by its own wind mill that was consumed by assessee, by treating said income as income derived from eligible undertaking. (AY. 2005-06)
CIT v. Cethar Ltd. (2015) 228 Taxman 139 (Mag.)(Mad.)(HC)

S.80IA : Industrial undertakings – Infrastructure development – Excise duty set-off and sales tax set-off – Not entitled deduction. [S.80HHC] 1424
The assessee-company was a closely held company engaged in the business of manufacturing of dyes and chemicals. It claimed deduction in respect of export benefit, Central Excise set-off, miscellaneous income, interest income and sales tax set-off. AO disallowed the claim. On appeal CIT(A) allowed the claim. Tribunal held that the claim was not allowable. On appeal the Court held that the assessee would not be entitled to deduction under section 80-IA in respect of Central Excise Duty set-off as well as sales tax set-off. (AY. 1994-95 to 1996-97)
ADCI Dye Chem (P.) Ltd. v. Dy. CIT (2015) 370 ITR 408 / 228 Taxman 137 (Mag.)(Guj.) (HC)

S.80IA : Industrial undertakings – Interest on TDS refund, interest from lessees, interest on FDRs and Tender fees are all "derived" from the undertaking and are eligible for deduction. If items of income are not eligible, it should be netted off against expenditure and only balance can be disallowed. 1425
(i) The TDS deduction from lease rental income was beyond the control of the assessee and also due to the delay in getting no-deduction certificate from the AO. In view of the same, the assessee was deprived of funds to the extent of TDS amount, which would have otherwise used for the purpose of business including repayment of loan taken for construction of IT parks and SEZ. The Income tax department was required to pay interest only due to the delay in granting refund of TDS. In the case of Liberty India Ltd. (supra), relied upon by the AO, the assessee therein received DEPB credits as per the scheme framed by the Government of India. Hence the Hon'ble Supreme Court held that the primary source of the DEPB receipt is the scheme framed by the Government. However, in the instant case, TDS deduction is integral part connected with the receipt of lease income and the same cannot be separated from the activity carried on by the assessee. Since the lease income is the primary source of the assessee and since the TDS has been deducted from the said primary source and since the assessee was deprived of a portion of lease rent for a temporary period for the reasons beyond the control of the assessee, there is some merit in the contention of the assessee that the interest on TDS refund should be equated with the interest on delayed payment

of business receipts. In our view, the assessee has got strong case in the alternative contentions that interest received by it on the TDS refund should be netted off against the interest expenditure for the purpose of computing the profits and gains derived from the undertaking, in which case, the interest income need not be assessed separately and it would automatically get deduction u/s. 80-IA of the Act due to netting off. In view of the above, The Hon'ble Tribunal upheld the decision taken by the CIT(A) on this issue.

(ii) As regards the interest received from the lessees for the delayed payment of lease rent, in view of the decision rendered by the Supreme Court in the case of Govinda Choudhary & Sons (supra) and the decision of Hon'ble jurisdictional Bombay High Court in the case of *CIT v. Bhansali Engg. Polymers Ltd (2008)(306 ITR 194)*, Tribunal did not find any infirmity in the decision of CIT(A) in holding that interest so received partakes the character of lease rentals and hence eligible for deduction u/s. 80-IA of the Act.

(iii) As regards interest received on FDR, the assessee had received lease deposits from the lessees, which is required to be returned to them upon vacating the premises. Since the possibility of vacating the premises in the middle is always there, in which event the lease deposits are required to be refunded, the assessee was not in a position to use the entire lease deposits for business purposes including for repayment of loans taken by it. Hence, as a prudent business policy, the assessee was constrained to keep part of the lease deposits into the Fixed deposits maintained with banks. The said fixed deposits have earned interest income. Thus, we notice that the assessee was required to keep part of lease deposits amounts in fixed deposits out of business compulsion. Since the lease rental income is the primary source of the assessee, as per the Tribunal view, the keeping of fixed deposits shall form integral part of the business of operation of IT parks and SEZ. Also find merit in the alternative argument of the assessee that the interest income should be netted off against the interest expenditure, since the assessee was constrained to keep part of lease deposits into fixed deposits in view of the peculiar nature of activities of the assessee instead of using the same for business purposes including repayment of loan. In view of the above, Tribunal does not find any infirmity in the decision taken by the CIT(A) on this issue.

(iv) As regards Tender fees received by the assessee on sale of tender forms, the CIT(A) noticed that the assessee has availed the services of various sub-contractors for the purpose of carrying our various works in the IT parks and SEZ. In order to select the vendors (sub-contractors), the assessee has followed tender system and in that process, it has collected money on sale of tender forms. Hence, the CIT(A) has held that the activity of inviting tender is very much part of the development and operation of SEZ and accordingly held that the sale of tender forms shall be eligible for deduction u/s. 80IA of the Act. Since the tenders have been invited in connection with the development and operation of IT parks and SEZ, the Tribunal of the view that the Ld. CIT(A) was justified in holding that the tender fees are eligible for deduction u/s. 80IA of the Act.

(v) There is also merit in the cross objection of the assessee that the corresponding expenditure relating to the items of receipts, which were not considered to be deductible u/s 80IA of the Act, should be deducted and the deduction should be

denied only in respect of net receipts since the deduction u/s. 80-IA is allowed in respect of "Profits and gains", which means only net income, i.e., Gross receipt less corresponding expenditure incurred to earn the said income. Accordingly, Tribunal direct the AO to exclude only the net receipts in respect of ineligible item of income.(ITA No. 4613/Mum/2013, dt. 28.10.2015) (AY. 2009-10)

ITO v. Hiranandani Builder (2015) 174 TTJ 533 / 128 DTR 97 (Mum.)(Trib.)

S.80IA : Industrial undertakings – Income must directly emanate from eligible undertaking and must have direct nexus – Excess provision written back and late payment charges – Deduction is allowable-Interest, machines hire charges, sundry and rent receipts cannot be considered as income – No direct nexus with immediate source of income derived from eligible undertaking – Not eligible for deduction. 1426

For the purposes of deduction under section 80-IA of the Income-tax Act, 1961, the income of the eligible undertaking must be derived from a particular source and must have a direct and immediate nexus with such source. If an income is indirectly connected with the eligible undertaking, the income loses the direct nexus and cannot be considered as "derived from" the eligible undertaking.

Held, (i) that the excess provision written back was not an income but a reduced amount of eligible deduction in the computation of profits derived from eligible enterprise. (Appeals).

(ii) That the late payment charges were extra payment received by the assessee from its customers on account of late payment of their dues. Once deduction was obtained on sale consideration, there could be no reason to deny deduction on such late payment charges, which were part and parcel of sale consideration.

(iii) That interest received against advances to its employees for purchase of house building, machines hire charges, rent receipts and sundry receipts in the nature of electricity charges and guest house receipts could not be characterised as income derived from the eligible undertaking. There was no direct nexus with the eligible undertaking. (AY. 2008-09, 2009-10)

ACIT v. THDC India Ltd. (2015) 39 ITR 206 (Delhi)(Trib.)

S.80IA : Industrial undertakings – Construction of foot overbridges and bus shelters – Part of infrastructure facility – Entitled to deduction. 1427

The assessee claimed deduction under section 80-IA of the Income-tax Act,

Held, that the contention raised by the Department was not the basis of disallowance by the Assessing Officer, subject matter before the Commissioner (Appeals) and the Tribunal. Therefore, the issue raised by the Department was a new one and could not to be adjudicated by the Tribunal. The bus shelters and footoverbridges should be considered as part of the infrastructure facility and therefore, the assessee was entitled deduction under section 80-IA of the Act. (AY. 2004-05 to 2009-10)

Dy. CIT v. Vantage Advertising P. Ltd. (2015) 39 ITR 240 / 70 SOT 610 (Kol.)(Trib.)

S.80IA : Industrial undertakings – Deduction to be allowed without adjustment of brought forward loss on notional basis.[S. 80IA(4)(iv)(a)] 1428

Assessee claimed deduction under section 80IA(4)(iv)(a) not in year in which power generation commence but in a later year. It was held by ITAT that as per section 80-

IA(2), assessee has option to exercise choosing of initial assessment year out of fifteen years beginning with year in which its undertaking starts production. It was further held that deduction under section 80-IA(4)(iv)(a) was to be allowed without deducting brought forward loss or unabsorbed depreciation prior to initial year on notional basis where depreciation and loss of those years had already been set off against other business income of those years. (AY. 2009-10)
Advik Hi tech (P.) Ltd. v. ACIT (2015) 67 SOT 158 (URO)(Pune)(Trib.)

1429 **S.80IA : Industrial undertakings – Computation – Loss in year earlier to initial assessment year already absorbed cannot be notionally brought forward and set off against profits of eligible business for current year.**
The assessee claimed deduction under section 80-IA of the Act. The Assessing Officer rejected the claim and referring to section 80-IA(5), held that the profits and gains of an eligible business for the assessment year immediately succeeding the initial assessment year or any subsequent assessment year, i.e., in the case of the assessee for the assessment year 2009-10 onwards, should be computed as if the eligible business was the only source of income of the assessee, that the losses from windmill business for assessment years 2005-06 to 2007-08 had to be set off against the profits from the windmill business of the assessment year under consideration, i.e., assessment year 2010-11 and the balance alone was eligible for deduction under section 80-IA. The Commissioner (Appeals) held that though prior to the amendment to section 80-IA by the Finance Act, 1999 the initial assessment year was defined in the Act, after the amendment there was no definition in the Act for the initial assessment year and there was an option to the assessee in selection of the year of claiming relief under section 80-IA and that, therefore, there was no question of setting off notionally carried forward unabsorbed business loss against the profits of the eligible business and the assessee was entitled to claim deduction under section 80-IA on the current assessment year for the current year profit. On appeal by the Department: Held, that no interference was called for in the order of the Commissioner (Appeals). (AY. 2010-11)
ACIT v. INTEX (2015) 38 ITR 496 / 154 ITD 365 (Chennai)(Trib.)

1430 **S.80IA : Industrial undertakings – Infrastructure development – SSNNL is an instrumentality or agency of State – Deduction cannot be denied merely because the cost of project executed by the assessee was not fully funded by the assessee itself**
SSNNL was formed with the objects to carry out Governmental functions and obligations of a water supply scheme to the assessee on turnkey basis whereby the assessee was required to conceptualize, design, manufacture etc. 20% of the project was funded by the assessee whereas 80% of the project was funded by SSNNL. Tribunal held that merely because the project was not fully funded by the assessee itself, it would not be proper to deny deduction u/s. 80IA to the assessee. (AY. 2006-07)
Kirloskar Brothers Ltd v. DCIT (2015) 167 TTJ 102 / 103 DTR 227 (Pune)(Trib.)

S.80IA : Industrial undertakings – Unabsorbed Depreciation – Computation – Gross total income – Though u/s. 80-IA(5), the profits of the eligible unit has to be computed on the 'standalone' principle, in a case where the assessee also has non-business income, the brought forward unabsorbed depreciation u/s. 32(2) has to be set off against the eligible profits before computing S.80-IA deduction. [S.32(2), 72 (2), 80A, 80AB, 80B(5)] 1431

(i) The assessee's manner of computing Gross Total Income, though mathematically leading to the same result, i.e., in terms of net taxable income, is incorrect and not in conformity with either the terms of the provisions or the scheme of the Act. There is, in fact, no scope for any vacillation; the same being basic to the scheme of the Act, with the apex court in *Synco Industries Ltd v. AO (2008) 299 ITR 444 (SC)* explaining the manner in which the GTI is to be computed, so that independent of the provision of s. 80-I(6) (or s. 80-IA(5)), all other applicable provisions, including ss. 32(2) & s. 72, would apply in computing such income. Rather, we observe a complete unanimity of judicial view;

(ii) What is the basis therefor? If not ridiculous or a travesty of the clear provisions of law, what is it? True, if the unabsorbed depreciation exceeds the business income of ₹ 77.91 lacs, the same would stand to be set off against the income assessable u/s.22 and/or section 56 in-as-much as the same, per the deeming of section 32(2), forms part of the current years' depreciation, and is to be given effect to, save for a precedence to the provision of sections 72(2) & 73(3), which are inapplicable in the present case in-as much as there is no brought forward business loss. There is no occasion or need for the set off of unabsorbed deprecation against income assessable under other heads of income, i.e., under Chapters IV-C and IV-F, as the assessee claims or does. How, for instance, s. 70 come into play without first determining the income assessable u/s. 28, and which would only be after giving effect to the provision of s. 32. The charge of depreciation u/s.32, it must be appreciated, is one, single charge, i.e., irrespective of the different sources of income whereunder it may arise and, accordingly, would, in terms of section 32(1) r/w s. 32(2), allowable under the income assessable u/s.28, which per section 29 is to be computed in accordance with the provisions contained in sections 30 to 43D. (AY. 2007-08)

Deepi Arora v. ITO (2015) 40 ITR 597 / 169 TTJ 537 (Mum.)(Trib.)

S.80IA : Industrial undertakings – Deduction cannot be denied in succeeding years without disturbing relief granted for initial year.[S.80IA(5)] 1432

Held, dismissing the appeal, that according to section 80-IA(5) the period of exemption of ten years will be counted from the initial assessment year which the enterprise or the undertaking will be allowed to choose. The concession has to be availed of within a span of 12 years beginning with the year of operation. This means that an enterprise or undertaking which chooses the fourth year of operation as the initial year will get deduction starting from that year. The Department can see the pre-requisite condition for allowance of deduction to an enterprise or an undertaking in the very first year the initial year of claim of deduction. In the present case, the assessee claimed deduction under section 80-IA of the Act in the assessment year 2004-05, i.e., that was the initial assessment year and in that year the claim of deduction had become final. Once the claim of deduction in respect to pre-requisite conditions for allowance of deduction had

been satisfied, it could not be questioned in future years unless and until the Department disturbed the finding for the initial assessment year. (AY. 2006-07 to 2010-11)
Dy. CIT v. Selvel Advertising P. Ltd. (2015) 37 ITR 611 (Kol.)(Trib.)

1433 **S.80IA : Industrial undertakings – Computation – Products were sold through C&F agents AO could not invoke provisions of section 8OIA (8) read with section 80IC (7). [S. 80IA(5)80IA(8), 80IC(7), 80IA(10)]**
The assessee-company was a manufacturer and trader of pharmaceutical goods, diagnostic kits, medical instruments etc. The assesse claimed deduction under section 80IA in respect of unit located in Baddi which was showing profit at the rate of 62 percent. AO held that the margin of profit shown by the assesssee as a whole was only to the extent of 10 percent, therefore he recomputed the profit of the unit by applying sub section 80IA (10) and restricted the profit of the unit to 10 percent only. On appeal Tribunal held that the assess has maintained separate books of account Baddi Unit, there is no provision in the statute to segregate the income on the basis of turn over basis hence the working of the AO was not proper. Tribunal also held that where assessee claimed deduction of section 80-IA in respect of unit engaged in manufacturing of pharmaceutical products, in view of fact that said products were not routed through Head Office rather same were sold through C & F agents in market, AO could not invoke provisions of section 80-IA(8), read with section 80-IC(7) in order to segregate profits of eligible undertaking. (AY. 2006-07)
Cadila Healthcare Ltd. v. Addl. CIT (2012) 21 taxmann.com 483 / (2015) 67 SOT 110 (URO)(Ahd.)(Trib.)

Section 80IB : Deduction in respect of profits and gains from certain industrial undertakings other than infrastructure development undertakings.

1434 **S.80-IB : Industrial undertakings – Filing of audit report in Form 10CCB – Sufficient compliance if report filed before assessment completed.[R. Form 10CCB]**
Dismissing the appeal of Revenue, the Court held that if the audit report was filed before completion of assessment was held to be sufficient compliance. (AY.2005-06)
CIT v. G.M. Knitting Industries (P) Ltd. (2015) 376 ITR 456 (SC)
CIT v. AKS Alloys (P) Ltd. (2015) 376 ITR 456 (SC)
Editorial: Decision of Bombay High Court in CIT v. Shivanand Electronics (1994) 2009 ITR 63 (Bom.)(HC) was affirmed.

1435 **S.80IB : Industrial undertakings – Proprietorship converted into partnership – Partnership firm is entitled to deduction. [S.84]**
Dismissing the appeal of Revenue, the Court held that; when a proprietorship converted in to partnership and transferred the industrial undertaking as a whole along with assets and liabilities is not a case of transfer of plant and machinery to firm or of splitting or reconstruction of business hence the firm is entitled to deduction.(AY. 2005-06)
CIT v. Advance Valve Global (2015) 377 ITR 207 / 227 Taxman 237 (Mag.)(All.)(HC)
CIT v. Prisma Electronics (2015) 377 ITR 207 / 227 Taxman 237 (Mag.)(All.)(HC)

S.80IB : Industrial undertakings – Manufacturing – Principle of consistency – Justified in allowing the claim. 1436

Assessee was engaged in manufacturing activity and claimed deduction. For earlier years, it was confirmed that activity undertaken by assessee qualified to be a manufacturing activity and deduction was allowed by the Tribunal. On appeal by revenue dismissing the appeal of revenue the Court held that; the Tribunal was justified in applying principle of consistency in current year and in allowing deduction. (AY. 2006-07 to 2009-10)

CIT v. Macbrout Engineering (P.) Ltd. (2015) 232 Taxman 406 (Bom.)(HC)

S.80IB : Industrial undertakings – Allocation of expenses – Eligible units – Matter remanded.[S.80IB(5), 80IB(13)] 1437

Onus is on assessee to produce sufficient material on record to show that there is no disproportionate allocation of expenses to arrive at more profits for 'eligible units' in order to claim more relief under section 80IB. Matter remanded. (AY. 2002-03)

CIT v. Gimpex Ltd. (2015) 231 Taxman 904 (Mad.)(HC)

S.80IB : Industrial undertakings – Mercantile system of accounting – Appeal – New plea – Profits of business – Transport subsidy – Not direct source of profit – Assessee cannot raise a new plea that it had received part of subsidy and not the whole. [S. 145, 260A] 1438

Dismissing the appeal of the assessee the Court held that the assessee had not obtained a certificate from the Corporation for the assessment year 2002-03. Apart from adopting the mercantile system of accounting it had chosen to take the benefit of section 80IB and sought exemption. It had never taken the plea before the authorities below which was now sought to be raised that it was only liable to be assessed to the tune of ₹ 5,17,123 which was actually received in the year concerned. The certificate was only obtained for the subsequent period and, therefore, it was never the case of the assessee that it could take the benefit of clause 6(vii) of the Transport Subsidy Scheme, 1971, on the ground that the actual freight paid would be the income. Once that was not the specific case before the assessing authority and the same material not having been placed before the Tribunal, the substantial question of law sought to be raised on the strength of clause 6(vii) of the Scheme was not permissible. The substantial question of law would only be on the strength of documents which have been brought before the authorities below and also which was the subject matter of consideration before the Tribunal. Once the stand was contrary before the assessing authority at the initial stage, the argument now sought to be raised could not be addressed before the court. (AY. 2002-03)

Maken Cement Industries v. CIT (2015) 374 ITR 25 (P&H)(HC)

S.80IB : Industrial undertakings – Eligible business – In view of *non obstante* clause contained in sub-section (5) of section 80IA, while computing profits from eligible business for allowing deduction under section 80IB, losses set-off against profits from other business is to be treated as losses being carried forward and after deducting said losses, profit prior to business is to be calculated. [S.80-IA(5)] 1439

In course of appellate proceedings, the Tribunal held that in view of provisions of section 80IA(5), while computing profits from the eligible business for allowing

deduction under section 80IB, the deduction of losses set-off against the profits from other business was to be taken into consideration. The assessee filed instant appeal contending that in view of order passed by the High Court of Madras in the case of *Velayudhaswamy Spinning Mills (P.) Ltd. v. Asstt. CIT [2012] 340 ITR 477*/ holding that once the set-off was taken place in earlier year against the other income of the assessee, the Revenue could not rework the set off amount and bring it notionally, impugned order passed by the Tribunal was not sustainable. The *non obstante* clause in sub-section (5) of section 80-IA overrides all the provisions of the Act. In the absence of non obstante clause, what the judgment of the Madras High Court states is the legal position, because of the *non-obstante* clause, the set-off amount against other income of the assessee has to be ignored and because of the fiction created in the sub-section notionally, the set off losses is to be treated as 'losses being carried forward and after deducting the said losses, the profit prior to business is to be calculated', i.e., precisely what the Tribunal has decided. In view of above, there is no infirmity in the impugned order of the Tribunal and, thus, assessee's appeal has to be dismissed. (AY. 2005-06)
Microlabs Ltd. v. ACIT (2015) 230 Taxman 647 (Karn.)(HC)
Editorial: Ratio in ACIT v. Goldmine Shares and Finance (P) Ltd is affirmed and ratio in Velayudhaswamy Spinning Mills (P.) Ltd. v. Asstt. CIT [2012] 340 ITR 477 (Mad.)(HC) dissented.

1440 **S.80IB : Industrial undertakings – Term "employs ten or more workers in a manufacturing process" - works manager and supervisor who were also counted as worker.**
Where assessee was engaged in manufacturing of certain items and employed 10 workers including works manager and supervisor who were also counted as worker under section 80IB(2)(iv) in said manufacturing process, she was eligible for 80-IB deduction. (AY. 1999-2000 to 2005-06)
CIT v. Bimla Rani (Smt.) (2015) 230 Taxman 629 (P&H)(HC)

1441 **S.80IB : Industrial undertakings – Profits derived from job work contract – Not falling under Explanation to sub-section (13) of section 80IA – Entitled to deduction. [S.80IA(13)]**
The assessee was engaged in the manufacture of automotive components made of aluminum castings. It claimed deduction under section 80IB of the Act on income from works contracts. The Assessing Officer denied the claim on the ground that the nature of the activity of the assessee was job work and, therefore, the Explanation to sub-section (13) of section 80-IA would operate in respect of such a claim. The Commissioner (Appeals) allowed the claim of the assessee taking into consideration that the assessee filed evidence in the form of flow charts, photographs of the various stages of manufacture, raw material used and final products which confirmed the fact that the end product was distinct from the raw material used. The Tribunal held that sub-section (13) of section 80-IA, which is relatable to enterprises falling under sub-section (4) of section 80-IA, was not applicable to a claim under section 80-IB. On appeal :
Held, dismissing the appeal, that even assuming that certain clauses of section 80-IA were made applicable by virtue of sub-section (13) of section 80-IB, the provision is

applicable only in respect of sub-section (5) and sub-sections (7) to (12) of section 80-IA and not in relation to sub-sections (4) and (13) of section 80-IA. Therefore, as the claim of the assessee did not fall under the Explanation to sub-section (13) of section 80-IA. (AY. 2002-03 to 2004-05)
CIT v. Light Alloy Products Ltd. (2015) 373 ITR 322 / 233 Taxman 405 (Mad.)(HC)

S.80IB : Industrial undertakings – Manufacturing of cycle parts – Job work – Entitle deduction. 1442
Assessee was engaged in business of manufacturing of cycle parts. Assessee was entitled to deduction under section 80-IB on income earned from job work carried out by assessee even if same did not form part of income derived from industrial undertaking. (AY. 2007-08)
CIT v. Saimbhi Cycles & Auto Industries (2015) 229 Taxman 552 (P&H)(HC)

S.80IB : Industrial undertakings – Workers employed for less than four months – Condition was not satisfied – Deduction was held to be not allowable. [S.80IB(2)(iv)] 1443
Most of the workers had only worked for three to four months during the entire year except the two employees/workers; therefore, the condition specified in section 80IB(2)(iv) requiring employment of ten or more workers in the process carried out could not be said to have been complied with.(AY. 2003-04)
CIT v. Indus Cosmeceuticals (2015) 273 CTR 168 / 229 Taxman 246 (HP)(HC)

S.80IB : Industrial undertakings – Manufacture – Conversion of heena leaves into herbal heena powder amounts to manufacture. [S.80-IB(4)] 1444
Conversion of heena leaves into herbal heena powder amounts to manufacture as the end produce is different from the original raw material. Hence, deduction u/s. 80IB(4) is allowable. (AY. 2003-04)
CIT v. Indus Cosmeceuticals (2015) 273 CTR 168 / 229 Taxman 246 (HP)(HC)

S.80IB : Industrial undertakings – Refund of excise duty – Eligible deduction [S.41(1)] 1445
Where assessee was refunded excise duty which was integrally connected with manufacturing and sale of goods produced by assessee and same was a refund of an amount already paid by assessee and reduced from sale price while computing profit, said refund was to be treated as part of business profit under section 41(1)(a) and assessee was eligible for deduction under section 80IB (AY. 2008-09, 2009-10)
Dy. CIT v. Coromandel International Ltd. (2015) 68 SOT 226 (Hyd.)(URO)(Trib.)

S.80IB : Industrial undertakings – Shifting to new premises and obtaining fresh trade licence for new premises in September, 2002 – Deduction is allowable. 1446
Assessee engaged in manufacturing activity from financial year 2000-01. Assessee shifting to new premises and obtaining fresh trade licence for new premises in September 2002. Condition that assessee should have commenced manufacture prior to March 31, March 2002 was satisfied, hence deduction is allowable.(AY. 2009-10)
ACIT v. Anandamoy Das (2015) 41 ITR 678 (Kol.)(Trib.)

1447 **S.80IB : Industrial undertakings – Submission of Form ITR V beyond 15 days from the date of filing e-return – Deduction was held to be not allowable.[S. 80AC, 139(1)]**
The Tribunal held that on the facts of the case, the requirements of law as per section 80AC r.w.s. 139(1) and 139(IB) are not satisfied and therefore assessee's claim of deduction under section 80IB is not allowable. (A.Y. 2008-09)
Dwarkadas G. Panchmatiya v. ACIT (2015) 153 ITD 625 / 172 TTJ 70 / 122 DTR 409 / 44 ITR 74 (Mum.)(Trib.)

1448 **S.80IB : Industrial undertakings – Headoffice expenses – Deduction cannot be reduced by allocating headoffice expenses from eligible units.**
Deduction under section 80IB cannot be reduced by allocating head office expenses to profits derived from eligible units.(AY.2003-04, 2005-06)
Aditya Birla Nuvo Ltd. v. ACIT (2015) 68 SOT 403 (Mum.)(Trib.)

1449 **S.80IB : Industrial undertakings – Initial assessment year – In order to claim SSI units eligibility continues for entire period of claim. [S.80IB(3)(ii)]**
The AO and Commissioner (Appeals) rejected assessee's claim for deduction under section 80IB where assessee did not qualify to be a small scale industrial undertaking in previous year relevant to year under consideration as value of its plant and machinery exceeded ₹ 3 crores. On appeal it was held that in order to claim deduction under section 80IB(3)(ii), eligibility of being SSI unit continues for entire period of claim and not only in initial assessment year. (AY. 2008-09)
Advik Hi tech (P.) Ltd. v. ACIT (2015) 67 SOT 158 (URO)(Pune)(Trib.)

1450 **S.80IB(9) : Industrial undertakings – Commercial production of natural gas – The Explanation to Section 80-IB(9) inserted by Finance (No. 2) Act, 2009 w.r.e.f. 1-4-2000 is *ultra vires* to Article 14 of the Constitution of India – Interpretation of taxing statutes – Rule against retrospectively of provision. [S.80IA, Constitution of India, Article 14]**
The Gujarat High Court had to consider the following issues:
(i) Whether the insertion of the Explanation to Section 80-IB(9) of the Income Tax Act, 1961 by Finance (No.2) Act, 2009 with retrospective effect from 1.4.2000 explaining the meaning of the term "undertaking" is unconstitutional and *ultra vires* to Article 14 of the Constitution of India?
(ii) Whether the insertion of sub clause (iv) in Section 80-IB(9) of the Income Tax Act, 1961, by Finance (No.2) Act, 2009 conferring the benefit of the deduction under this Section to undertakings engaged in commercial production of natural gas in blocks licensed under VIIIth round of bidding provided such commercial production commenced on or after 1.4.2009 results in denial of the benefit of deduction under 80-IB(9) to undertakings engaged in commercial production of natural gas under contracts entered into prior to NELP VIII on an interpretation thereof that the term "mineral oil" would not include natural gas since the benefit was available only to undertakings engaged in commercial production of "mineral oil" rendered the newly added sub-clause (iv) unconstitutional and *ultra vires* Article 14 of the Constitution of India?
(iii) Whether the Petitioner has any accrued or vested right?

HELD by the High Court:
In this backdrop, one has to now consider whether the insertion of Explanation by Finance (No.2) Act, 2009 with retrospective application from 1-4-2000 would be valid and sustainable in law. The above analysis would indicate that though the expression "Undertaking" has not been defined under the Act, it has acquired a well defined meaning through consistent judicial decisions commencing from Textile Machinery case. The expression 'Undertaking' is used in various provisions of the Act, while conferring the benefits under different schemes. It is clear that commercial production of mineral oil happens from every Development Area/Field consisting of a well or cluster of wells with a Development Plan being approved for every Development Area/Field thereby making every Development Area/Field as an independent economic unit. Every Development Area/Field is thus an "Undertaking". The Petitioner placed on record the decision of the ITAT rendered in their own case for the Assessment Year 2001-02. The Respondent contended that this matter is under challenge in appeals before the High Court which are pending. This decision, however, has not been stayed. Looking at the whole conspectus, it is clear that the term "Undertaking" has acquired a consistent statutory meaning. It is true that legislature is entitled to depart from this meaning and can define it the way it chooses to do so. While doing so, it has to resort to the process known to and approved by law. The explanation introduced by Finance Act (No.2) of 2009 is a departure from the settled interpretative meaning given by Courts to the expression 'Undertaking". Any departure, therefore, has to be through the process of validation which has to be notwithstanding any law or decision. The Explanation is not a non-obstante clause, notwithstanding any law or decision, it proceeds under the presumption that an existing ambiguity is sought to be clarified when, in reality, there is none. In fact, the usage of the expression "single" before the term 'undertaking' in the explanation evidences the legal understanding that the undertaking is not synonymous to assessee and an assessee can have more than one undertaking doing the same or distinct business as long as they are independent standalone units. When, clearly there can be separate commercial discoveries for every Development Area/Field which may consists of one well or cluster of wells which makes each Development Area an "Undertaking" and this is as per the Production Sharing Contract (PSC) entered into between the Petitioner and the Central Government, there does not exist any ambiguity under the Act.
Niko Resources Ltd. v. UOI (2015) 374 ITR 369 / 276 CTR 273 / 231 Taxman 100 / 117 DTR 257 (Guj.)(HC)
Gujarat State Petroleum Corporation Ltd. v. UOI (2015) 276 CTR 273 / 117 DTR 257 / 231 Taxman 100 (Guj.)(HC)

S.80IB(10) : Housing projects – Restriction on extent of commercial area in "housing project" imposed w.e.f. 1.4.2005 does not apply to housing projects approved before 1.4.2005 even though completed thereafter 1.4.2005. 1451
The definition of "housing project" was amended w.e.f. 1-4-2005 to provide that the benefit of Section 80-IB(10) would not be admissible to these assessees/developers in case the area utilised for shops and commercial establishments exceeded 5% of the aggregate built-up area of the housing project or 2000 sq. feet, whichever is less. The Bombay High Court held in *CIT v. M/s. Brahma Associates 333 ITR 289 (Bom.)* that as this amendment is prospective and has come into effect from 1-4-2005, this condition

would not apply to those housing projects which had been sanctioned and started earlier even if they finished after 1-4-2005. On appeal by the department to the Supreme Court, the Court had to consider "Whether Section 80IB(10)(d) of the Income Tax Act, 1961 applies to a housing project approved before 31-3-2005 but completed on or after 1-4-2005?" HELD by the Supreme Court dismissing the appeal:

(i) Before 1-4-2005, the legal position was that once the project is sanctioned by the local authority as 'housing project', the extent of area sanctioned for shops and commercial establishments in the said housing project was immaterial and had no bearing. Thus, irrespective of the said of area where shops and commercial establishments were permitted by the local authority in a housing project, it was still treated as housing project and further that while granting 100% deductions, the area covered by shops and commercial establishments was also includible. This position has changed with the insertion of clause (d) to sub-section (10). As per the amendment carried out and made effective from 1-4-2005, even if the local authority had sanctioned larger area for shops and commercial establishment, the benefit of Section 80-IB(10) would not be admissible to these assessees/developers in case the area utilised for shops and commercial establishment exceeded 5% of the aggregate built-up area of the housing project or 2000 sq. feet, whichever is less;

(ii) What follows is that prior to 1-4-2005, these developers/assessees who had got their projects sanctioned from the local authorities as 'housing projects', even with commercial user, though limited to the extent permitted under the DC Rules, were convinced that they would be getting the benefit of 100% deduction of their income from such projects under Section 80-IB of the Act. Their projects were sanctioned much before 1-4-2005. As per the permissible commercial user on which the project was sanctioned, they started the projects and the date of commencing such projects is also before 1-4-2005. All these assessees were made known of the provision by which these projects are to be completed as those dates have been specified from time to time by successive Finance Acts in the same provision Section 80-IB. In these cases, completion dates were after 1-4-2005. Once they arrange their affairs in this manner, the Revenue cannot deny the benefit of this section applying the principle of retroactivity even when the provision has no retrospectivity. Take for example, a case where under the extant DC Rules, for shops and commercial activity construction permitted was, say, 10% and the project was also sanctioned allowing a particular assessee to construct 10% of the area for commercial purposes. The said developer started with its project much prior to 1-4-2005 with the aforesaid permissible use and the construction was at a very advanced stage as on 1-4-2005. Can it be argued by that Revenue that he is to demolish the extra coverage meant for commercial purpose and bring the same within the limits prescribed by the new provision if he wanted to avail the benefit of deduction under Section 80IB(10) of the Act, only because of the reason that the project was not complete as on 1-4-2005? As in such a case he filed his return for an assessment year after 1-4-2005 and for the purpose of assessment of the said return, law prevailing as on that date would be applicable? Answer has to be in the negative on the principle that with the aforesaid planning as per the law prevailing prior to 1-4-2005, these assessees acted and acquired vested right

thereby which cannot be taken away. It is ludicrous on the part of the Revenue authorities to expect the assessees to do something which is almost impossible;

(iii) Can it be said that in order to avail the benefit in the assessment years after 1-4-2005, balconies should be removed though these were permitted earlier? Holding so would lead to absurd results as one cannot expect an assessee to comply with a condition that was not a part of the statute when the housing project was approved. We, thus, find that the only way to resolve the issue would be to hold that clause (d) is to be treated as inextricably linked with the approval and construction of the housing project and an assessee cannot be called upon to comply with the said condition when it was not in contemplation either of the assessee or even the Legislature, when the housing project was accorded approval by the local authorities.

CIT v. Sarkar Builders (2015) 375 ITR 392 / 277 CTR 301 / 119 DTR 241 / 232 Taxman 731 (SC)

Editorial: From the judgment in, ITA No 872 of 2010 dt 22-2-2011 and CIT v. Happy Home Enterprises & Ors (2014) 110 DTR 49 / 271 CTR 524 (2015) 372 ITR 1 (Bom.) (HC), impliedly affirmed.

S.80IB(10) : Housing projects – If the project is approved by local authority as housing project with convenience shopping the assessee is entitled to deduction – Prior to 1-4-2005 – Clause (d) inserted to Section 80IB(10) with effect from 1-4-2005 is prospective and not retrospective and hence cannot be applied for the period prior to 1-4-2005. 1452

All these special leave petitions are filed by the Revenue/ Department of Income tax against the judgments rendered by various High Courts deciding identical issue which pertains to the deduction under Section 80-IB(10) of the Income Tax Act, as applicable prior to 1-4-2005. We may mention at the outset that all the High Courts have taken identical view in all these cases holding that the deduction under the aforesaid provision would be admissible to a "housing project".

All the assessees had undertaken construction projects which were approved by the municipal authorities/ local authorities as housing projects. On that basis, they claimed deduction under Section 80-IB(10) of the Act. This provision as it stood at that time, i.e., prior to 1-4-2005 reads as under: – Section 80-IB(10) [as it stood prior to 1-4-2005]

"(10) The amount of profits in case of an undertaking developing and building housing projects approved before the 31st day of March, 2005 by a local authority, shall be hundred per cent of the profits derived in any previous year relevant to any assessment year from such housing project if,

(a) such undertaking has commenced or commences development and construction of the housing project on or after the 1st day of October, 1998;

(b) the project is on the size of a plot of land which has a minimum area of one acre; and

(c) the residential unit has a maximum built-up area of one thousand square feet where such residential unit is situated within the cities of Delhi or Mumbai or within twenty-five kilometres from the Municipal limits of these cities and one thousand and five hundred square feet at any other place."

However, the Income Tax Authorities rejected the claim of deduction on the ground that the projects were not "housing project" inasmuch as some commercial activity was also undertaken in those projects. This contention of the Revenue is not accepted by the income tax Appellate Tribunal as well as the High Court in the impugned judgment. The High Court interpreted the expression "housing project" by giving grammatical meaning thereto as housing project is not defined under the Income Tax Act insofar as the aforesaid provision is concerned. Since sub-section (10) of Section 80-IB very categorically mentioned that such a project which is undertaken as housing project is approved by a local authority, once the project is approved by the local authority it is to be treated as the housing project. We may also point out that the High Court had made observations in the context of Development Control Regulations (hereinafter referred to as 'DCRs' in short) under which the local authority sanctions the housing projects and noted that in these DCRs itself, an element of commercial activity is provided but the total project is still treated as housing project. On the basis of this discussion, after modifying some of the directions given by the ITAT, the conclusions which are arrived at by the High Court are as follows: –

"30. In the result, the questions raised in the appeal are answered thus: –

a) Upto 31-3-2005 (subject to fulfilling other conditions), deduction under Section 80-IB(10) is allowable to housing projects approved by the local authority having residential units with commercial user to the extent permitted under DC Rules/ Regulations framed by the respective local authority.

b) In such a case, where the commercial user permitted by the local authority is within the limits prescribed under the DC Rules/ Regulations, the deduction under Section 80-IB(10) up to 31-3-2005 would be allowable irrespective of the fact that the project is approved as 'housing project' or 'residential plus commercial'.

c) In the absence of any provisions under the Income Tax Act, the Tribunal was not justified in holding that up to 31-3-2005 deduction under Section 80-IB(10) would be allowable to the projects approved by the local authority having residential building with commercial user up to 10% of the total built-up area of the plot.

d) Since deductions under Section 80-IB(10) is on the profits derived from the housing projects approved by the local authority as a whole, the Tribunal was not justified in restricting Section 80-IB(10) deduction only to a part of the project. However, in the present case, since the assessee has accepted the decision of the Tribunal in allowing Section 80-IB(10) deduction to a part of the project, we do not disturb the findings of the Tribunal in that behalf.

e) Clause (d) inserted to Section 80-IB(10) with effect from 1-4-2005 is prospective and not retrospective and hence cannot be applied for the period prior to 1-4-2005."

We are in agreement with the aforesaid answers given by the High Court to the various issues. We may only clarify that insofar as answer at para (a) is concerned, it would mean those projects which are approved by the local authorities as housing projects with commercial element therein.

There was much debate on the answer given in para (b) above. It was argued by Mr. Gurukrishna Kumar, learned senior counsel, that a project which is cleared as "residential plus commercial" project cannot be treated as housing project and therefore,

this direction is contrary to the provisions of Section 80(I)(B)(10) of the Act. However, reading the direction in its entirety and particularly the first sentence thereof, we find that commercial user which is permitted is in the residential units and that too, as per DCR. Examples given before us by the learned counsel for the assessee was that such commercial user to some extent is permitted to the professionals like Doctors, Chartered Accountants, Advocates, etc., in the DCRs itself.

Therefore, we clarify that direction (b) is to be read in that context where the project is predominantly housing/residential project but the commercial activity in the residential units is permitted. With the aforesaid clarification, we dispose of all these special leave petitions.(AY. 2004-05 to 2005-06)

CIT v. Veena Developers (2015) 277 CTR 197 / 119 DTR 237 / 66 taxmann.com 353 (SC)

Editorial: From the judgment in ITA No. 2630 of 2010 dt 28-2-2011, others and in CIT v. Brahma Associates (2011) 333 ITR 289 (Bom)(HC) is approved.

S.80IB(10) : Housing projects – Completion certificate was issued by the local authority after cut off date but mentioned date of completion of project before cut off date i.e. 27-2-2008, held not entitled to deduction. 1453

Assessee is a partnership firm which is engaged in the business of construction and sale of Houses. The approval was grated by the Municipal corporation for housing project before 31-3-2004. The assessee submitted the application to the Municipal Corporation on 16-1-2008, claiming that the project was completed. The site was inspected by the Inspector of the Municipal Corporation on 27-2-2008, however the completion certificate was not issued before 31-3-2008. The completion certificate was issued by local authority on 4-5-2010 however did not mention the date of completion of the project. Latter in the local authority clarified *vide* letter dated 23-3-2001, that the date of completion was on 27-2-2008. Assessing Officer rejected the claim. Tribunal allowed the claim of assessee. On appeal by revenue allowing the appeal the court held that, completion certificate was issued by the local authority after cut off date but mentioned date of completion of project hence not entitled to deduction. (AY. 2004-05 to 2006-07)

CIT v. Global Reality (2015) 379 ITR 107 / 234 Taxman 677 / 280 CTR 558 (MP)(HC)

Editorial: Judgement in, Global Reality v. ITO (2012) 134 ITD 407 (Indore)(Trib.) is reversed.

S.80IB(10) : Housing projects – Project was completed of all 43 units – Completion certificate was granted only in respect of 20 units – Entitled to deduction in respect of entire project. 1454

The assessee was engaged in the business of development and construction of residential housing project. It claimed deduction with respect to housing project consisting of 43 units which was disallowed on ground that Building Use (BU) permission and completion certificate was granted only with respect to 20 units within a period of four years from date of approval of project by local authority and not with respect to entire housing project consisting of 43 units. On appeal Tribunal allowed the claim of assessee. On appeal by revenue dismissing the appeal the Court held that since assessee had completed construction of all 43 units and had applied for BU permission/completion certificate within 4 years from date of approval by competent authority, it was entitled to

deduction under section 80-IB(10) notwithstanding fact that BU permission was granted with respect to 20 units only, assessee was eligible deduction. (AY. 2007-08)
ITO v. Saket Corporation (2015) 234 Taxman 435 (Guj.)(HC)

1455 **S.80IB(10) : Housing projects – Completion certificate – Delay in issuing certificate by Municipal Corporation – Entitled deduction.**
Dismissing the appeal of revenue the Court held that;
the Explanation is quite clear and did not introduce any uncertainty. In other words, the date of completion of a project has to be the date of issuance of the completion certificate by the Municipal authority. The architect of the project had given a certificate prior to March 31, 2008. The assessee submitted the application to the Municipal authority along with such certificate well in time on March 25, 2008. The Municipal authorities directed the assessee to deposit a certain amount for issuance of completion certificate on March 27, 2008, and the amount was, accordingly, deposited on March 31, 2008. Thereafter, the certificate was issued in October, 2008. This delay could not be attributed to the assessee. Therefore, the project, for which exemption was sought completed prior to March 31, 2008, and entitled to deduction under section 80-IB(10).(AY. 2002-03, 2007-08)
CIT v. Hindustan Samuh Awas Ltd. (2015) 377 ITR 150 / 234 Taxman 743 / (2016) 284 CTR 43 (Bom.)(HC)

1456 **S.80IB(10) : Housing projects – Derived from – Profit relatable to sale of unutilized FSI would not be eligible for deduction.**
Allowing the appeal of revenue the Court held that; Profit relatable to sale of unutilized FSI would not be eligible for deduction. Followed *CIT v. Shreenath Infrastructure (2014) 44 taxmann.com 461 (Guj)(HC)* (AY. 2009-10)
CIT v. Desai Developers (2015) 232 Taxman 490 (Guj.)(HC)

1457 **S.80IB(10) : Housing projects – Even when title of lands had not been passed to assessee [Constitution of India. Article 366(29A(b)]**
Assessee a developer, entered into development agreement with land owners and constructed a housing project at its own risk and cost. Assessee was entitled to benefit under section 80-IB even when title of lands had not been passed to assessee. While construing provisions of Income-tax Act, ordinary meaning of expression 'works contract' is required to be taken and resort cannot be taken as envisaged under relevant Sales Tax Act, which are enacted in context of provision of Article 366(29-A)(b) of Constitution. (AY. 2003-04 to 2005-06)
CIT v. Mangala Properties (P.) Ltd. (2015) 231 Taxman 526 (Guj.)(HC)

1458 **S.80IB(10) : Housing projects – Commercial project on a plot of land of 1.33 acres – Commencement of project on 1-10-1998 and completion on or before 31-3-2008 – Project completion complied with in terms of section 80-IB(10)(d) – Area situated 25 kilometres from limits of Mumbai city – Eligibility for deduction of flat of size of 1,500 square feet approximately – Commercial establishment in project less than 2,000 square feet – Entitled to deduction.**
Held, dismissing the appeals, that the assessee had complied with all the requirements of the provisions of section 80-IB(10) since it had undertaken to commence the

development project on October 1, 1998, and completed the project on or before March 31, 2008. Furthermore, the project completion had been complied with by virtue of section 80-IB(10)(d) on a plot of land which was 1.33 acres. The criteria of the minimum area of 1 acre required under section 80-IB(10)(a) had been complied with. It also complied with section 80-IB(10)(c) since the area was situated within 25 kilometres from the limits of Mumbai city and, therefore, was eligible for deduction of the flat of the size of 1,500 square feet approximately. The Commissioner (Appeals) and the Tribunal also found that the commercial establishment in the project was less than 2,000 square feet. Hence, no fault could be found with the order of the Tribunal. (AY. 2005-06, 2006-07)
CIT v. Suresh L. Wadhwa (HUF) (2015) 374 ITR 541 (Bom.)(HC)

S.80IB(10) : Housing projects – Developer – Land owned by co-operative society – Eligible deduction – Court criticised the approach of revenue and stated that the department is wasting pubic time and money. 1459

The assessee, a developer, claimed deduction for having constructed and developed a housing project. The Assessing Officer rejected such claim on the ground that the assessee was not the owner of land and development permission was also not granted to assessee but to a co-operative housing society who was owner of the said land. The Tribunal deleted disallowance made by the Assessing Officer in view of decision of High Court in *CIT v. Radhe Developers [2012] 341 ITR 403 (Guj.)(HC)*. On appeal, the department contended that development agreement was vitally different from that in Radhe Developers' case (supra) as in that case land owners were individual but in instant case land was owned by a co-operative society.

The distinction presented by the revenue was not even drawn by the Assessing Officer. In the order of assessment all that is recorded is that the department wishes to keep the issue open. Quite apart from not being convinced by any such distinction in law, the factual aspects which the Assessing Officer has not relied upon would not be enough to draw a distinction in a decided issue. All parameters appearing on record are identical to those appearing in Radhe Developers' case (supra). In the result, the appeal was dismissed.

Per Court : When Radhe group of appeals were taken for hearing, the Court had a fond hope that decision of this Court would give a quietus to large number of issues travelling to High Court and hopefully even before the Tribunal. Such hope has been completely belied by litigious approach of the department. Even after the decision of this Court in case of Radhe Developers (supra) and series of SLP being dismissed against the group of appeals, decided in the said judgment, fresh appeals keep coming before the Court on this very issue. Till the appeals were pending before the High Court or even after the judgment was rendered, the department was further contemplating appeals before the Supreme Court, the Court could still appreciate the stand of the Assessing Officer to deny the benefits on the premise that the revenue has not accepted the finality of the view. However, when no further proceedings are available to the revenue, the Supreme Court having finally repelled all such challenges, it is rather unfortunate that even today the appeals still keep travelling before the Court. In fact, the Tribunal's judgment was rendered after the Court's judgment in Radhe Developers' case (supra). This appeal was filed long after the SLPs against such judgment came to be dismissed. In a recent judgment in case of *CIT v. Excel Industries Ltd. [2013] 358 ITR*

295 (SC) the Court severely criticised such litigious approach of the department, for wasting public time and money.
CIT v. Swastik Associates (2015) 231 Taxman 893 (Guj.)(HC)

1460 **S.80IB(10) : Housing projects – Deduction available to assessee even where, after development of infrastructure facility project, the same is transferred to Government for consideration.**
The assessee was engaged in the business of building and developing of housing projects and claimed exemption u/s. 80-IB(10) in respect of profits derived from two housing projects developed and executed for DDA and IRWO. The AO denied exemption on the ground that the assessee merely executed the contract work awarded to it by the principals, i.e., DDA and IRWO and there was, consequently, no development of building of housing project. The CIT(A) and the Tribunal held that ownership was not a pre-condition for claim of deduction and hence allowed the assessee's appeal.
The High Court dismissed the departmental appeal and observed that the mere circumstance that the Indian Railways or DDA paid for development of a housing project carried out by the assessee, did not mean that the assessee did not develop the residential complex. The High Court, accepting the stand of the Tribunal, held that the assessee had worked as a developer and not merely as a work contractor and since ownership of the project was not provided as a precondition for the claim of deduction u/s. 80-IB(10), the assessee was entitled to deduction u/s. 80-IB(10). (AY. 2002-03 to 2005-06)
CIT v. VRM India Ltd. (2015) 375 ITR 414 / 118 DTR 225 / 231 Taxman 675 / 280 CTR 36 (Delhi)(HC)

1461 **S.80IB(10) : Housing projects – Plot must have minimum area of one acre – Composite housing scheme consisting of six blocks in area exceeding one acre – Separate plan permits obtained for six blocks – Not ground for denial of deduction – Entitled to deduction. [S. 263]**
The Assessing Officer disallowed the deduction granted earlier to the assesse in pursuance of order passed u/s. 263. The Commissioner (Appeals) upheld the findings of the Assessing Officer. The Tribunal held that the assessee had developed a project in a land measuring 1 acre and 6.5 cents and allotted 1.022 sq. ft. of undivided share of land to each of the 48 allottees and, hence, the assessee was entitled to the benefit of section 80-IB(10) as a composite scheme. On appeal :
Held, dismissing the appeal, that there was no dispute in the approval granted by the CMDA in respect of the composite housing scheme. When the Legislature introduced 100 per cent deduction it was known that the local authorities could approve a housing project to the extent permitted under the Development Control Rules. When the project fulfilled the criteria for being approved as a housing project, the deduction could not be denied under section 80-IB(10) merely because the assessee had obtained a separate plan permits for the six blocks. If the conditions specified under section 80-IB are satisfied, then deduction is allowable on the entire project. Since the project was approved in accordance with the Development Control Rules, the assessee would be entitled to 100 per cent deduction on the entire project approved by the local authority. The assessee

constructed six blocks in a land measuring one acre and 6.5 cents which admittedly exceeded the required area specified in clause (a) sub-section (10) of section 80-IB, viz., one acre. Therefore, the assessee was entitled to deduction. (AY. 2007-08)
CIT v. Voora Property Developers P. Ltd. (2015) 373 ITR 317 (Mad.)(HC)

S.80IB(10) : Housing projects – Land not owned by assessee – Eligible to deduction – Car parking area is not includible in the "built-up area". 1462
Dismissing the appeal of revenue the Court held that; for claiming deduction it is not necessary that the assessee, who is engaged in the business of developing and construction of housing project should be the owner of the land. Car park area is not includible in the "built-up area" of the residential unit for the purpose of determining the maximum built up-area under section 80-IB(10) (AY. 2004-05)
CIT v. Subba Reddy (HUF) (2015) 373 ITR 103 / 278 CTR 252 / 231 Taxman 397 (Mad.) (HC)

S.80IB(10) : Housing projects – Where petitioner barely raising infrastructural facilities was not entitled to deduction u/s. 80-IB(10) and could not have raised any substantial question of law. [S.260A] 1463
The petitioner was a private limited company engaged in the business of real estate and construction of residential/housing projects only creating infrastructural development. The AO held that the petitioner was not entitled to claim deduction under section 80-IB (10) as they had not constructed residential flats on the plots. The CIT(A) and Tribunal upheld the order of AO. On further appeal, the High Court also dismissed the appeal of the petitioner. Thus, the petitioner sought review of the aforesaid judgment passed stating that the appeal filed by them raises substantial question of law.
The High Court held that the infrastructural development had been done by the petitioner, that also permitted deduction under the provisions contained under section 80-IB(10), which is not tenable since the entire controversy raised by the petitioner was factual in nature and does not contain any legal issue. (Review Petition No. 79 of 2014 dated 14-3-2014) (AY. 2008-09)
Navratna Techbuild (P.) Ltd v. CIT (2014) 224 Taxman 72 (Mag.) / (2015) 113 DTR 393 / 274 CTR 270 (MP)(HC)

S.80IB(10) : Housing projects – Definition of built-up area with effect from 1-4-2005 not retrospective in operation – Super built-up area cannot be equated with built-up area – Entitled to exemption. 1464
Dismissing the appeal of revenue the Court held that the housing project does not include commercial premises. The concept of "super built-up area" was used by builders to get a higher price and included the common area of the stair-case and the balcony area. Since the super built-up area cannot be equated with built-up area it could not be stated that the area of the flat was more than 1,500 sq. ft. The words "including projections and balconies" inserted with effect from April 1, 2005, by the Finance Act, 2004, would not apply to projects completed prior to April 1, 2005. There were no distinguishing features brought on record which called for any interference. The Tribunal's view was a well-reasoned and could not be said to be perverse. In the present

set of facts, even if the definition of built-up area was considered it made no difference to the assessee's case. (AY. 2006-07)
CIT v. Hermes Developers (2015) 370 ITR 38 / 274 CTR 113 / 113 DTR 100 / 56 taxmann.com 50 (Bom.)(HC)

1465 **S.80IB(10) : Housing project – Commercial area was 3,906 sq.ft – Exemption was allowed on entire project except excess commercial area of 1906 sq.ft.**
The assessee was engaged in the business of construction and sale of apartments. It claimed deduction u/s. 80-IB(10) of the Act. AO held that the commercial area as 3906 sq. ft which is more than 2000 sq. ft. permitted by the Act hence denied the exemption. On appeal CIT(A) held that the assessee is entitled the deduction on *pro rata* basis.
On appeal by revenue the Tribunal held that only condition which assessee failed to fulfil was with respect to maximum limit of commercial area in a housing project, i.e., 2000 sq. ft.. In housing project under consideration, area allocated for commercial purpose was 3906 sq. ft. Since there was a partial compliance, deduction under section 80-IB(10) was allowable on *pro rata* basis and, thus, assessee was entitled to deduction under section 80-IB on entire project except profit element in respect of area of 1906 sq. ft. (AY. 2006-07 to 2008-09)
Dy. CIT v. Rajarathnam Construction (P.) Ltd. (2014) 33 ITR 466 / (2015) 68 SOT 41 (URO) (Chennai)(Trib.)

1466 **S.80IB(10) : Housing projects – Development of housing project on part of the land allocated by the society – Deduction is held to be available.**
The assessee firm carries the business of construction and development of housing projects. During the period under consideration the assessee undertaken construction of housing project known as "Madhav Park". A search took place in the business premises and residential premises of the partners of the assessee. During the search certain incriminating materials were found and thereafter notice under section 153A(1)(a) was served to the assessee requesting to file block return of income. The assessee filed it return of income declaring Nil income claiming deduction under section 80-IB(10) for A.Y. 2008-09. The Assessing Officer vide its assessment order passed under section 143(3) r.w.s. 153A and rejected the claim of deduction under section 80-IB (10) considering the assessee firm as a "contractor" and not as a "developer" as the land on which project was carried was not owned by the assessee. On appeal, the learned CIT(A) upheld the action of the Assessing Officer on appeal, the Appellate Tribunal observed that the assessee was entrusted area of 14,843.27 sq. mtrs out of total area of 16,815 sq. mtrs to develop 74 residential tenements. The separate development permission as well as BU permission were accorded to carry out the said activity. Therefore, the provisions of section 80-IB(10) has to be looked on the basis of piece of land allotted to the assessee on which the activity of construction was carried. Hence, the claim of the assessee cannot be negated on the ground that some portion was constructed by other firm assigned by the society. Thus, the assessee fulfills all the conditions laid down in section 80-IB(10) and therefore eligible for deduction under section 80-IB(10). (AY 2006-07 to 2008-09)
Madhav Corporation v. ACIT (2015) 44 ITR 193 (Ahd.)(Trib.)

S.80IB(10) : Housing projects – To be the "developer" of a housing project, the assessee has to undertake the entrepreneurship risk in execution of the project. He need not be the owner of the land – Entitled to deduction. 1467

In order to answer the question as to whether the condition precedent for deduction under section 80-IB has been satisfied inasmuch as whether or not the assessee is engaged in "developing and building housing projects", all that is material is whether assessee is taking the entrepreneurship risk in execution of such project. When profits or losses, as a result of execution of project as such, belong predominantly to the assessee, the assessee is obviously taking the entrepreneurship risk *qua* the project and is, accordingly, eligible for deduction under section 80-IB(10) in respect of the same. The assumption of such an entrepreneurship risk is not dependent on ownership of the land. The business model of "developing and building housing projects" by buying, on outright basis, and constructing residential units thereon could probably be the simplest business models in this line of activity, but merely because there is an improvisation in the business model or because the assessee has adopted some other business models for the purpose of developing and building housing project does not vitiate fundamental character of the business activity as long as the risks and rewards of developing the housing project, in substance, remain with the assessee. It is difficult, if not altogether impossible, to visualize all the business models that an assessee may use in this dynamic commercial world even as, in substance, the fundamental character of the business remains the same, but certainly such modalities or complexities of business models cannot come in the way of eligibility for an incentive which is for the purpose of 'developing and building a housing project'. There is no justification, conceptual or legal, in restricting eligibility of deduction under section 80-IB(10) to any particular business model that an entrepreneur adopts in the course of developing and constructing housing project. (AY. 2006-07)

Shri Umeya Corporation v. ITO (Ahd.)(Trib.); www.itatonline.org

S.80IB(10) : Housing projects – Allotment of two residential units to one single individual – Amendment with effect from 1-4-2010 restricting allotment of more than one residential unit to same person – Housing units allotted to purchasers prior to amendment – Entitled to deduction. 1468

The assessee was engaged in the business of development and construction of housing projects. The assessee claimed deduction under section 80-IB(10) of the Income-tax Act, 1961. The Assessing Officer rejected the claim of the assessee on the ground that the assessee had allotted two residential units to one single individual in the housing project in violation of conditions prescribed under section 80-IB(10)(f)(iii) of the Act. The Commissioner (Appeals) confirmed the order of the Assessing Officer. On appeal: Held, allowing the appeal, that the amendment in sections 80-IB(10)(e) and (f) of the Act, restricting allotment of more than one residential units in the housing project to the same person came into force with effect from April 1, 2010, inserted by the Finance (No. 2) Act, 2009. However, the payments towards allotted residential units had been made by way of cheques on September 2009 and October 2009 itself, except the amount of ₹3 lakhs which was paid on March 31, 2010. Therefore the payments were made even before the amendment came into force. The authorities were not justified in rejecting the claim of deduction under section 80-IB(10) of the Act on the basis of a condition created

by a provision which came into force subsequent to the allotment of the residential units. (AY. 2010-11, 2011-12)
Patel Jashwantlal A v. ITO (2015) 38 ITR 135 (Ahd.)(Trib.)

1469 **S.80IB(10) : Housing projects – Completion certificate – Deduction cannot be denied on the ground that the completion certificate has not been issued by the Municipality if the assessee has completed construction before the due date.**
Tribunal held that, (ii) Explanation (ii) to section 80IB(10)(a) of the Act prescribes that the date of completion of construction of the housing project shall be taken to be the date on which the completion certificate in respect of such housing project is issued by the local authority. In the present case, the local authority, i.e. Pune Municipal Corporation has not issued the requisite completion certificate (to be understood as occupancy certificate in the context of the PMC) before the stipulated date. However, the assessee has countered the aforesaid objection by pointing out that infact it has completed the construction of the project on 4-12-2007 i.e. much before the stipulated date of completion contained in section 80-IB(10)(a) of the Act, it had applied to the PMC for obtaining of the occupancy certificate based on the certificate of the architect and the other NOCs required for the said purpose. The CIT(A) has also called for information u/s.133(6) of the Act from the PMC and its response did not reveal any objection on the part of the PMC that the construction was not complete with respect to the sanctioned plans. Therefore, factually speaking, there is no controversion to the assertions of the assessee that its project was otherwise complete as per the sanctioned plans within the stipulated date. In this background, in our view, the CIT(A) made no mistake in allowing the claim of the assessee and her approach is not only consistent with the decision of the Pune Bench of the Tribunal in the case of Satish Bora and Associates but it is also in line with the judgment of the Hon'ble Gujarat High Court in the case of *CIT v. Tarnetar Corporation, (2014) 362 ITR 174 (Guj).* (AY. 2009-10)
Gera Development Pvt. Ltd. v. JCIT (2015) 70 SOT 418 / 169 TTJ 181 (Pune)(Trib.)

Section 80IC : Special provisions in respect of certain undertakings or enterprises in certain special category States.

1470 **S.80IC : Special category States – Not entitled to benefit in respect of sales tax rebate obtained by it.**
Allowing the appeal of revenue the Court held that the assessee was not entitled to benefit in respect of sales tax rebate obtained by it. (AY. 2007-08)
CIT v. H.M. Steels Ltd. (2015) 234 Taxman 615 (P&H)(HC)

1471 **S.80IC : Special category States – Manufacture – Route Markers – Entitled to deduction.**
Manufacturing of 'Route Markers' by undertaking process of cutting stainless steel pipes of larger sizes with electric cutter including painting and welding of pipes, would amount to 'manufacture or production' entitling assessee to deduction. (AY. 2006-07)
CIT v. Megha Dadoo (Ms.) (2015) 232 Taxman 419 (HP)(HC)

S.80IC : Special category States – Industrial undertaking – Interest income – Deduction is not available in respect on fixed deposits. 1472

Deduction is not available in respect on fixed deposits.(AY.2007-08)

CIT v. Reckitt Benckiser (India) Ltd. (2015) 122 DTR 332 / 231 Taxman 585 (Cal.)(HC).

S.80IC : Special category States – Industrial undertaking – Sale of scrap – T&M fee – Eligible to deduction. 1473

Court held that the Tribunal was justified in allowing deduction on account of scrap sales and T&M fee. (AY.2007-08)

CIT v. Reckitt Benckiser (India) Ltd. (2015) 122 DTR 332 / 231 Taxman 585 (Cal.)(HC).

S.80IC : Special category States – Manufacture – Paper insulated wires and strips of copper and aluminium – Entitled to deduction. 1474

Where paper insulated wires and strips of copper and aluminium being manufactured by assessees were commercially different from its raw material and further it was commercially known different in market, same was manufactured in terms of section 80-IC and therefore assessees were entitled to deduction under said section.

CIT v. Pawan Aggarwal (2014) 272 CTR 33 / (2015) 231 Taxman 652 (HP)(HC)

S.80IC : Special category States – New unit – Purchase of some plant and machinery from old firm will not amount to reconstruction – Entitled exemption. 1475

In new partnership firm was formed by the same partners by splitting up the business of an existing partnership and which utilizes the infrastructure and employees of the existing firm, would be entitled to first year of deduction u/s. 80-IC. The HC dismissed revenues appeal and held that assessees firm had different PAN, separate registration under HP State Industrial Development Corporation and department of industries as small scale industry, at different location on a different plot. New unit cannot be even presumed as reconstruction of the old existing up the existing undertaking shifting of the employees from the old firm would not affect the constitution of the new firm to avail the benefit u/s. 80-IC.(A Y. 2007-08)

CIT v. Yash International Inc (2015) 273 CTR 38 / 231 Taxman 890 (HP)(HC)

S.80IC : Special category States Industrial undertaking – LCD monitors – Description of information and communication technology devices – Assessing Officer without rejecting the accuracy of books of account or inspecting wages paid, electricity bills generated, nature of plant and machinery rejecting assessee's claim to deduction – Rejection of claim merely on doubts and surmises – Assessee entitled to deduction. 1476

Held, dismissing the appeal, that the LCD monitors did answer the description of information and communication technology devices and, therefore, would attract the benefit of exemption under section 80-IC, provided other statutory conditions are fulfilled. The Assessing Officer had proceeded more on the basis of doubts entertained by him as to the genuineness of the claim rather than some concrete material. If he had any reasons to disbelieve the correctness of the claim about the manufacturing activity (on the basis of considerations such as wages paid, electricity bills generated, the nature of the plant and machinery, etc.), the least that he could have done was to have the

manufacturing unit of the assessee inspected. For such purposes, he only had to have recourse to his statutory powers under the law. Without having undertaken any such exercise or rejecting the accuracy of the books of account, adverse conclusions on facts as reached could not have been drawn. The assessee was entitled to deduction under section 80-IC. (AY. 2009-10)
CIT v. Tej Pal Singh Kohli (2015) 371 ITR 11 / 231 Taxman 399 / 122 DTR 269 / 279 CTR 82 (Delhi)(HC)

1477 **S.80IC : Special category States – Air purification system – Even though assessee carrying out assembling and manufacturing of air purifiers by using simple tools and testing equipments, it would be entitled to deduction.**
The assessee, engaged in business of manufacture of healthcare and surgical items, had set up a manufacturing unit for manufacture of air purification systems. It procured various parts/components of air purification system from different vendors and assembled the same at the facility. The assessee claimed deduction. The AO denied deduction holding that the aforesaid activities would not qualify as 'manufacturing activity,' as the assessee was merely a assembler and did not have requisite tools or machinery. On appeal, the CIT(A) allowed the assessee's claim. The Tribunal upheld the order of the CIT(A) On revenue's appeal to the High Court:
The finding of the appellate authorities including the Tribunal is that the product produced and sold by the assessee was air purification system. For manufacturing the said product, the assessee had purchased parts like base motors, filters, UV lights, etc., but the final product produced was entirely different from its constituents or parts. The product manufactured or produced, i.e., the air purifier or air purification system, was completely a new and an entirely different commodity having distinct name, character and use. The assessee had filed a flow chart of the manufacturing process. The manufacturing unit stood registered with District Industries Centre, Roorkee, Pollution Control Department, Commercial Tax Department, Uttaranchal, etc. Order of Tribunal was upheld. (AY. 2006-07, 2008-09, 2009-10)
CIT v. Faith Biotech (P.) Ltd. (2015) 229 Taxman 451 (Delhi)(HC)

1478 **S.80IC : Special category States – Transport & Interest Subsidy is derived from industrial undertaking – Eligible to deduction.**
Transport subsidy and interest subsidy is income derived from industrial undertaking eligible for deduction under section 80-IC. (AY. 2005-06)
Manas Salt Iodisation Industries (P) Ltd. v. ACIT (2015) 169 TTJ 172 / 38 ITR 502 (Gau.) (Trib.)

1479 **S.80IC : Special category States – Transport subsidy, interest subsidy, insurance subsidy and power subsidy – Direct nexus with profits and gains derived by industrial undertaking – Deduction under section 80-IC is allowable on the same.**
The Appellate Tribunal held that amount of transport subsidy, interest subsidy, insurance subsidy and power subsidy would reduce cost of production of an industry and there is direct nexus between said subsidies and profits and gains derived by

industrial undertaking, deduction under section 80-IC has to be granted in respect of subsidies so received. (AY. 2008-09, 2009-10)
Meghalaya Mineral Products v. ACIT (2015) 168 TTJ 9 (UO) / 38 ITR 186 (Gau.)(Trib.)

S.80IC : Special category States – Initial assessment year – The benefit of "substantial expansion" is applicable to units which were in existence at the time of announcement of scheme i.e. in AY 2004-05. Assessees who installed new units during this period and are now going for substantial expansion are not eligible to claim deduction u/s. 80IC. 1480
Section 80-IC was inserted by the Finance Act 2003 w.e.f. 1-4-2004 and provides that any undertaking or enterprise which has begun or being to manufacture or produce any article or thing not being any article or thing, not being any article or thing specified in the 13th Schedule and undertakes substantial expansion during the period beginning 7th day of January, 2003 and ending before the 1st day of April, 2012 in the State of Himachal Pradesh shall be entitled to 100% of such profits and gains for five assessment years connecting with the initial assessment year and thereafter 25% (or 30% where the assessee is a company) of the profits and gains. The assessee's unit started commercial production from 17-1-2004. The assessee claimed deduction u/s. 80IC on the products of this unit @ 100% from assessment years 2004-05 to 2008-09. Subsequently, during financial year 2008-09, the assessee undertook substantial expansion by way of addition to plant and machinery by more than the prescribed limit. On the basis of the substantial expansion, the assessee again started claiming deduction u/s. 80IC from assessment year 2009-10 @ 100%. The AO held that since the assessee has already claimed 100% deduction for first five years upto assessment year 2008-09 from the date of setting up of the unit, the assessee was entitled only to 25% deduction from the eligible business profits from assessment years 2009-10 to 2013-14. This was upheld by the CIT(A). On appeal by the assessee to the Tribunal HELD dismissing the appeal:
(i) Liberal interpretation of an incentive provision is possible if there is any doubt. If the various sub-sections of section 80-IC are read carefully it leaves no doubt that deduction was meant only for new units or in case of old units if substantial expansion was carried out in such old units and deduction was available only for a period of 10 years. Therefore, there is no question of giving any interpretation much less liberal interpretation to section 80-IC when the reading of whole section makes the provision very clear. As observed in case of *M/s. Novapan India Ltd. v. Collector of Central Excise and Customs Appeal (Civil) 3356 of 1984* the burden was on the assessee to show under which clause he was entitled to the deduction but assessee is simply asserting before us that there is no restriction for deduction in case of substantial expansion of new units. In our opinion, that is not enough because absence of restriction does not mean that particular deduction was allowable.
(ii) If interpretation given by the assessee is to be accepted, the provision would become discriminatory for two classes of undertakings i.e. new units and old units. Because the old units would be entitled to 100% deduction on expansion for first five years and 25% thereafter whereas the new units would become entitled to deduction for 100% for first five years and again @ 100% on substantial expansion. Such discriminatory

intention cannot be imputed to the Legislature. (ITA No. 798/Chd/2012, dated 27-5-2015) (AY. 2009-10)
Harcron Electronics v. ITO (Chd.)(Trib.); www.itatonline.org
Stove Kraft India v. DCIT (Chd.)(Trib.); www.itatonline .org
Vanser Metallics v. ITO (Chd.)(Trib.); www.itatonline.org
Sansui Electronics v. DCIT (Chd.)(Trib.); www.itatonline.org
Lyon DC v. ITO (Chd.)(Trib.); www.itatonline.org
Cutting Edge Technologies v. ACIT (Chd.)(Trib.); www.itatonline.org
UPS Invertor.com v. ITO (Chd.)(Trib.); www.itatonline.org
Rakesh Verma v. ITO (Chd.)(Trib.); www.itatonline.org
Uska Electricals v. ITO (Chd.)(Trib.); www.itatonline.org
Digital Systems Inc v. ITO (Chd.)(Trib.); www.itat.online.org
Adamac Formulations v. ITO (Chd.)(Trib.); www.itatonline.org
Vipan Gupta v. ITO (Chd.)(Trib.); www.itatonline.org

1481 **S.80IC : Special category States – Profits of undertaking – Subsidies such as transport, power, interest and insurance are part of business profits and gains from industrial undertaking – Deduction allowable.**
Held, allowing the appeal, that subsidies such as transport, interest, insurance and power were received to be a part of the business profits and gains from the industrial undertaking in accordance with law. Deduction was to be allowed in respect thereof under section 80-IC of the Income-tax Act, 1961. (AY. 2008-09, 2009-10)
Meghalaya Mineral Products v. A CIT (2015) 38 ITR 186 / 168 TTJ 9 (UO)(Gau.)(Trib.)

Section 80J : Deduction in respect of profits and gains from newly established industrial undertakings or ships or hotel business in certain cases.

1482 **S.80J : Industrial undertaking – Film production – Manufacturing activity – Entitled to deduction.**
On reference held that the activities of production of a film amounted to manufacturing of an article or goods. The activities be treated as those of an industrial undertaking within the purview of section 80J. Even otherwise, film production had to be considered as a manufacturing activity and the undertaking as an industrial undertaking as the activity is considered under the excise law and other allied laws also. Whether the assessee satisfied the conditions of section 80-J, as it then stood, had to be ascertained by the authorities. (AY. 1981-82)
CIT v. Rupam Pictures P. Ltd. (2015) 374 ITR 450 (Bom.)(HC)

Section 80JJ : Deduction in respect of profits and gains from business of poultry farming.

1483 **S.80JJ : Dairy farming – Income derived from after sale services was connected to that of sale proceeds of chicks – Eligible for deduction.**
Assessee was a hatchery and sold one day old chicks to poultry farms. It also provided after sale services to purchasers in context of providing feed, administering medicines and taking various precautionary measures so that optimum result was procured. It

claimed deduction in respect of income derived from sale of chicks as well as services rendered therefore. AO restricted benefit only to profit derived from sale of chicks. In appeal the claim of assessee was allowed by CIT(A) and Tribunal. On appeal by revenue the Court held that income derived from after sale services was connected to that of sale proceeds of chicks and, therefore, assessee was eligible for deduction in respect of profits and gains derived from after sale services as well. (AY. 1993-94 and 1994-95)
CIT v. Singh Poultry Ltd. (2015) 229 Taxman 543 (AP)(HC)

Section 80M : Deduction in respect of certain inter corporate dividends.

S.80M : Inter corporate dividends – Net dividend which required to be taken. [S.80AA] 1484
Held, allowing the appeal it is the net dividend which is required to be taken into account under section 80M read with section 80AA. (AY. 1994-95)
Eicher Goodearth Ltd. v. CIT (2015) 378 ITR 28 / 233 Taxman 285 (Karn.)(HC)

S.80M : Inter corporate dividends – Deduction is to be allowed with reference to net income rather than gross dividend income. 1485
Allowing the appeal of revenue the Court held that deduction is to be allowed with reference to net income rather than gross dividend income.(AY. 1989-90)
CIT v. Highway Cycle Industries Ltd. (2015) 232 Taxman 302 (P&H)(HC)

S.80M : Inter corporate dividends – No expenditure was incurred – No disallowance can be made on assumptions. 1486
When no expenditure are shown to have been incurred by assessee for earning gross dividend income, deduction under section 80M cannot be curtailed to reduce amount qualifying for claim of deduction under section 80M by assuming amount of expenditure, which is assumed to have been incurred by assessee. (AY. 1997-98)
United Phosphorus Ltd. v. Addl.CIT (2015) 230 Taxman 596 (Guj.)(HC)

S.80M : Inter corporate dividends – Deduction under S. 80M to be computed without reducing from the dividend income, the amount of deduction under S. 36(1)(viii). [S. 36(1)(viii)] 1487
Assessee in its return of income claimed deduction as per s. 36(1)(viii) as well as s. 80M. The AO while computing the deduction under s. 80M, was of the opinion that once the deduction under s. 36(1)(viii) was allowed on income that included dividend income, the gross dividend should be reduced by 40% to compute the net dividend income for determining the deduction under s. 80M. On appeal, the High Court held that as per s. 80B(5) "gross total income" means total income computed as per provisions of the Act but before any deduction under Chapter VI-A. The gross total income would be income computed as per s. 28 after allowing deduction under s. 36(1)(viii) plus other incomes, on which deduction under s. 80M would be computed. The deduction allowed under s. 36(1)(viii) ceased to be a part of the gross total income, and hence there was no question of double deduction or multiple deduction of the same income, while computing the deduction under s. 80M. (AY. 1986-87)
CIT v. Industrial Finance Corporation of India Ltd. (2015) 114 DTR 407 / 231 Taxman 648 (Delhi)(HC)

1488 **S.80M : Inter corporate dividends – Sale of shares at reduced price as per the contract – Entitled to deduction in respect of dividend received.**

Assessee-company purchased UTI shares. Later on assessee entered into a contract to sell shares at then prevailing price. In meantime, assessee obtained dividends on said shares and, therefore, it had to sell shares at reduced price being contracted price minus dividend earned. The assessee claimed deduction under section 80M, which was disallowed. On appeal allowing the claim of assessee the Court held that though contract was entered into, it was not specifically performed and there was an alteration of contract inasmuch as assessee obtained dividends; hence, assessee was entitled to deduction in respect of dividend received.

Maud Tea & Seed Co. Ltd. v. CIT (2015) 370 ITR 603 / 273 CTR 590 / 113 DTR 353 / 232 Taxman 244 (Cal.)(HC)

Section 80O : Deduction in respect of royalties, etc., from certain foreign enterprises.

1489 **S.80O : Royalties – Foreign enterprises – Proof or evidence of use of patent by collaborators was not placed on record – Disallowance of claim was held to be justified.**

Dismissing the appeal the Court held that, where beyond placing agreements with a party in Malaysia proof or evidence of use of patent by collaborators outside India was not placed before authorities, deduction under section 80-O was rightly denied. (AY. 1998-99)

Crompton Greaves Ltd. v. ACIT (2015) 230 Taxman 509 (Bom.)(HC)

1490 **S.80O : Royalties – Foreign enterprises – Remuneration from foreign enterprise – Assessee conducting services for benefit of foreign companies – Services rendered "from India" and "in India" – Distinction – Report of survey submitted by assessee not utilised within India though received by foreign agency in India – Mere submission of report within India does not take assessee out of purview of benefit – Entitled to deduction.**

The assessee was an agency undertaking the activity of conducting services for the benefit of foreign companies or agencies. After conducting a survey on the assigned subject, the reports were submitted to the foreign agencies. The assessee, claimed deduction under section 80-O. The Assessing Officer denied the deduction on the ground that the survey report was submitted in India and thereby section 80-O was not attracted. However, the appellate authorities allowed the claim under section 80-O. On appeal : Held, dismissing the appeal, that it was not the case of the Revenue that the report of survey submitted by the assessee was utilised within India, though it was received by the foreign agency within India. It is only when it was established that the survey report submitted to a foreign agency was, in fact, used or given effect to, in India, that the assessee becomes ineligible for deduction. The mere fact that the submission of the report was within India, did not take away the matter from the purview of section 80-O. If that was to be accepted, the very purpose of providing the Explanation becomes redundant. Thus, the assessee was entitled to deduction under section 80-O. (AY. 1994-95)

CIT v. Peters and Prasad Association (2015) 371 ITR 206 / 232 Taxman 350 / 124 DTR 45 (T&AP)(HC)

S.80O : Royalties – Foreign enterprises – Gross total income – Chapter VI-A deductions are not limited to the business profits but are available to the extent of the gross total income.[S.80B(5)] 1491

The AO determined the deduction u/s. 80O at ₹ 1,29,41,830. However, though the gross total income was higher, he held that the deduction had to be confined to the extent of business income of ₹ 69,70,127. This was reversed by the Tribunal. On appeal by the department to the High Court HELD dismissing the appeal:

The only question sought to be canvassed is that out of these deductions the admissible deduction under section 80O ought to be limited to the extent of ₹ 69,70,127 which represents business income. In other words, the income from interest and dividend shall not form part of the gross total income as defined under section 80B(5) of the Act. The submission is misconceived. If one turns to the definition of the "gross total income" under section 80B(5), it reads as under:

"80B(5) "gross total income" means the total income computed in accordance with the provisions of this Act, before making any deduction under this Chapter."

Considering the definition of the gross total income, it is difficult to hold that the interest income and the dividend in come would not form part of the gross total income computed in accordance with the provisions of the Act. The view taken by the Tribunal, in our considered view, is in consonance with what is stated herein. No substantial question of law is involved. In the result, appeal is dismissed in limine with no order as to costs. (ITA No. 3224 of 2009, dated 18-10-2010)

CIT v. J. B. Boda & Co. P. Ltd. (Bom.)(HC), www.itatonline.org

Section 80P : Deduction in respect of income of co-operative societies.

S.80P : Co-operative societies – Appeal against notice for reassessment to deny deduction on ground assessee not a banking company – Meanwhile Tribunal in proceedings arising out of reassessment holding in favour of assessee – Appeal dismissed as infructuous – Question of law left open. [S. 80P(2)(a)(i)] 1492

The assessee, engaged in the business of banking, filed an appeal from the order of the High Court dismissing its writ petition against a notice for reassessment proposing to deny it exemption from tax under section 80P(2)(a)(i) of the Income-tax Act, 1961, for the assessment year 1999-2000 on the ground that the assessee was not a banking company registered under the Banking Regulation Act, 1949. During the pendency of the appeal, the Assessing Officer proceeded with the assessment holding that the assessee was not entitled to any deduction but the assessee's appeal before the Commissioner (Appeals) was allowed and the Department's appeal before the Tribunal was dismissed. In view of the supervening events, the Supreme Court held that the appeals had become infructuous and disposed of them accordingly, leaving the question of law open. (AY. 1999-2000)

Punjab State Co-op. Agricultural Development Bank Ltd. v. CIT (2015) 379 ITR 533 / (2016) 131 DTR 401 / 284 CTR 206 / 237 Taxman 373 (SC)

Editorial : Refer, Punjab State Co-operative Agricultural Development Bank Ltd. v. CIT [2008] 305 ITR 156 (P&H)(HC).

1493 **S.80P : Co-operative societies – Income from marketing of agricultural produce of members – Matter remanded. [S.80P(2)(a)(ii)]**
In view of the order in *Mohinda Co-operative Sugar Mills Ltd. v. CIT (2012) 253 CTR 225 (SC)*, matter is remanded to CIT(A) to ascertain whether production of sugar undertaken by the assessee Co-operative Sugar Mill from the sugar crane grown by its members amounts to 'manufacture' in order to decide whether the assessee is entitled to deduction under section 80P(2)(a)(iii).(AY.1993-94)
Dy. CIT v. Budhewal Co-operative Sugar Mills Ltd. (2015) 373 ITR 35 / 278 CTR 103 / 233 Taxman 509 (SC)

1494 **S.80P : Co-operative societies – Activity of doing business of procuring and selling toddy and thereby making profit and, thus, it could not be considered to be a society engaged in collective disposal of labour of its members – Not entitled to deduction.**
Assessee society was formed with object of establishment and management of toddy shops. It purchased toddy from its members and non-members on payment of agreed remuneration and thereupon sale was carried out through shops established by society. It filed its return claiming deduction under section 80P(2)(a)(vi). Assessing Officer held that main activity of assessee was doing business of procuring and selling toddy and thereby making profit and, thus, it could not be considered to be a society engaged in collective disposal of labour of its members, he thus rejected assessee's claim. Tribunal upheld older of Assessing Officer. On appeal the Court held that since income of assessee-society had nothing to do with collective disposal of labour of its members, but was entirely from out of price realised by it for sale of toddy through its own toddy shops, Tribunal was justified in holding that assessee was not eligible for deduction claimed. (AY. 2008-09)
Nileswar Range Kallu Chethu Vyavasaya Thozhilali Sahakarana Sangham v. CIT (2015) 234 Taxman 698 / (2016) 282 CTR 310 (Ker.)(HC)

1495 **S.80P : Co-operative societies – Income attributable to extension of credit facilities to members – Co-operative society engaged solely in provision of credit facilities to its members – Interest on deposits in banks – Entitled to special deduction.**
Allowing the appeal the Court held that Under the provisions of section 80P of the Income-tax Act, 1961, in the case of a co-operative society engaged in carrying on the business of banking or providing credit facilities to its members, the whole amount of profits and gains attributable to the business is entitled to special deduction. The word "attributable to" is certainly wider in import than the expression "derived from". Whenever the Legislature wanted to give a restricted meaning, it used the expression "derived from". The expression "attributable to" being of wider import, it is used by the Legislature whenever it intended to gather receipts from sources other than the actual conduct of the business. A co-operative society which is carrying on the business of providing credit facilities to its members, earns profits and gains of business by providing credit facilities to its members. The society cannot keep idle the interest so derived or the capital, if not immediately required to be lent to the members. If it deposits this amount in a bank so as to earn interest, the interest is attributable to the profits and gains of the business of providing credit facilities to its members. The society is not carrying on any separate business for earning such interest. The income

so derived is the amount of profits and gains of business attributable to the activity of carrying on the business of banking or providing credit facilities to its members by a co-operative society and is entitled to be deducted from the gross total income under section 80P. (AY 2010-11)
Guttigedarara Credit Co-op. Society Ltd. v. ITO (2015) 377 ITR 464 / 234 Taxman 476 (Karn.)(HC)

S.80P : Co-operative societies – Income from other sources – Deductions – Administrative and other expenses – Only net income could be brought to tax. [S.56, 57] 1496
Assessee was a co-operative society engaged in business of marketing agricultural produce and was also providing credit facilities to its members. It claimed benefit of deduction under section 80P(2)(a)(i) in respect of interest, earned on deposits kept with scheduled banks, Indra Vikas Patra, NSC etc. Assessing Officer rejected assessee's claim and brought said interest income to tax under section 56 as 'Income from other sources'. Tribunal confirmed Assessing Officer's order. Assessee filed instant appeal seeking direction to pass fresh order by giving permissible deduction under section 57. On facts, only net interest income, i.e., interest income reduced by administrative expenses and other proportionate expenses to earn said income had to be brought to tax under section 56. (AY. 1991-92 to 1999-2000)
Totgars Co-Operative Sale Society Ltd. v. ITO (2015) 231 Taxman 794 (Karn.)(HC)

S.80P : Co-operative societies – Providing credit facilities to members – Cannot be considered to be co-operative bank for the purpose section 80P(4) – Entitled to the benefit of deduction under section 80P(2)(a)(i)] 1497
Allowing the appeal of assessee the Court held that assessee co-operative society's principal business was not of accepting deposits from public and there was no bye law specifically prohibiting admission of any other co-operative society to its membership; assessee cannot be considered to be a co-operative bank for the purpose of section 80P(4), thus the assessee is entitled to the benefit of deduction under section 80P(2)(a)(i). (AY. 2008-09, 2009-10 & 2011-12)
Quepem Urban Co-operative Credit Society Ltd. v. ACIT (2015) 377 ITR 272 / 278 CTR 48 / 232 Taxman 510 (Bom.)(HC)
Editorial: SLP is granted to revenue (SLA(C) Nos. 17885 1792 / 17937 of 2015 dt 5-10-2015) (2015) 235 Taxman 514 (SC)

S.80P : Co-operative societies – Amounts invested in banks – Interest so earned was attributable to carrying on business of banking and, therefore, it was entitled to be deduction. 1498
Assessee a co-operative society was engaged in activity of carrying on business of providing credit facilities to its members. Amount not immediately required to be lent to members was invested in banks to earn interest. This amount was in nature of profits and gains and interest so earned was attributable to carrying on business of banking and, therefore, it was entitled to be deducted in terms of section 80P(1). (AY. 2009-10)
Tumkur Merchants Souharda Credit Co-operative Ltd. v. ITO (2015) 230 Taxman 309 (Karn.)(HC)

1499 **S.80P : Co-operative societies – Assessee falls within definition of primary agricultural credit co-operative society – Deduction under s. 80P allowable.**
Assessee is a multi-purpose co-operative society registered under the Karnataka Co-operative Societies Act. The AO did not allow deduction under s. 80P. On appeal, the High Court held that the assessee was covered under the definition of multi-purpose co-operative society as per the provisions of Karnataka Co-operative Societies Act as well as definition of primary agricultural credit co-operative society as per the Banking Regulations Act, 1949 and hence deduction under s. 80P is allowable. (AY. 2010-11)
Venugram Multipurpose Co-operative Credit Society Ltd. v. ITO (2015) 370 ITR 636 / 276 CTR 84 / 114 DTR 388 / 231 Taxman 646 / 276 CTR 84 (Karn.)(HC)

1500 **S.80P : Co-operative societies – Once notification is repealed it cannot stand in the eye of law – Notification issued 1922 Act was repealed, matter was remanded.[S.263, 279]**
Assessee-co-operative society was engaged in business of supplying fertilizer, crude oil, sugar, oil seeds etc. to members and non-members. Assessee claimed exemption on entire income under Notification No. SRO/992 dated 22-12-1950. As said notification was of Income-tax Act, 1922 which was repealed by Income-tax Act, 1961, income was not entirely exempt and issue was to be decided according to section 80P. Matter remanded.
CIT v. Shri Gopal Gram Seva Sahakari Mandli Ltd. (2015) 229 Taxman 166 (Guj.)(HC)

1501 **S.80P : Co-operative societies – Individual members – Interest income from individual members – Entitled to deduction.**
Assessee, a co-operative and federal society, earned interest income from individual members on which it claimed deduction under section 80P(2). AO disallowed said claim on ground that an individual could not be a member of federal society. However, according to definition of federal society as given in relevant co-operative Act, an individual could be admitted as a nominal member. An individual could be a nominal member both of a federal society and a co-operative society and hence if federal society extended credit facilities to such nominal members, income derived from such business would fall within preview of section 80P(2)(a)(i) and assessee would be entitled to benefit of deduction on said amount also. (AY. 2009-10)
CIT v. Karnataka State Co-operative Housing Federation Ltd. (2015) 229 Taxman 95 (Karn.)(HC)

1502 **S.80P : Co-operative societies – Interest income – Voluntary reserves in banks, bond and small scale Industrial corporation – Entitled to exemption.**
Court held that interest income received by assessee, a co-operative bank on its voluntary reserve in bank, bonds and small scale industrial corporation was exempted under section 80P. (AY. 1998-99)
Prime Co-op Bank Ltd. v. ITO (2015) 228 Taxman 101 (Mag.)(Guj.)(HC)

1503 **S.80P : Co-operative societies – Matter was remanded for re-examination.**
Tribunal held that the AO did not examine that assessee was a credit co-operative Bank or a credit co-operative society to decide section 80P exemption, matter was to

be restored back to Assessing Officer for re-examination in light of decision of *CIT v. Jafari Momin Vikas Co-op. Credit Society Ltd. (2014) 362 ITR 331 (Guj.)(HC)*(AY. 2007-08). *Dharti Nagrik Sarafi Sahkari Mandali Ltd. v. ACIT (2015) 41 ITR 68 (2016) 157 ITD 278 (Ahd.)(Trib.)*

S.80P : Co-operative societies – Income from fixed deposits – Held as business income – Deduction allowed. [S.80P(2)] 1504

The assessee was a registered co-operative society. It was engaged in business of providing credit facilities to its members and therefore claimed deduction under Section 80P(2)(a)(i) of the Income-tax Act, 1961. The AO rejected the claim of the assessee on the ground that the assessee was a Co-operative bank and therefore was disqualified as per provision of Section 80P(4) of the Act. The CIT(A) reversed the order of AO to the extent he treated assessee as co-operative bank. However with respect to interest earned from fixed deposits maintained with various banks, it held that the same shall be treated as income from other sources and not income from business and therefore deduction under Section 80P(2)(a)(i) was not available. On appeal to the Tribunal, following the decision of *Jaoli Taluka Sahakari Patpedhi Maryadit v. ITO [2015] 43 ITR(T) 138 (Mum.),* it was held that interest income was assessable as profits and gains of business and accordingly deduction under Section 80P was allowable. (AY. 2010-11)
Gadhinglaj Taluka Sahakari Patpedhi Ltd. v. ITO 44 ITR 87 (Mum.)(Trib.)

S.80P : Co-operative societies – Credit Co-operative Bank or credit Co-operative Society – Matter remanded.[S.80P(4)] 1505

Whether assessee a credit co-operative bank or credit co-operative society is disputed question of fact. Matter remanded for examination afresh. (AY. 2007-08)
Dharti Nagrik Sarafi Sahkari Mandali Ltd. v. ACIT (2015) 41 ITR 68 / (2016) 157 ITD 278 (Ahd.)(Trib.)

S.80P : Co-operative societies – Interest earned from deposits with bank entitled to deduction. [S. 80P(2)(a)(i)] 1506

The assessee, engaged in the business of providing credit facilities to its members, claimed exemption under section 80P(2)(a)(i) of the Act. The Assessing Officer and CIT(A) treated the interest from deposits with the bank as income from other sources. On appeal : Held, allowing the appeal, that the interest earned on the deposits made by the assessee in any banking activity was entitled to exemption under section 80P of the Act. (AY. 2008-09)
Shri Siddarsiri Pattin Suharada Sahakari Niyami v. ACIT (2015) 39 ITR 643 (Bang.)(Trib.)

S.80P : Co-operative societies – Acceptance of deposits from non-members would not prevent a co-operative society from claiming deduction under section 80P(2)(a)(i) – Deduction not allowable to extent of income from providing credit facilities to non-members. [S.80P(2)(a)(i)] 1507

Held that the acceptance of deposits from non-members would not prevent a co-operative society from claiming deduction under section 80P(2)(a)(i) of the Act.

Deduction not allowable to extent of income from providing credit facilities to non-members. (AY. 2008-09, 2009-10)
ACIT v. Rangareddy District Judicial Employees Mutually Aided Co-operative Credit Society Ltd. (2015) 39 ITR 198 (Hyd.)(Trib.)

1508 **S.80P : Co-operative societies – Assessee providing credit facilities to its members – Assessee not co-operative bank – Entitled to deduction.[S. 80P(2)(a)(i)]**
The assessee, a co-operative society, registered under the Andhra Pradesh Mutually Aided Co-operative Societies Act, 1995. The assessee claimed deduction under section 80P(2)(a)(i) of the Income-tax Act, 1961, on the income from providing credit facilities to its members. The Assessing Officer, relying on Circular No. 6 of 2010 dated September 20, 2010 ([2010] 328 ITR (St.) 63), rejected the claim. The Commissioner (Appeals) noticed that the subject matter in the circular was with reference to eligibility of regional rural banks for deduction under section 80P and did not apply to the assessee. He held that the assessee was a co-operative society and not a co-operative bank and the provisions of section 80P(4) would not apply and therefore it was entitled to deduction under section 80P(2)(a)(i) of the Act. On appeal the Tribunal affirmed the view of CIT(A). (AY. 2007-08 to 2010-11)
ACIT v. Metrocity Criminal Courts Employees Mutually Aided Cooperative Credit Society Ltd. (2015) 39 ITR 1 (Hyd.)(Trib.)

1509 **S.80P : Co-operative societies – Co-operative Bank-paid-up share capital and reserve were 1 lakh or more – Did not permit admission of any other co-operative society as a member – Not entitled to exemption u/s. 80P(2)(a)(i).[S.80P(2)(a)(i)]**
Assessee was a co-operative bank regarded as a primary co-operative bank if it satisfied three conditions, firstly that primary object or principle business transacted by it was a banking business, secondly, paid-up share capital and reserve of which were 1 lakh or more and thirdly, by-laws of co-operative society did not permit admission of any other co-operative society as a member. Assessee was accepting deposits from persons who were not members it could not be said that assessee society was not carrying on banking business. Paid-up share capital and reserves in case of assessee were more than ₹ 1 lakh. No by laws of society permitted admission of any other co-operative society to be member of impugned society. All three conditions in case of assessee for becoming primary co-operative bank stood complied with and it could be held that assessee was a primary co-operative bank and therefore hit by provisions of section 80P(4). Hence, the assessee not entitled to exemption u/s. 80P(2)(a)(i). (AY. 2009-10, 2010-11)
Shri Chandraprabhu Urban Co-operative Credit Society Ltd. v ITO (2015) 152 ITD 477 (Panaji)(Trib.)

1510 **S.80P : Co-operative societies – Cottage industry – Huge capital outlay, high turnover and large number of workers not reasons to deny exemption – No specific embargo under Act – Assessee entitled to benefit of section 80P. [S.80P(2)(a)(ii)]**
The assessees, handloom weavers co-operative societies, functioning under the administrative control of the Commissioner of Handloom and Textiles, Government of Tamil Nadu, enjoyed exemption under section 80P(2)(a)(ii) of the Act, since their

inception. the Department contended that since the assessees had huge capital outlay, high turnover and large number of workers they were not cottage industries and were not eligible for the benefits under section 80P(2)(a)(ii) of the Act :
Held, dismissing the appeal, that the assessees received various concessions like subsidies and rebates in promoting the sale of their products. These concessions and facilities were given to protect the employment and interest of traditional workers and artisans in various cottage industries. The size of the industry and the large number of workers employed were not reasons to deny the benefit available to the assessee under section 80P of the Act, when there was no specific embargo imposed under the Act. As long as the assessees were cottage industries, they would be entitled to the benefit of section 80P of the Act. (A.Y. 2010-11)
ACIT v. Kalikkavalasu Primary Industrial WCS Ltd. (2015) 37 ITR 422 (Chennai)(Trib.)

Section 80RRA : Deduction in respect of remuneration received for services rendered outside India.

S.80RRA : Remuneration – Insurance consultant – Services rendered outside India – Remuneration was received in foreign currency – Eligible deduction even if services were also rendered from India. 1511
Assessee, an insurance consultant, sought approval from Government of India under section 80RRA. Said application was rejected on ground that assessee did not render services outside India but rendered services from India. On writ allowing the petition the Court held that petitioner had gone abroad as an integral part of rendering his service as Insurance Consultant, moreover, remuneration had been received in foreign currency. Assessee submitted certificates from his employer indicating that his visit abroad was for purpose of rendering service outside India, therefore petitioner was entitled to be considered for benefit of section 80RRA. (AY. 2000-01, 2001-02)
Dr. Ramesh Dinkar Samarth v. UOI (2015) 231 Taxman 423 (Bom.)(HC)

Section 88E : Rebate in respect of securities transaction tax.

S.88E : Rebate – Securities transaction tax – Computation – Set-off of business loss of earlier year – Average rate should be applied to income before set-off of brought forward business loss. 1512
Assessee claimed rebate under s. 88E. The AO reduced the amount of rebate by taking into consideration the brought forward business losses instead of the income from taxable securities transaction while computing the amount of rebate. The High Court, on appeal, held that the clear language of s. 88E ought to be given effect to. If the conditions of s. 88E(1) are satisfied, the rebate should be computed as per s. 88E(2) and there was no warrant to apply the average rate on the income after setting off of losses. (AY. 2008-09)
CIT v. Manish D. Innani (2015) 370 ITR 679 / 114 DTR 370 / 274 CTR 193 (Bom.)(HC)

CHAPTER IX
DOUBLE TAXATION RELIEF

Section 90 : Agreement with foreign countries or specified territories.

1513 **S.90 : Double taxation relief – Service fee – Consultancy services – Entire service fee is taxable – DTAA-India-China [Article 12(4)]**

Applicant received service fee for providing services in connection with procurement of goods from vendors in China. AAR held that Services provided by applicant falls within the term 'consultancy services', thus, taxable under Article 12(4) of Treaty hence entire service fee is taxable at 10% as technical fees and not merely income element.

Guangzhou Usha International Ltd., In re (2015) 378 ITR 465 / 280 CTR 412 / 235 Taxman 211 / 126 DTR 193 (AAR)

CHAPTER X
SPECIAL PROVISIONS RELATING TO AVOIDANCE OF TAX

Section 92B : Meaning of international transaction.

1514 **S.92B : Transfer pricing – If assessee contends that it has not entered into an "international transaction" with an Associated enterprise the TPO has to counter that by furnishing relevant information. Failure to do so can be challenged by a Writ Petition. [S. 92A, 92C]**

The only issue which falls for consideration in the facts and circumstances of the instant case is whether there has been any "international transaction" between the petitioner No. 1 on one hand and PricewaterhouseCoopers Services BV on the other, as defined under section 92B of the Income Tax Act, 1961.

(i) A plain reading of sub-section (1) of section 92B of the Income-tax Act, 1961 reveals that "international transaction" means a transaction between two or more "associated enterprises". Meaning of "associated enterprise" (emphasis supplied) has been statutorily elaborated under section 92A of the Income-tax Act, 1961. Clause (a) under sub-section (1) of section 92A of the Income-tax Act, 1961, spells out that one of the three statutory requirements, i.e. management or control or capital are necessary to be fulfilled for an enterprise to be associated with another enterprise. The kind of management or control or capital required has been further elaborated in sub-section (2) of section 92A of the Income-tax Act, 1961.

(ii) In the facts of the instant case, it is noticed from the records that even after the writ petitioner No.1, by a letter dated 29th April, 2015, replied to the notice dated 24th March, 2015, issued by the Joint Commissioner of Income Tax (Transfer Pricing Officer), Kolkata, taking a specific point that the partnership firm had not entered into any "international transaction" within the meaning of section 92B of the Income-tax Act, during the assessment year 2012-13 nor in any earlier assessment years, the Income Tax authorities have remained conspicuously silent by not furnishing relevant materials based on which it came to a conclusion that there has been an "international transaction" within the meaning of section 92B of the Income-tax Act, 1961. If there is no relevant material in the hands of the Income Tax authorities with which it has come to an incontrovertible conclusion that the petitioner No.1 is an "associated enterprise" of

PricewaterhouseCoopers Services BV, within the meaning of section 92A of the Income -tax Act, 1961, the question of issuance of notice dated 24th March, 2015, would not arise. When the petitioner No.1 replied to the said notice by its letter dated 29th April, 2015, the concerned respondent authority ought to have given a reply by supplying such relevant materials with which it come to a conclusion that the petitioner no.1 was an "associated enterprise" of PricewaterhouseCoopers Services BV. The reason why furnishing of such relevant materials were singularly important is that if the petitioner no.1 was not an "associated enterprise" of PricewaterhouseCoopers Services BV, there cannot be any computation of income from "international transaction" having regard to arm's length price as envisaged under section 92 of the Income tax Act, 1961.
(iii) Undoubtedly, in the facts and circumstances of the instant case, for reasons stated earlier, a prima facie case has been made out for an ad interim order in terms of prayer (g) of the petition. Such ad interim order shall continue until final disposal of the writ petition. (*Hindalco Industries Ltd. v. Additional Commissioner of Income Tax 2012 211 Taxman 315 (Bom)* distinguished) (WP No. 16340 (W) of 2015, dated 06.08.2015)(AY.2012-13)
Price Waterhouse v. CIT (Cal.)(HC); www.itatonline.org

S.92B : Transfer pricing – Issue of shares – Capital account – Provisions of Chapter X would not apply. 1515
Issue of equity shares by assessee-company to its AE located abroad is on capital account and provisions of Chapter X would not apply to such a transaction.
Equinox Business Parks (P.) Ltd. v. UOI (2015) 230 Taxman 191 (Bom.)(HC)

S.92B : Transfer pricing – Issue of shares at premium – Does not give rise to any income from international transaction and, thus, there is no occasion to apply Chapter X in such a case. 1516
Where assessee-company had issued shares at a premium to its non-resident holding company, it does not give rise to any income from international transaction and, thus, there is no occasion to apply Chapter X in such a case. (AY. 2009-10)
SKR BPO Services (P.) Ltd. v. ITO (2015) 230 Taxman 192 (Bom.)(HC)

S.92B : Transfer pricing – Equity shares – Difference between ALP at which equity shares had to be issued and prices at which equity shares had actually been issued did not give rise to any income from an admitted International transaction. 1517
Difference between ALP at which equity shares had to be issued and prices at which equity shares had actually been issued did not give rise to any income from an admitted International transaction.)
S.G. Asia Holdings (India) (P.) Ltd. v. Dy. CIT (2015) 229 Taxman 452 (Bom.)(HC)

S.92B : Transfer pricing – Notice – Writ – Control and exercise – Petition was dismissed.[S. 92CA, 92D] 1518
Assessee, a non-resident company, made certain investment in shares of an Indian insurance company. AO issued a notice under section 92CA(1) and 92D(3) in respect of said transaction. Assessee filed instant petition for quashing of notice contending, that shareholding was so small that there could not be any reasonable opinion that Indian insurance company was an associated enterprises or that transaction of subscribing to

its equity shares was an international transaction. Since it was not merely shareholding which was involved but also extent of control exercisable in terms of available materials which could amount to assessee's participation as an associated enterprise under section 92A, it was not a fit case for exercise of writ jurisdiction to quash impugned notice.
First American Securities (P.) Ltd. v. Addl.CIT (2015) 228 Taxman 187 (Mag.)(Delhi)(HC)

Section 92C : Computation of arm's length price.

1519 **S.92C : Transfer pricing – Arm's length price – Comparable – Companies were no doubt large and distinct companies where area of development of subject services was different and as such profit earned therefrom could not be bench-marked or equated with assessee – Order of Tribunal was upheld. [S. 92CA, 260A]**
Assessee was engaged in business of manufacture of fibre glass pressure vessel used for water treatment, swimming pool equipments and were making three kinds of vessels. That assessee set up in-house facility for catering to its needs on area of engineering, designing & product development and had unit where said manufacturing activity was taking place. Assessee filed returns of income disclosing total income on which total tax was calculated. Order u/s. 92CA was passed by TPO and AO added certain amount in Order passed u/s. 143(3) thereof. CIT(A) directed AO to compute TP adjustment by taking operating margin at comparable rate of 22.92%. Revenue claimed that 3 companies were wrongly removed from list of comparables. Tribunal held in favour of assessee. On further appeal in HC, HC dismissed revenue's appeal and held that, ITAT recorded reasons for not accepting said three companies as comparable. Findings of Tribunal in respect of said three Companies were on basis of appreciation of evidence on record. No infirmity found in findings of Tribunal on that count. Tribunal had endorsed views of CIT Appeals whilst coming to conclusions. Concurrent findings of facts arrived at by Authorities below could not be re-appreciated in Appeal. Apex Court in Judgment reported in 2011(1) SCC 673 in case of *Vijay Kumar Talwar v. CIT*, had observed that finding of fact may give rise to substantial question of law, only in events where such findings were based on no evidence; and/or while arriving at said findings relevant admissible evidence had not been taken into consideration; or inadmissible evidence had been taken into consideration; or legal principles had not been applied in appreciating evidence; or when evidence had been misread. Apparently, Revenue had not been able to controvert or deny data relied upon by Authorities below to come to conclusion of exclusion of comparables. Said Companies were no doubt large and distinct companies where area of development of subject services was different and as such profit earned there from could not be bench-marked or equated with assessee. (AY. 2007-08)
CIT v. Pentair Water India Pvt. Ltd. (2015) 128 DTR 178 / (2016) 381 ITR 216 / 282 CTR 160 (Bom.)(HC)

1520 **S.92C : Transfer pricing – Arms' length price – Selection of comparable based on earlier order was held to be justified.**
Dismissing the appeal of assessee the Court held that selection of comparables by giving an opportunity to the assessee based on earlier order was held to be justified. (AY. 2007-08)
Polaris Consulting Services Ltd. v. Jt. CIT (2015) 235 Taxman 229 / (2016) 285 CTR 81 / 133 DTR 110 (Mad.)(HC)

S.92C : Transfer pricing – Computation of profit level indicator – Assessee a contract manufacturer in a capital intensive industry importing raw materials from its associated enterprise and selling finished catalysts to vendors of MUL under instructions of MUL – Assessee accepting rejection of return on capital employed as profit level indicator and changing its profit level indicator to operating cost/total cost excluding raw material cost for subsequent AYs – No risk undertaken by assessee which also appropriate for contract manufacturers in terms of OECD Guidelines – Rejection of return on capital employed as profit level indicator for relevant year – Justified. [ITR.10B(1)(e)(i)] 1521

The assessee had realised the limitations of adopting the return on capital employed as the profit level indicator for the subsequent AYs. It improved upon the profit level indicator used in the AY 2003-04 taking into account the economic realities in the AY 2004-05. It explained how it arrived at the profit level indicator of operating cost/total cost after excluding the cost on which no risk was undertaken by it which was also appropriate for contract manufacturers in terms of the OECD Guidelines. In its written submissions the assessee explained that the exclusion of cost of raw material in respect of which the assessee bore no costs or risks presented a very accurate picture of the profit margins of the assessee. The exclusion of factors which did not affect returns was allowed under all the guidelines. This profit level indicator used in the AYs 2004-05, 2005-06 and 2006-07 was accepted without any objection by the tax authorities. Consequently, the rejection of return on capital employed as profit level indicator by the Revenue for the AY 2003-04 was a fact that had been accepted and acted upon by the assessee for the subsequent AYs when it changed its profit level indicator to operating cost/total cost excluding raw material cost, which was accepted by the Revenue. There was no fault in rejecting return on capital employed as the profit level indicator.

The very purpose of transfer pricing is to benchmark transactions between the related parties in order to discover the true price if such entities were unrelated. In the absence of any reliable comparable data, and in the absence of proper reasons, the Revenue could not reject a financial ratio adopted by the assessee for computing the net profit margin by excluding a pass-through cost from the total cost in the denominator. (AY. 2003-04)

Johnson Matthey India P. Ltd. v. Dy. CIT (2015) 235 Taxman 590 / 281 CTR 431 / (2016) 380 ITR 43 (Delhi)(HC)

S.92C : Transfer pricing – Arm's length price – Transactions with associated enterprises – Commissioner (Appeals) restricting addition to transactions with associated enterprises – Tribunal deleting addition on ground transaction within safe harbour rules – No question of law. [S.260A] 1522

Dismissing the appeal of revenue the Court held that, the decision of the Tribunal that the arm's length price was within the + / - 5 per cent safe harbour range was a factual determination. This was not shown to be perverse or arbitrary. Accordingly, no occasion to entertain the question could arise as it did not give rise to any substantial question of law. (AY.2006-07)

CIT v. Firestone International P. Ltd. (2015) 378 ITR 558 / 234 Taxman 141 (Bom.)(HC)

1523 **S.92C : Transfer pricing – Arm's length price – Comparison of international transaction with uncontrolled transaction under rule 10B – Wide range of services in information technology enabled services – Knowledge process outsourcing could not be compared to call centres.**

Allowing the appeal the Court held that wide range of services in information technology enabled services. Knowledge process outsourcing could not be compared to call centres. (AY.2008-09)

Rampgreen Solutions P. Ltd. v. CIT (2015) 377 ITR 533 / 234 Taxman 573 / 279 CTR 441 (Delhi)(HC)

1524 **S.92C : Transfer pricing – Adjustment with respect to transfer pricing has to be confined to transactions with Associated Enterprises**

An adjustment with respect to transfer pricing has to be confined to transactions with Associated Enterprises and cannot be made with respect to transactions with unrelated third parties. (AY.2007-08)

CIT v. Thyssen Krupp Industries India (P) Ltd. (2016) 282 CTR 527 / 129 DTR 412 (Bom.) (HC)

1525 **S.92C : Transfer pricing – Arm's length price ('ALP') – Burden on revenue to prove existence of international transaction – Advertisement, marketing and sales promotion (AMP) – Adjustment for Advertisement & Market Promotion (AMP) expenses cannot be made on the basis that there is an assumed "international transaction" with the AE because the advertisement expenditure of the Indian company is "excessive". [S.92B, 92F]**

The Tribunal followed its decision in *LG Electronics India Pvt. Ltd. v. ACIT (2013) 22 ITR (Trib.)* 1 and held that the Assessing Officer ('AO') was entitled to make a transfer pricing adjustment under Chapter X of the Act in respect of the AMP expenditure incurred by MSIL on the ground that such expenditure created brand value and marketing intangibles in respect of the brands/trademarks belonging to MSIL's Associated Enterprise ('AE'), Suzuki Motor Corporation, Japan (hereinafter 'SMC'). HELD by the High Court: Advertisement & Market Promotion (AMP)-Adjustment for Advertisement & Market Promotion (AMP) expenses cannot be made on the basis that there is an assumed "international transaction" with the AE because the advertisement expenditure of the Indian company is "excessive". Appeals of assessee was allowed by holding that AMP expenses incurred by MSIL cannot be treated as an international transaction under section 92B of the Act. (AY. 2005-06, 2006-07)

Maruti Suzuki India Limited v. CIT (2015) 282 CTR 1 / 129 DTR 25 / (2016) 381 ITR 117 / 237 Taxman 256 (Delhi)(HC)

1526 **S.92C : Transfer pricing – Arm's length price – Transfer pricing study, companies selected as comparables should be functionally comparable.**

Dismissing the appeal of revenue the Court held that in transfer pricing study, companies selected as comparables should be functionally comparable and not identical. (AY. 2005-06)

CIT v. DSM Anti Infectives India Ltd. (2015) 233 Taxman 257 / 280 CTR 398 / 126 DTR 111 (P&H)(HC)

S.92C : Transfer pricing – Multiple transactions – A transaction results in a profit or a loss has no bearing on whether it is at arm's length price – Matter remanded. [S. 92B, R.10A(d)] 1527

The AO or TPO is required to determine the arm's length price in relation to "an international transaction". The acquisition of various items/components in the assessee's venture could indeed be telescoped into and form a single transaction. For instance, in the case of a package deal where each item of the package is not separately valued but all the components thereof are given a composite price, the transactions form but one composite transaction. An assessee may enter into one composite transaction with its AE involving the provision of various services or the sale of various goods. A party may opt for a single window facility where all the services and/or goods are provided under a composite agreement. Each of the components may even be priced differently. If it is established that each transaction was so inextricably linked to the other that the one could not survive without the other, it could be said that it formed a part of a transaction and that it was an international transaction. Take, for instance, a case where an AE offers to provide a bouquet of services and goods to the assessee each priced differently but on the understanding that the pricing was dependent upon the assessee accepting all the services and/or all the goods. In that event, it would not be open to the assessee to accept only some of the goods or the services at the prices indicated. It either takes all or none. This would normally constitute one transaction.

The assessee would have to prove that although each sale and each provision of service is priced separately, they were all provided under one composite agreement which constitutes an international transaction.

The contention that as the services and goods are utilized by the assessee for the manufacture of the final product they must be aggregated and considered to be a single transaction and the value thereof ought to be computed by the TNMM is not acceptable. Merely because the purchase of each item and the acceptance of each service is a component leading to the manufacture/production of the final product sold or service provided by the assessee, it does not follow that they are not independent transactions for the sale of goods or provision of services. The end product requires several inputs. The inputs may be acquired as part of a single composite transaction or by way of several independent transactions. In the latter case, the sale of certain goods and/or the provision of certain services from out of the total goods purchased or services availed of by an assessee together can form part of a separate independent international transaction. In such an event, the AO/TPO must value this group of sale or purchase of goods and/or provision of services as separate transactions.

The TNM Method may establish the aggregate price paid for the goods and services received under independent transactions to be an arm's length price. This, however, would give a skewed picture. One of these independent transactions may be at a bargain and the pricing, therefore, is not objected to by the department. This bargain may be for a variety of reasons and in a variety of circumstances unconnected however to the other transactions. The value of the other transactions, on the other hand, may be overestimated and would not be at the arm's length price. In that event, for the purpose of the Act, the price of the second transaction cannot possibly be taken to be the arm's length price for it was not the arm's length price. It does not become the arm's length

price merely because the bargain struck with respect to the first transaction balanced the inflated price of the second although the two transactions were independent of each other. The two transactions are different and, therefore, the arm's length price of each of them must be determined separately. The question, therefore, in each case must first be whether the sale of goods or the provision of services was a separate independent agreement or whether they formed part of an international transaction i.e. a composite transaction. (AY. 2007-08)
Knorr-Bremse India Pvt. Ltd. v. ACIT (2015) 128 DTR 25 / (2016) 282 CTR 44 / 236 Taxman 318 / (2016) 380 ITR 307 (P&H)(HC)

1528 **S.92C : Transfer pricing – Arm's length price – Indenting transaction being different from trading transactions, to Associated Enterprises, commission percentage from Associated Enterprise transactions should be bench marked on the basis of commission rate earned from Non-AE transactions under indenting business only.**
Assessee is engaged in import and export activities both to domestic and overseas, had two business segments, i.e., commission (Indenting) and trading. To determine arm's length price of commission business, TPO/Assessing Officer applied profit percentage earned by assessee from non-AE transactions under 'Trading business segment'. Tribunal held commission transactions being different from 'Trading transactions' in terms of functional differences, risks undertaken and assets employed, both cannot be considered as uniform and, thus, commission earned by assessee from its AEs under 'Indenting segment' was required to be benchmarked on basis of commission earned by assessee from non-AEs under 'Indenting segment' only. On appeal by revenue dismissing the appeal the Court held that, indenting transaction being different from trading transactions, to Associated Enterprises, commission percentage from Associated Enterprise transactions should be benchmarked on the basis of commission rate earned from Non-AE transactions under indenting business only. (AY. 2009-10)
CIT v. Sumitomo Corporation India (P.) Ltd. (2015) 232 Taxman 313 / 281 CTR 454 (Delhi)(HC)

1529 **S.92C : Transfer pricing – Arm's length price – Failure by Transfer Pricing Officer to apply turnover filter at initial stage – Inconsistency not noticed by Dispute Resolution Panel – Tribunal correcting position holding Department could not take advantage particularly when turnover filter not a test even in respect of surviving comparable – Finding of fact.**
The assessee was engaged in installation, maintenance, repairing, sales and supply of plant, equipment and apparatus for the purpose of communication of all kinds. The assessee submitted a transfer pricing report for the assessment years 2007-08 and 2008-09. The Transfer Pricing Officer accepted the arm's length price of all international transactions except that of marketing and after sales support services which it concluded was not at the arm's length. The assessee had entered into a service agreement for provision of marketing and after sales service on cost plus mark-up basis. The assessee provided marketing and after sales services to associated enterprises in relation to sale of telecommunication equipment, software and other information technology products to customers in India. The assessee adopted the transactional net margin method taking operating profit/operating cost as the profit level indicator. The Transfer Pricing Officer rejected its analysis so far as it

related to interpretation of the comparables. The assessee had, in this context, relied upon the data relating to seven comparable enterprises whose average unadjusted profit margin worked to 11.5%. The Transfer Pricing Officer determined that two out of these seven were not comparables. This determination, as it pertained to CME was accepted by the assessee. The other CT was held not to be a comparable on account of its low revenue. The related party turnover in respect of this comparable exceeded 25% and was a diminishing revenue. The Assessing Officer incorporated the report and framed the final assessment order. The Dispute Resolution Panel accepted the Transfer Pricing Officer's reasoning that the segment turnover of the excluded company, i.e. CT was only ₹ 25 lakhs and constituted less than 2% of the total turnover of the company and, therefore, the assessee could not use its data. The Tribunal reversed the findings of the Transfer Pricing Officer with respect to the inclusion of CT as a comparable. On appeal:

Held, dismissing the appeal, that the Transfer Pricing Officer chose to apply that filter but used it to exclude the data pertaining to CT. This inconsistency went unnoticed even by the Dispute Resolution Panel. The Tribunal corrected the position and noticed that not having applied the turnover filter at the initial stage, the Revenue could not take advantage, in the facts of the case, particularly when the turnover filter was not a test even in respect of the surviving comparable. These were findings of fact.(AY. 2007-08, 2008-09)

CIT v. Nortel Networks India P. Ltd. (2015) 375 ITR 183 / 127 DTR 118 / 281 CTR 314 (Delhi)(HC)

Editorial: Order in Nortel Networks India P. Ltd. v. Addl. CIT (2015) 40 ITR 102 (Delhi)(Trib.) is affirmed.

S.92C : Transfer pricing – Arm's length price – Corporate guarantee commission – No comparison can be made between guarantees issued by commercial banks as against a corporate guarantee issued by a holding company for benefit of its AE, for computing ALP of guarantee commission – No transfer pricing adjustment could be made in respect of commission charged. [S.92B] 1530

The assessee provided a corporate guarantee for repayment of borrowings made by its AE from the bank for purchase of assets and inventories, for working capital and as a term loan. The assessee had charged guarantee commission at the rate of 0.5% from its AE. The TPO found that the guarantee fee charged was at a lower rate. He came to the conclusion that the banks and companies were charging at least 3% for providing guarantees and, therefore, the arm's length price for the guarantee given by the assessee to bank for the benefit of the AE was at 3% of the amount of guarantee. Accordingly, he made an adjustment for the differential 2.5%.

On appeal, the CIT(A) upheld the order of the TPO on the basis that the bank rate and guarantee of the relevant period was 6% whereas PLR was 10.5%, which showed that the return for bearing received was 4.5%. Therefore, the CIT(A) found that the return of 3% arrived at by the TPO was justified. Against the dismissal of appeal by the CIT(A), the assessee approached the Tribunal. The Tribunal reversed the order of the CIT(A) and deleted the adjustment.

On appeal by the Department before the High Court, the High Court upheld the order of the Tribunal on the basis that the considerations which apply for issuance of a corporate guarantee are distinct and separate from that of a bank guarantee and, accordingly, comparison cannot be made between guarantees issued by commercial banks as against

corporate guarantees issued by holding companies for the benefit of its AE, a subsidiary company. (AY. 2007-08)
CIT v. Everest Kento Cylinders Ltd. (2015) 378 ITR 57 / 119 DTR 394 / 232 Taxman 307 / 277 CTR 511 (Bom.)(HC)

1531 **S.92C : Transfer pricing – Arm's length price – Comparables – High profits/losses – Mere fact that an entity makes extremely high profits/losses cannot lead to its exclusion from the list of comparables. Only if there are material differences in the functions, assets and risks between the assessee and the said entity which cannot be eliminated u/r. 10B(3), the entity can be excluded as a comparable – Multiple year data – While determining comparability of transactions, multiple year data can only be considered if conditions stated in R. 10B(4) are satisfied and, thus, the assessee cannot rely upon previous year's data as a general rule.**
The assessee company entered into international transaction with its AEs for provision of advisory services. The TPO, rejecting the multiple year analysis carried out by the assessee in its TP study, made a TP adjustment to the said international transaction by including certain high profit making companies as comparables. On appeal, the CIT(A) and the Tribunal upheld the order of the TPO/ AO. On further appeal, the High Court observed that wide fluctuations in profit margins of the same entity on a year-to-year basis would be offset by taking the arithmetic mean of all comparables for the assessment year in question. In any case, in the event that the volatility is on account of a materially different aspect incapable of being accounted for, the analysis under R. 10B(3) would exclude such an entity from being considered as a comparable. Accordingly, the High Court held that an enquiry u/r. 10B(3) ought to be carried out to determine whether material differences between the assessee and the high profit making entity can be eliminated. Unless such differences cannot be eliminated the entity has to be included as a comparable. With respect to the issue on consideration of multiple year data, the High Court held that, while determining the comparability of transactions, multiple year data can only be considered if the conditions provided in R. 10B(4) are satisfied and, thus, it is not open to the assessee to rely upon previous years' data as a general rule. (AY. 2008-09)
Chryscapital Investment Advisors (India) (P.) Ltd. v. DCIT (2015) 376 ITR 283 / 119 DTR 1 / 232 Taxman 20 / 277 CTR 137 (Delhi)(HC)

1532 **S.92C : Transfer pricing – Arm's length price – TPO cannot hold that a company undertook all crucial functions of its AE when TPO's findings cannot be proved.**
The assessee provided agency services on behalf of its holding company and other group companies as well as co-ordinated for import and export of goods and services on behalf of its AE. The TPO noted that the assessee provided some services to its AEs which formed the basis of sourcing activities carried out by the AEs from or to India and that the assessee's functions to its AEs were not only confined to providing marketing support services but also in arranging for feasibility studies, industry analysis and project evaluation for potential projects identified by the AEs assessee assumed significant risks and thus, it should be compensated by its AEs and the Profit Split Method (PSM) had to be applied for determining the ALP of the international

transactions. The Tribunal held that the findings of the TPO were without proof and hence could not be sustained.
The High Court observed that the TPO had discarded TNMM as the most appropriate method, holding that the assessee assumed significant risks, and relied on unique intangibles thus resulting in higher profits of the AE which should be attributed to it. The High Court further observed that TPO's observations vis-à-vis the AE's decisions being taken by the assessee were without any proof and thereby held that the TNMM was the most appropriate method and that the TPO had to make a fresh determination of the ALP of the disputed international transactions. (AY.2008-09)
CIT v. Marubeni India (P) Ltd. (2015) 118 DTR 330 / 232 Taxman 318 / 277 CTR 189 (Delhi)(HC)

S.92C : Transfer pricing – Shares at premium – Income deemed to accrue or arise in India-In view of order passed in case of *Vodafone India Services (P.) Ltd. v. UOI [2014] 50 taxmann.com 300 (Bom.)* shortfall in amounts received on issue of shares to non-resident AEs when compared to that receivable on basis of ALP, along with interest on above shortfall could not be brought to tax.[S.9(1)(i)] 1533
The assessee had issued shares to its non-resident Associated Enterprise (AE) of the face value of ₹ 10 at the premium of ₹ 120 each per share.
The Assessing Officer referred the transaction declared in Form 3CEB to the TPO in terms of section 92CA(1) of the Act.
Before the TPO, the assessee contended that the issue of equity shares being on Capital Account does not give rise to any income. However, the TPO negatived the assessee's contention.
Further the TPO held that the Arm's Length Price (ALP) of the equity shares had to be ₹ 2315 per share as against ₹ 130 per share declared by the petitioner. Consequently, a Transfer Pricing Adjustment on account of undervaluation of shares was determined of ₹ 168.05 crores and deemed interest/compensation on non-receipt of the above amount at ₹ 2.79 crores, aggregating to ₹ 170.82 crores. In view of order passed in case of *Vodafone India Services (P.) Ltd. v. UOI [2014] 50 taxmann.com 300 (Bom.)* shortfall in amounts received on issue of shares to non-resident AEs when compared to that receivable on basis of ALP, along with interest on above shortfall could not be brought to tax.
Essar Projects (India) Ltd. v. UOI (2015) 229 Taxman 162 (Bom.)(HC)

S.92C : Transfer pricing – Uncontrolled Price method (CUP) – London Interbank Offered Rate (LIBOR) – Euro Interbank Offered Rate (EURIBOR) – Arm's length interest – Interest received on loan – Transfer pricing determination is not primarily undertaken to re-write the character and nature of the transaction- Arm's length interest applied by the TPO at 14% p.a. as against 4% interest received by the assessee was deleted by the Tribunal was affirmed – Appeal of revenue was dismissed.[S.92CA] 1534
The assessee advanced a loan to its wholly-owned subsidiary in the USA. The assessee selected the Comparable Uncontrolled Price method (CUP) to benchmark the interest received on the loan and claimed that the interest received at the rate of 4% was comparable with the export packing credit rate obtained from independent banks in India. The TPO held that the arm's length interest rate should be taken as 14% p.a. This

was reduced to 12.20% by the DRP by adopting the Prime Lending Rate fixed by the Reserve Bank of India. On appeal by the assessee, the Tribunal relied on Siva Industries and Holding, Tech Mahindra, Tata Autocomp Systems etc. and upheld the assessee's claim. On appeal by the department to the High Court HELD dismissing the appeal:

(i) The reasoning recorded by the TPO suffers from a basic and fundamental fallacy. Transfer pricing determination is not primarily undertaken to re-write the character and nature of the transaction, though this is permissible under two exceptions. Chapter X and Transfer Pricing rules do not permit the Revenue authorities to step into the shoes of the assessee and decide whether or not a transaction should have been entered. It is for the assessee to take commercial decisions and decide how to conduct and carry on its business. Actual business transactions that are legitimate cannot be restructured. It is not uncommon for manufacturers cum exporters to enter into distribution and marketing agreements with third parties or incorporate subsidiaries in different countries for undertaking marketing and distribution of the products.

(ii) Two exceptions have been allowed to the aforesaid principle and they are (i) where the economic substance of a transaction differs from its form and (ii) where the form and substance of the transaction are the same but arrangements made in relation to the transaction, viewed in their totality, differ from those which would have been adopted by independent enterprises behaving in a commercially rational manner;

(iii) The assessee's act of incorporating a subsidiary in United States was done with the intention to expand and promote exports in the said country and was a legitimate business decision. The transaction of lending of money by the assessee to the subsidiary, should not be seen in isolation, but also for the purpose of maximising returns, propelling growth and expanding market presence. The reasoning of the TPO ignores the said objective facet. Transfer pricing rules treat the domestic AE and the foreign AE as two separate entities and profit centres, and the test applied is whether the compensation paid for the products and services is at arm's length, but it does not ignore that the two entities have a business and a commercial relationship. The terms and conditions of the commercial business relationship as agreed and undertaken are not to be rewritten or obliterated. Transfer pricing is a mechanism to undo an attempt to shift profits and correct any under or over payment in a controlled transaction by ascertaining the fair market price. This is done by computing the arm's length price. The purpose is to ascertain whether the transfer price is the same price which would have been agreed and paid for by unrelated enterprises transacting with each other, if the price is determined by market forces. The first step in this exercise is to ascertain the international transaction, which in the present case is payment of interest on the money lent. The next step is to ascertain the functions performed under the international transaction by the respective AEs. Thereafter, the comparables have to be selected by undertaking a comparability analysis. The comparability analysis should ensure that the functions performed by the comparables match with the functions being performed by the AE to whom payment is made for the services rendered.

(iv) Rules 10B and 10C of the Income Tax Rules, 1962 indicate factors that ought to be taken into account for selection of the comparables, which necessarily include the

contractual terms of the transaction and how the risks, benefits and responsibilities are to be divided. The conditions prevailing in the market in which the respective parties to the transactions operate, including the geographical location and the size of the markets, the laws and Government orders in force, costs of labour and capital in the markets, overall economic development and level of competition, are all material and relevant aspects. If we keep the aforesaid aspects in mind, it would be delusive not to accept and agree that as per the prevalent practice, subsidiary AEs are often incorporated to carry on distribution and marking function. This is not an unusual but common. Once this is accepted, then we cannot accept the reasoning given by the TPO that the transfer pricing adjustment could restructure the transaction to reflect maximum return that a party could have earned and this would be the yardstick or the benchmark for determining the interest payable by the subsidiary AE. This is not what Chapter X of the Act and Rules mandate and stipulate. The aforesaid provisions neither curtail the commercial freedom, nor do they bar or prohibit a legitimate transaction. They permit transfer pricing adjustment so as to bring to tax what would have been paid for the transaction in the same or similar comparable circumstances by an independent third party.

(v) This ratio and rationale, when applied to the facts of the present case, would mean that the transfer pricing determination would decide what an independent distributor and marketer, on the same contractual terms and having the same relationship, would have earned/paid as interest on the loan in question. What an independent party would have paid under the same or identical circumstances would be the arm's length price or rate of interest. What the assessed would have earned in case he would have entered into or gone ahead with a different transaction, say with a party in India, is not the criteria. What is permitted and made subject matter of the arm's length determination is the question of rate of interest and not re-classification or substitution of the transaction.

(vi) The comparison, therefore, has to be with comparables and not with what options or choices which were available to the assessee for earning income or maximizing returns. Importantly, the TPO, DRP and the Assessing Officer have all accepted that the respondent assessee had adopted and applied CUP Method for computing arm's length interest payable by the subsidiary AE. To this extent, there is no lis or dispute.

(vii) We express our inability to accept that commercial expediency and related benefits have no connection or relationship with the rate of interest. In terms of Clauses (c) and (d) to Rule 10B (2), contractual relations or terms, and other material facts should be recognized. Having said so, we do accept the force of the alternative argument advanced that this fact could be of marginal significance and effect. It would be for the assessee to show and prove that a transaction separately benchmarked, included consideration for the lower interest rate being paid.

(viii) We do not agree with the finding recorded by the TPO that the comparable test to be applied is to ascertain what interest would have been earned by the assessee by advancing a loan to an unrelated party in India with a similar financial health as the taxpayer's subsidiary. The aforesaid reasoning is unacceptable and illogical

as the loan to the subsidiary AE in the instant case is not granted in India and is not to be repaid in Indian Rupee. It is not a comparable transaction. The finding of the TPO that for this reason the interest rate should be computed at 14% per annum i.e. the average yield on unrated bonds for Financial Years (FY, for short) 2006-07, has to be rejected.

(ix) The question whether the interest rate prevailing in India should be applied, for the lender was an Indian company/assessee, or the lending rate prevalent in the United States should be applied, for the borrower was a resident and an assessee of the said country must be answered by adopting and applying a commonsensical and pragmatic reasoning. We have no hesitation in holding that the interest rate should be the market determined interest rate applicable to the currency concerned in which the loan has to be repaid. Interest rates should not be computed on the basis of interest payable on the currency or legal tender of the place or the country of residence of either party. Interest rates applicable to loans and deposits in the national currency of the borrower or the lender would vary and are dependent upon the fiscal policy of the Central bank, mandate of the Government and several other parameters. Interest rates payable on currency specific loans/ deposits are significantly universal and globally applicable. The currency in which the loan is to be re-paid normally determines the rate of return on the money lent, i.e. the rate of interest. (UN Model Double Taxation Convention Between Developed and Developing Countries & OECD Model Convention Commentary, Chapter 10 of the U.N. Transfer Pricing Manual etc. considered.(AY. 2007-08)

CIT v. Cotton Naturals (I) Pvt. Ltd. (2015) 118 DTR 1 / 276 CTR 445 / 231 Taxman 401 (Delhi)(HC)

1535 **S.92C : Transfer pricing – The "bright line test" has no statutory mandate and a broad-brush approach is not mandated or prescribed. Parameters specified in paragraph 17.4 of Special Bench verdict in L. G. Electronics are not binding on the assessee or the Revenue – Matter remanded to the Tribunal for *de novo* consideration because the legal standards or ratio accepted and applied by the Tribunal was erroneous.**

This High Court had to consider various issues arising from the judgement of the Special Bench of the Tribunal in *L.G. Electronics India Pvt. Ltd. versus Assistant Commissioner of Income Tax,* reported as (2013) 152 TTJ 273 (Del). The principal issue was whether advertisement, marketing and sale promotion expenditure ("AMP", for short) beyond and exceeding the "bright line" is a separate and independent international transaction undertaken by the resident Indian assessee towards brand building for the brand owner, i.e. the foreign Associated Enterprise ("AE", for short). There were several other core issues pertain to aspects of arm's length pricing of international transactions. HELD by the High Court remanding the issue to the Special Bench for reconsideration of the primary issue:

(i) In case of a distributor and marketing AE, the first step in transfer pricing is to ascertain and conduct detailed functional analysis, which would include AMP function/expenses.

(ii) The second step mandates ascertainment of comparables or comparable analysis. This would have reference to the method adopted which matches the functions and obligations performed by the tested party including AMP expenses.

(iii) A comparable is acceptable, if based upon comparison of conditions a controlled transaction is similar with the conditions in the transactions between independent enterprises. In other words, the economically relevant characteristics of the two transactions being compared must be sufficiently comparable. This entails and implies that difference, if any, between controlled and uncontrolled transaction, should not materially affect the conditions being examined given the methodology being adopted for determining the price or the margin. When this is not possible, it should be ascertained whether reasonably accurate adjustments can be made to eliminate the effect of such differences on the price or margin. Thus, identification of the potential comparables is the key to the transfer pricing analysis. As a sequitur, it follows that the choice of the most appropriate method would be dependent upon availability of potential comparable keeping in mind the comparability analysis including befitting adjustments which may be required. As the degree of the comparability increases, extent of potential differences which would render the analysis inaccurate necessarily decreases.

(iv) The assessee, i.e. the domestic AE must be compensated for the AMP expenses by the foreign AE. Such compensation may be included or subsumed in low purchase price or by not charging or charging lower royalty. Direct compensation can also be paid. The method selected and comparability analysis should be appropriated and reliable so as to include the AMP functions and costs.

(v) Where the Assessing Officer/TPO accepts the comparables adopted by the assessee, with or without making adjustments, as a bundled transaction, it would be illogical and improper to treat AMP expenses as a separate international transaction, for the simple reason that if the functions performed by the tested parties and the comparables match, with or without adjustments, AMP expenses are duly accounted for. It would be incongruous to accept the comparables and determine or accept the transfer price and still segregate AMP expenses as an international transaction.

(vi) The Assessing Officer/TPO can reject a method selected by the assessed for several reasons including want of reliability in the factual matrix or lack / non-availability of comparables. (see Section 92C(3) of the Act).

(vii) When the Assessing Officer/TPO rejects the method adopted by the assessed, he is entitled to select the most appropriate method, and undertake comparability analysis. Selection of the method and comparables should be as per the command and directive of the Act and Rules and justified by giving reasons.

(viii) Distribution and marketing are inter-connected and intertwined functions. Bunching of inter-connected and continuous transactions is permissible, provided the said transactions can be evaluated and adequately compared on aggregate basis. This would depend on the method adopted and comparability analysis and the most reliable means of determining arm's length price.

(ix) To assert and profess that brand building as equivalent or substantial attribute of advertisement and sale promotion would be largely incorrect. It represents a coordinated synergetic impact created by assortment largely representing reputation and quality. "Brand" has reference to a name, trademark or trade name and like "goodwill" is a value of attraction to customers arising from name and a reputation

for skill, integrity, efficient business management or efficient service. Brand creation and value, therefore, depends upon a great number of facts relevant for a particular business. It reflects the reputation which the proprietor of the brand has gathered over a passage or period of time in the form of widespread popularity and universal approval and acceptance in the eyes of the customer. Brand value depends upon the nature and quality of goods and services sold or dealt with. Quality control being the most important element, which can mar or enhance the value.

(x) Parameters specified in paragraph 17.4 of the order dated 23rd January, 2013 in the case of L.G. Electronics India Pvt Ltd (supra) are not binding on the assessee or the Revenue. The "bright line test" has no statutory mandate and a broad-brush approach is not mandated or prescribed. We disagree with the Revenue and do not accept the overbearing and orotund submission that the exercise to separate "routine" and "non-routine" AMP or brand building exercise by applying "bright line test" of non-comparables should be sanctioned and in all cases, costs or compensation paid for AMP expenses would be "NIL", or at best would mean the amount or compensation expressly paid for AMP expenses. It would be conspicuously wrong and incorrect to treat the segregated transactional value as "NIL" when in fact the two AEs had treated the international transactions as a package or a single one and contribution is attributed to the aggregate package. Unhesitatingly, we add that in a specific case this criteria and even zero attribution could be possible, but facts should so reveal and require. To this extent, we would disagree with the majority decision in L.G. Electronics India Pvt. Ltd. (supra). This would be necessary when the arm's length price of the controlled transaction cannot be adequately or reliably determined without segmentation of AMP expenses.

(xi) The Assessing Officer/TPO for good and sufficient reasons can de-bundle interconnected transactions, i.e. segregate distribution, marketing or AMP transactions. This may be necessary when bundled transactions cannot be adequately compared on aggregate basis.

(xii) When segmentation or segregation of a bundled transaction is required, the question of set off and apportionment must be examined realistically and with a pragmatic approach. Transfer pricing is an income allocating exercise to prevent artificial shifting of net incomes of controlled taxpayers and to place them on parity with uncontrolled, unrelated taxpayers. The exercise undertaken should not result in over or double taxation. Thus, the Assessing Officer/TPO can segregate AMP expenses as an independent international transaction, but only after elucidating grounds and reasons for not accepting the bunching adopted by the assessed, and examining and giving benefit of set off. Section 92(3) does not bar or prohibit set off.

(xiii) CP Method is a recognised and accepted method under Indian transfer pricing regulation. It can be applied by the Assessing Officer/TPO in case AMP expenses are treated as a separate international transaction, provided CP Method is the most appropriate and reliable method. Adoption of CP Method and computation of cost and gross profit margin comparable must be justified.

(xiv) The object and purpose of Transfer Pricing adjustment is to ensure that the controlled taxpayers are given tax parity with uncontrolled taxpayers by determining their true taxable income. Costs or expenses incurred for services provided or in respect of property transferred, when made subject matter of arm's length price by applying CP Method, cannot be again factored or included as a part of inter-connected international transaction and subjected to arm's length pricing. (AY. 2008-09)

Sony Ericsson Mobile Communication India Pvt. Ltd. v. CIT (2015) 374 ITR 118 / 276 CTR 97 / 117 DTR 105 / 231 Taxman 113 (Mag.)(Delhi)(HC)
Discovery Communications India v. Dy. CIT (Delhi)(HC); www.itatonline.org
Daikin Airconditioning India Pvt. Ltd. v. Dy. CIT (Delhi)(HC); www.itatonline.org
Haier Appliances (India) P. Ltd. v. Dy. CIT (Delhi)(HC); www.itatonline.org
Reebok India Company Ltd. v. Addl. CIT (Delhi)(HC); www.itatonline.org
Canon India Pvt. Ltd. v. CIT (2015) 374 ITR 118 / 276 CTR 97 / 117 DTR 105 / 231 Taxman 113 (Mag.)(Delhi)(HC)
Casio India Co. P. Ltd. v. CIT (Delhi)(HC); www.itatonline.org

S.92C : Transfer pricing – Arms' length price – Resale method is most appropriate method – Purchasing goods from AE and selling them to unrelated parties without any value addition, RPM is the most appropriate method for determination of ALP. 1536

In case of distribution or marketing activities when goods are purchased from associated entities and sales are effected to unrelated parties without any further processing, RPM (resale price method) is most appropriate method to determine ALP of said transaction, i.e., international transaction of import of goods. Appeal of revenue was dismissed.(AY. 2003-04)

CIT v. L'Oreal India (P.) Ltd. (2015) 228 Taxman 360 / 117 DTR 480 / 276 CTR 484 (Bom.) (HC)

S.92C : Transfer pricing – Arm's length price – Comparable – Comparable cases cannot be ignored on the ground that loss suffered in some years. 1537

Court held that where the assesse based on computations made in comparable cases, there was no justification for revenue to ignore comparable cases only on ground that assessee had sustained losses in some years. (AY. 2007-08)

Joy Alukkas India (P.) Ltd. v. ACIT (2015) 228 Taxman 35 (Mag.)(Ker.)(HC)

S.92C : Transfer pricing – Arm's length price – Where no details of AMP functions performed by assessee was available on record, matter required readjudication 1538

Tribunal held that Examination of AMP functions carried out by assessee and probable comparables is *sine qua non* in process of determination of ALP of international transaction, thus, where no details of AMP functions performed by assessee was available on record, matter required readjudication. (AY.2010-11)

Toshiba India (P.) Ltd. v. Dy. CIT (2015) 41 ITR 300 / 172 TTJ 172 / (2016) 156 ITD 599 (Delhi)(Trib.)

1539 **S.92C : Transfer pricing – Arm's length price – Export incentives – Comparable to be done by applying same formula.**
The assessee made export sales to its AE. The TPO made TP adjustments to said transaction. The CIT(A) held that the TPO computed the difference of the operating margin by excluding export incentives but while evaluating the comparable instances, the export incentives were included by the TPO. In this background, the CIT(A) observed that for making any comparison, the same parameters will have to be adopted. Tribunal affirmed the view of CIT(A). On appeal by revenue the Court held that, while making a comparison of operating profit with other comparables, TPO is required to compute operating profit by treating case of assessee and comparable instances on same footing by applying same formula and he has no jurisdiction to apply a different formula to work out operating profit for comparables and for assessee.(AY. 2008-09)
CIT v. Mirza International Ltd. (2015) 228 Taxman 34 (Mag.)(All.)(HC)

1540 **S.92C : Transfer pricing – Arm's length price – Since the jurisdictional High Court had deleted addition of 5 per cent mark up on FOB value of exports, in view of aforesaid, markup of more than 15 per cent on operational cost shown by assessee was justified.**
The assessee operates as a procurement support services company for its foreign associated enterprises under a model of reimbursement of the operating cost plus a markup of 15%. The TPO challenged the assessee's cost plus model and adopted a commission based model as in the earlier years and adopted a commission of 3.82% on the value of goods procured by the foreign AE directly from third party vendors from India. On appeal to the Tribunal, it held that that TP adjustment in the assessee's case for earlier years was made on the basis of ITAT ruling in case of Li & Fung which was later overruled by Delhi HC [2014] 361 ITR 85 where the High Court had approved remuneration model markup of 5% whereas assessee has 15% markup on operational costs. It therefore held that since the assessee was earning a markup which was more than the case referred above, assessee's markup was more conservative and thereby deleted adjustment.(AY. 2009-10)
GAP International Sourcing (India) (P.) Ltd. v. DCIT (2015) 44 ITR 168 / 57 taxmann.com 143 (Delhi)(Trib.)

1541 **S.92C : Transfer pricing – Arm's length price – Payment of royalty to Associated Enterprise – Adjustment was held to be not justified.**
The Tribunal held that the TPO has not brought on record any comparable case of royalty payment so as to resort to the provisions of section 92C. TPO has not disputed that the payment was made wholly and exclusively for the purpose of business inasmuch as he has allowed the royalty payment albeit 30% of actual sales. Further in A.Y. 2006-07 DRP has accepted the payment of royalty @56% of actual sales. Therefore, no adjustment is to be made in respect of the royalty payout. (AY. 2004-05)
ACIT v. Oracle India P. Ltd. (2015) 174 TTJ 1 / 127 DTR 1 (Delhi)(Trib.)

1542 **S.92C : Transfer pricing – Arm's length price – Functional difference – Matter remanded.**
Assessee-company was rendering software development services to its AE located abroad. Assessee computed operating profit to cost ratio at 11.88 per cent. TPO, on

basis of its own set of comparables, computed arithmetic mean margin at 23.18 per cent. Accordingly, certain addition was made to assessee's ALP. On appeal Tribunal held that; it was noted that some of comparables selected by TPO were improper on account of functional difference as they were involved in development of software products, further, some comparables were found inappropriate on account of their huge turnover and brand value. In view of aforesaid, impugned addition was to be set aside and, matter was to be remanded back for disposal afresh. (AY.2007-08)
Broadcom India Research (P.) Ltd. v. Dy. CIT (2015) 68 SOT 138 (URO)(Bang.)(Trib.)

S.92C : Transfer pricing – Arm's length price – Segmental results determined by assessee could not be rejected merely on the ground that accounts segmental results unaudited or segmental break up was done after accounts were closed – Matter remanded. 1543

Assessee entered into international transaction with AE in respect of communication network operations and engineering services, provision of finance & accounts functions (i.e. administrative support services), in its TP study assessee submitted that international transactions were at arm's length on basis of comparability of these transactions with non-AE transactions. TPO rejected assessee's submission, he is taking both international transactions together, selected 21 comparables and arithmetic mean of comparables was arrived 28.57% and made addition. Before DRP assessee submitted audited segmental results. DRP also rejected same on ground that assessee did not maintain segmental accounts contemporaneously, that break-up into segments was made after books of accounts were closed or after end of the financial year for the purpose of the TP study. Held, The segment wise account submitted by the assessee could not be rejected unless any defect was pointed out in the segmental results shown by the assessee. Moreover, the activities relating to both these transactions are different activities as is observed from the functional analysis described in the above part of this order as one transaction is relating to communication net work operation and engineering services and other transaction relates to provision of finance and accounts services, therefore, these transactions are to be evaluated separately for determination of ALP. If the claim of the assessee is to be rejected then Revenue Authorities are bound to explain that why such claim of the assessee is required to be rejected. No such reason has been given except stating that either the segmental results are unaudited or they have been prepared later on or for the purpose of TP study. Taking into account these facts and submissions which are supported by the case laws relied upon by learned AR, it would meet the interest of justice if the matter is restored back to the file of AO/TPO with a direction to re-determine the ALP of these international transaction separately after verifying the segmental results of the assessee. Matter remitted to AO. (AY. 2008-09)
Tata Communication Transformation Services Ltd. v. DCIT (2015) 169 TTJ 257 / 116 DTR 356 (Mum.)(Trib.)

S.92C : Transfer pricing – Unique geographical market conditions of the source country have no relevance for benchmarking purposes and benefit of +/-5% be given by TPO in eligible cases 1544

The assessee is importer and reseller of fertiliser (DAP) who source whole of its purchases from AE. The TPO concluded price paid to AE is on higher side and

proposed additions which deleted by CIT(A). ITAT set aside revenue appeal and concluded that the focus has to be on India prices as the market for the product of the assessee is India and any third uncontrolled entity for selling similar product would pay the price for the said product going by India specific prices as such they should form the basis for benchmarking. The TPO shall also consider the benefit of +/- 5%, if available to the assessee on facts of the case. (AY.2005-06)
ACIT v. Mosaic India (P) Ltd. (2015) 169 TTJ 504 (Delhi)(Trib.)

1545 **S.92C : Transfer pricing – Comparables for Arm's length price – Comparables excluded in case of their abnormal profit for deciding ALP of assessee.**
The assessee is Indian branch of UK incorporated company and paying royalty for providing IT enabled services to its AE. The Comparables considered to arrive Arm's Length Price by TPO had abnormally high profit during the relevant years as also having no consistency in previous years and hence such comparables allowed excluding for arriving correct ALP of assessee by Tribunal.(AY.2007-08, 2008-09)
Cummins Turbo Technologies Ltd. v. DCIT (IT) (2015) 169 TTJ 358 (Pune)(Trib.)

1546 **S.92C : Transfer pricing – Arm's length price – Interest free for initial seven years – Adjustment was set aside – Extra commercial borrowings lower than interest paid – Addition was held to be not justified.**
Where loans taken by assessee from its AE were interest free for initial period of seven years and when said period of moratorium was taken into account, effective rate of interest incurred by assessee was lower than arm's length rate of interest considered by TPO, adjustment made to assessee's ALP on aforesaid ground was to be set aside. Where rate of interest paid by assessee to its AE in respect of Extra Commercial Borrowing (ECB) was lower than rate of interest paid by said AE to an independent concern, transaction of payment of interest in question was to be regarded as carried out at arm's length price. (AY. 2005-06 to 2007-08)
Goodyear South Asia Tyres (P) Ltd. v. ACIT (2015) 170 TTJ 250 / 118 DTR 1 (Pune)(Trib.)

1547 **S.92C : Transfer pricing – Arm's length price – Where a particular company was wrongly excluded for determining ALP for an earlier year, same could not debar the assessee from including it in list of comparables in succeeding year.**
It has been held by the Appellate Tribunal that simply because a particular company was wrongly excluded by assessee in determining ALP of an international transaction for an earlier year, could not debar him from including it in list of comparables in succeeding year, if it was actually comparable. (AY.2006-07)
Microsoft Corporation India (P) Ltd. v. Addl. CIT (2015) 168 TTJ 314 / 67 SOT 340 (URO)/ 37 ITR 290 (Delhi)(Trib.)

1548 **S.92C : Transfer pricing – Arm's length price – Where prices charged to Associated Enterprises are higher than prices charged to non-Associated Enterprise, a transaction based benchmarking approach should not be rejected.**
The Hon'ble Appellate Tribunal held where prices charged to Associated Enterprises are higher than prices charged to non-Associated Enterprise, though yearly average is a

good and reasonable indicator for benchmarking under CUP approach, but a transaction based benchmarking approach should not be rejected especially when rejection of a transaction-based benchmarking may lead to some distortion. (AY. 2007-08)
Saertex India (P) Ltd. v. ACIT (2015) 168 TTJ 139 / 113 DTR 369 (Pune)(Trib.)

S.92C : Transfer pricing – Arm's length price – While benchmarking international transactions where assessee had advanced money to its AE and charged interest, international rates fixed being LIBOR + rate would be applicable and not domestic prime lending rates. 1549

The Appellate Tribunal held that while benchmarking international transactions what has to be seen is comparison between related transactions, i.e., where assessee has advanced money to its associated enterprises and charged interest, then said transaction is to be compared with a transaction as to what rate assessee would have charged, if it had extended loan to third party in foreign country and in that case, international rates fixed being LIBOR + rates would have an application and domestic prime lending rates would not be applicable. The Appellate Tribunal has further held that where assessee had made borrowings on LIBOR + rates and advanced same at LIBOR + rates, then said transaction was at arm's length price. (AY.2008-09)
Varroc Engineering (P) Ltd. v. ACIT (2015) 168 TTJ 514 (Pune)(Trib.)

S.92C : Transfer pricing – Arm's length price – Operating profit margins – Net margin method – Simply because the profit rate of a company is higher or it has a higher turnover can be no reason to seek exclusion. 1550

Assessee an I.T. Enabled Company providing Transaction processing services and Voice based customer care services to customers of its Associated Enterprises (AEs). Assessee selected TNMM as most appropriate method with Profit Level Indicator (PLI) of Operating Profit to Total cost (OP/TC). Assessee showed weighted PLI of seven comparable companies. TPO did not treat two companies as comparable. TPO worked out OP/TC of remaining five companies, which resulted into eventual addition on account of Transfer pricing adjustment. The CIT(A) held that assessee was entitled to +5% adjustment in terms of proviso to Section 92C. The Tribunal held that the sum and substance of the above cases is that neither any adjustment can be made for a simpliciter higher/lower amount of depreciation in itself or as a percentage of neither the total operating expenses nor an otherwise comparable company ceases to be comparable because of the above factors. However, an adjustment is called for when there is a difference in the rates of depreciation on similar types of assets under similar method of charging depreciation. At the cost of repetition, we want to accentuate the line of distinction between two cases, viz., first in which the amount of depreciation is more due to higher value of the assets employed by one company and second, in which the amount of depreciation is more not due to higher value of the assets employed by one company but due to higher rates of depreciation. Whereas, the first situation would not call for any adjustment, the second one would warrant adjustment in the operating profit of the comparable company. That is where Rules 10B(1)(e) (ii) & (iii) read with Rules 10B(2) & (3) come into play for neutralising the difference in the operating profits of the two otherwise comparable companies by

making a "reasonably accurate adjustment ... to eliminate the material effects of such differences". (AY. 2003-04)
EXL Service. Com (India) P. Ltd. v. ACIT (2015) 152 ITD 778 / 168 TTJ 156 (Delhi)(Trib.)

1551 **S.92C : Transfer pricing – ALP of more than one transaction can be determined as one unit, only if they are closely linked transactions – Deductibility of expenditure has to be decided by the Assessing Officer and not the TPO – Matter was set side. [S. 37(1)]**
Tribunal held that TNMM cannot be adopted at entity level for purposes of benchmarking the transaction as a single transaction, CUP is most appropriate method for sale of finished goods.
The Tribunal sent the matter back to the AO/TPO for redetermination of ALP of the international transaction of sale of finished goods.
The Tribunal held that TPO is required to simply determine the ALP of the commission payments made by the assessee to its AE unconcerned with the fact as to whether any benefit accrued to the assessee from such payments and it was for the AO to decide the deductibility of the commission payments. The matter restored back to AO / TPO to decide afresh. (AY. 2008-09)
ITW India Ltd. v. ACIT (2015) 169 TTJ 60 / 68 SOT 10 (URO) / 115 DTR 327 (Delhi)(Trib.)

1552 **S.92C : Transfer pricing – Applicability of CUP method or TNMM – IT Rules 10B(1)(a) & 10B(1)(e).**
The Tribunal in assessee's own case for the immediately preceding two assessment years is that firstly, the internal CUP method should be applied and if any reasons the CUP method cannot be applied, then TNMM should be restored to. The Tribunal sent the matter back to the AO / TPO with a direction that assessee will provide all necessary details to the TPO to facilitate him to make a meaning & comparison of the services rendered by it to the AEs and non-AEs. (AY. 2009-10)
Hughes Systique India (P) Ltd. v. DCIT (2014) 151 ITD 208 / 117 DTR 97 (2015) 169 TTJ 193 (Delhi)(Trib.)

1553 **S.92C : Transfer pricing – CUP method – Erstwhile agent was appointed as sub-agent of assessee, price agreement between assessee and its sub-agent could not be used as CUP for determining ALP – Matter remanded.**
The Tribunal held that neither the transaction between the assessee and its sub-agent can be used as CUP for benchmarking the transaction between the assessee and its AE under the agency agreement nor the commission received by the said sub agent from the same AE in an earlier year can be applied as CUP for determination of ALP of the services rendered by the assessee to the AE in the absence of any current / contemporary data, issue is restored back to the TPO / AO to decide the same afresh. (AY. 2008-09, 2009-10)
Hapag Lloyd India (P) Ltd. v. DCIT (2015) 169 TTJ 419 / 40 ITR 375 / 117 DTR 113 (Mum.)(Trib.)

S.92C : Transfer pricing – Arm's length price – AMP expenses – AMP functions performed by assessee and comparables can be brought to a similar platform – Matter remanded. 1554
Assessee was a wholly owned subsidiary of N, Japan engaged in distribution and marketing services for N products in India. Assessee applied TNMM for computing ALP, TPO accepted methods so applied by assessees, however, found that assessees had incurred AMP expenses towards promotion of brand and no reimbursement of expenses was made from AEs. TPO used bright line test by segregating non-routine expenses and treating AMP spend as a separate international transaction and applied Cost Plus method to determine excess AMP incurred by assessee and added same to income of assessee. TPO had jurisdiction to determine ALP of international transaction of AMP expenses. In doing so, it was mandatory to make a comparison of AMP functions performed by assessee and comparables and then make an adjustment, if any, due to differences between two, so that AMP functions performed by assessee and comparables could be brought to a similar platform. (AY. 2010-11)
Nikon India (P.) Ltd. v. Dy. CIT (2015) 155 ITD 627 / 174 TTJ 486 (Delhi)(Trib.)

S.92C : Transfer pricing – Arm's length price – Related party transactions – No comparable can be excluded from TP study mere relying on legal proposition that companies having related party transactions of more than 15 per cent cannot be considered as comparable, without supporting evidence on record – Matter remanded. 1555
The CIT(A) deleted two comparable selected by TPO on ground that said parties had substantial related party transactions. While doing so, CIT(A) adopted well-settled law that companies having related party transactions of more than 15 per cent cannot be considered as comparable but he had not referred any evidence on record in support of his conclusion nor assessee could establish this fact conclusively. The ITAT held that no relief could be granted based on mere reliance on legal proposition without supporting evidence on record. Matter remanded. (AY. 2002-03)
ITO v. ICC India (P.) Ltd. (2015) 155 ITD 805 (Delhi)(Trib.)

S.92C : Transfer pricing – Arm's length price – Notional interest – Addition was deleted as addition of deemed loan was deleted in earlier year. 1556
TPO made addition in respect of notional interest on deemed loan representing difference between ALP and issue price of shares issued by assessee to its AE Tribunal in preceding year had deleted addition on account of deemed loan hence addition in question was also not sustainable. (AY.2009-10, 2010-11)
J.P. Morgan Securities India (P.) Ltd. v. Addl. CIT (2015) 155 ITD 519 (Mum.)(Trib.)

S.92C : Transfer pricing – Allowing interest on excess credit to AEs on account of sale of goods – Addition cannot be made as notional value – Corporate guarantee to AEs – Adjustment was held to be not valid. [S. 92B] 1557
If the international transaction of exports of goods which has been benchmarked on TNMM basis is duly accepted by the TPO, making an adjustment for interest on excess credit allowed on sales to AEs will vitiate the picture, inasmuch as what has already been factored in the TNMM analysis, by taking operating profit figure which incorporate financial impact of the excess credit period allowed. Therefore benchmarked on TNMM

adjustment of ALP on the basis of notional value of excess credit period allowed to AE was not a called for in the facts and circumstance of the case.
Corporate guarantees issued by the assessee were in the nature of quasi-capital or shareholder activity and, for this reason alone, the issuance of these guarantees should be excluded from the scope of services and thus from the scope of 'international transactions' under s. 92B; these guarantees do not have any impact on income, profits, loses or assets of the assessee and therefore were outside the ambit of international transaction under s. 92B. (AY. 2002-03, 2003-04, 2004-05, 2006-07)
Micro Link Limited v. ACIT (2016) 175 TTJ 8 / 157 ITD 132 (Ahd.)(Trib.)

1558 **S.92C : Transfer pricing – (i) If the AO & CIT make a mechanical reference to the TPO without applying mind to the TP report & other data filed by the assessee, the reference is invalid, (ii) A transfer pricing adjustment cannot be made if the assessee's income is exempt u/s. 10A or 80HHE or (iii) if the AE is assessed at a rate of tax higher that tax rate in India. [S. 10A, 80HHE, 92CA]**
The assessee contended before the Tribunal:
(i) that under section 92C or 92CA of the Act, it is the statutory duty of the AO to decide independently, whether the determination of arm's length price by the assessee should be accepted, or whether or not after applying the provisions of section 92CA, the transfer pricing adjustment should be made. This is a statutory safeguard for the assessee. It was contended that similarly, it is only after proper application of mind to all the facts and holding a *prima facie* belief that the AO can make reference to the TPO, or that the CIT can grant approval to such a reference. This, again, is a statutory safeguard for the taxpayer. It was submitted that CBDT Instruction No. 3 of 2003, dated 20-5-2003 detracts the AO and the CIT from the above obligation in complete violation of the statutory provisions of the principles of natural justice. It has been submitted that in the present case, in compliance of the said CBDT Instruction No.3 of 2003, the AO did not himself examine the issue of transfer pricing and with the approval of the CIT, made a reference to the TPO u/s 92CA(1) of the Act. The AO and the CIT did not apply their minds to the Transfer Pricing Report, or to any other material or information or document. The TPO made an adjustment which was incorporated by the AO in the assessment order. On their part, the AO and the CIT did not discharge necessary judicial functions conferred upon them u/s 92C or 92CA of the Act and
(ii) That Transfer Pricing adjustment cannot be made in a case where the assessee enjoys benefit u/s. 10A or section 80HHE of the Act, or where the tax rate in the country of the Associated Enterprise is higher than the Indian rate and where, accordingly, establishment of tax avoidance or manipulation of prices or establishment of shifting of profits is not possible.
HELD by the Tribunal:
(a) In *Vodafone India Services P. Ltd. v. Union of India 361 ITR 531 (Bom.)* the Bombay High Court has held that CBDT Instruction No.3 dated 20-5-2003 is contrary to the decision being taken therein and it is not binding on the AO. It was held that this Instruction departs from the provisions of law. It was held that the decision in *Sony India P. Ltd. v. Central Board of Direct Taxes 288 ITR 52 (Delhi)*, is not

applicable after the amendment of 2007 (paras 35 to 37 of the judgment are relevant in this regard);

(b) The AO abrogated his obligation under a wrong assumption that CBDT Instruction No.3 of 2003 dated 20-5-2003 mandated him to go ahead without making any reference to the TPO. The AO did not examine the question, whether he should himself accept the transfer pricing report of the assessee or whether he should himself determine the arm's length price;

(c) The AO erred in not himself examining the issue of Transfer Pricing and with the approval of the CIT, made a reference to the TPO u/s. 92CA(1) of the Act; that the AO as well as the CIT failed to apply their mind to the TP Report filed by the assessee, or to any other material or information or document furnished. The TPO made an adjustment which was incorporated by the AO in the assessment order. Thereby, the AO as well as the CIT did not discharge necessary respective judicial functions conferred on them under sections 92C and 92CA of the Act;

(d) Further, the assessee is also correct in contending that no TP adjustment can be made in a case like the present one, where the assessee enjoys u/s. 10A or 80HHE of the Act, or where the tax rate in the country of the Associated Enterprises is higher than the rate of tax in India and where the establishment of tax avoidance or manipulation of prices or establishment of shifting of profits is not possible. (AY. 2005-06)

DCIT v. Tata Consultancy Service Ltd. (2015) 174 TTJ 570 / (2016) 46 ITR 394 (Mum.) (Trib.)

S.92C : Transfer pricing – Arm's length price – Focus has to be on India prices as market for the product of the assessee is India and any third uncontrolled entity for selling similar product would pay price for the said product going by India specific prices as such they should form basis for benchmarking – Impugned order is set aside, matter remitted to TPO. 1559

Tribunal held that focus has to be on India prices as market for the product of the assessee is India and any third uncontrolled entity for selling similar product would pay price for the said product going by India specific prices as such they should form basis for benchmarking. Impugned order is set aside, matter remitted to TPO. (AY. 2005-06)

ACIT v. Mosaic India Pvt. Ltd. (2015) 169 TTJ 504 (Delhi)(Trib.)

S.92C : Transfer pricing – Arm's length price – Loan to subsidiary – TPO has made adjustment at the rate of 12% – Tribunal held that adjustment at 4% is to be reasonable. 1560

Assessee was leading manufacturer of popular, affordable and innovative rider apparel. Assessee had given loan to its 100% subsidiary in USA under fixed term basis at the rate of 4%. Assessee had also invested its surplus funds in FDRs with bank at the rate of 5%. Show cause notice was issued by TPO to assessee stating that arm's length rate of interest on debt contracts of this nature is 14% and same was proposed as TP adjustment. Assessee's contention that comparison has to be made with respect of advance or loan in USA & not based on Indian conditions was rejected by TPO. In appeal DRP calculated interest rate at 12%. The Tribunal held that the issue is fully covered by virtue of order of co-ordinate Bench hence, it was held that where transaction was in foreign currency to its foreign subsidiary, comparison had to be made with respect of advance and loan

in foreign country and not based on Indian conditions. Comparable transactions by unrelated parties in foreign currencies are relevant. In such situation domestic prime lending rate would have no applicability and international rate fixed being LIBOR should be taken as benchmarked rate for international transaction. CUP method is the most appropriate method to ascertain arm's length price in case of assessee. Further assessee has arrangement, for loan with Citi Bank, for less than 4% and loan was provided to AE at 4%. Hence, adjustment made by the TPO is not warranted. (AY. 2008-09)
Cotton Natural (I) (P) Ltd. v. DCIT (2013) 22 ITR 438 / (2014) 146 ITD 662 / (2015) 169 TTJ 685 (Delhi)(Trib.)

1561 **S.92C : Transfer pricing – Arm's length price – While benchmarking international transactions where assessee had advanced money to Associated Enterprise and charged interest rates fixed being LIBOR+ rate would be applicable and not domestic prime lending rates.**
Assessee company was engaged in business of manufacture of polymer engineering and electrical goods and wind power generation. During year under consideration, Assessee had proposed to take over a running auto component business in Europe and said business was carried on through Italian and Poland company. In view of transactions, made by assessee, it entered into transactions with its AE with regard to disbursement of loan to AE and repayment of loan by AE. Assessee furnished its return of income declaring total income at ₹ 15,14,72,558. AO referred case to TPO for determining arm's length price of services availed by Assessee company. TPO tabulated transactions in respect of loans granted and interest charged and proposed an adjustment of ₹ 4,41,74,661. Dispute Resolution Penal upheld proposition of TPO and consequently, AO made addition of ₹ 4,41,74,661/- being Arm's Length Price adjustment of international transactions. Tribunal held that the assessee had entered into transaction with its associated enterprises in foreign currency, and transactions were international transactions, then same had to be looked into by applying commercial principle in regard to international transactions. Assessee had borrowed loan from Citi Bank and advanced same on LIBOR+ rates to its associated enterprises, said transaction with its associated enterprises was within arm's length price. TPO/AO was directed to re-compute arm's length price of international transactions. Assessee adopted interest receivable from associated enterprise company at ₹ 2,86,27,089/- instead of ₹ 2,91,82,060/- which was disclosed in audit report in Form No.3CEB. AO was also directed to verify submission of Assessee in this regard and to compute arm's length price of international transactions.(AY. 2008-09)
Varroc engineering Pvt. Ltd. v. ACIT (2015) 168 TTJ 514 / 54 taxmann.com 384 (Pune)(Trib.)

1562 **S.92C : Transfer pricing – Allotment of shares – The allotment of shares/ receipt of share application money by the assessee from the AE for a price less than the book value of the shares cannot be regarded as a "deemed loan" by the assessee to the AE and notional interest cannot be imputed thereon – Provisions of section 56(2)(viib) is also not applicable to issue at a lower price. [S.56(2)]**
The allotment of shares/ receipt of share application money by the assessee from the AE for a price less than the book value of the shares cannot be regarded as a "deemed loan"

by the assessee to the AE and notional interest cannot be imputed thereon. There is no provision in Chapter X mandating addition to assessee's ALP on account of less share premium received and also consequential interest on resultant deed loan. Provisions of section 56(2)(viib) is not applicable to issue at a lower price. (ITA No. 3072/Del/2013, dt. 5-6-2015)(AY. 2008-09)
First Blue Home Finance Ltd. v. DCIT (2015) 59 taxmann.com 431 (Delhi)(Trib.); www.itatonline.org

S.92C : Transfer pricing – Arm's length price – Comparable and adjustments – TPO rejected comparable selected by assessee without assigning any reason, ALP addition made by TPO was to be deleted. 1563
Assessee was engaged in providing computer system consultancy services. It had rendered software services to its associated enterprise, assessee selected six comparables after comparability test and returned operating profit at rate of ₹ 4.15 crores. TPO followed other methods adopted by assessee to determine ALP, but rejected comparables selected by assessee and made his list of comparables and computed operating profit at rate of ₹ 8.73 crores. The addition of differential between profits determined and reported by assessee to assessee's income and determined ALP. No reasons for rejection of comparable selected by assessee was assigned. The ITAT held that in view of arbitrary selection of comparables by TPO and in absence of any failure on part of assessee, there was no basis to make ALP addition to assessee's income.(AY. 2003-04, 2004-05)
ACIT v. SRA Systems Ltd. (2013) 22 ITR 205 / (2015) 153 ITD 338 (Chennai)(Trib.)

S.92C : Transfer pricing – Circumstances in which the Profit Split Method (PSM) has to be preferred over the TNMM for determining the ALP and method of allocation of profits between the assessee and the AE under the PSM. 1564
The Tribunal had to consider whether the most appropriate method is the Profit Split Method (PSM) as claimed by the assessee or the TNMM as claimed by the AO, while working out the arm's length value in respect of international transactions between Infogain India i.e. assessee and Infogain US i.e. parent company. HELD by the Tribunal:

(i) Rule 10B(1)(d) of the Income Tax Rules, 1962, defines the Profit Split Method. From the provisions contained in the said Rule 10B(1)(d), it is clear that "PSM" may be applicable in case where transaction involved transfer of unique, intangibles or any multiple transactions interrelated international transactions which cannot be evaluated separately for determining the Arm's Length Price of any one transaction. The Profit Split Method (PSM) first identifies the profit to be split for the associated enterprise from the controlled transactions in which the AEs are engaged. It then splits these profits between the AEs on an economically valid basis that approximates the division of the profit that would have been anticipated and reflected in an agreement, transaction or a residual profit intended to represent the profit that cannot readily be assigned to one of the parties. The contribution of each enterprise is based upon a functional analysis and valued to the extent possible by any available reliable standard market data. The functional analysis is an analysis of the functions performed (taking into account assets used and risk assumed) by each enterprise.

(ii) A perusal of the function of the assessee company reveals that the international transactions are highly integrated and interrelated and both the entities are contributing significantly to the value chain of provision of software services to the end customers. The Global Delivery Organization Group (GDO) in India is responsible for delivery of services to the customers globally. The primary objective of the group is to bring synergies amongst geographic groups and project, to make efficient use of the available resources, to broaden areas of service offerings, to improve opportunity fulfilment ratio, and to maximize customer satisfaction with each project execution. However, the TPO had not considered the role of the GDO. The assessee assigned weights to each activity keeping in view the relative importance in the entire value chain, based on interviews with the key management personnel and the functions in the value chain of software services provided by the Infogain Group to the customers based in the US were identified and weights were assigned to the functions having regard to their relative importance in the value chain. Both the parties i.e. Infogain India (assessee) and Infogain US are making contribution. Therefore, the Profit Split Method is the most appropriate method for determination of ALP. The decision as what is the most appropriate method does not depend on the fact as to whether an assessee is having loss or has a profit.

(iii) On the question as how the allocation is to be done for residuary profits under the Profit Split Method, it is well settled that as per the Rule 10D, the benchmarking should be done with the external uncontrolled transactions, however, in the present case, it is not possible to get a comparable. Therefore, such allocation can be done on the basis that how much each independent enterprise might have contributed. Therefore, relative contribution has to be determined, based on key value drivers because benchmarking is not practicable. In the present case, as the comparables having similar transactions would be difficult to find out, therefore, in such a situation, a harmonious interpretation of the provisions is required to make the rule workable, so as to achieve the desired result of the determination of the ALP.

(iv) Both the OECD Transfer Pricing Guidelines as well as the UN draft method of transfer pricing for developing countries, suggest that an allocation of residual profits under PSM should be done, based on contributions by each entity. In the present case, since the department has accepted in the preceding year and the succeeding year 40:60 ratio between the Infogain India and Infogain US and if the facts are similar for the year under consideration then no deviation is to be done. Appeal of assessee was allowed. (AY. 2008-09)

Infogain India Pvt. Ltd. v. DCIT (2015) 173 TTJ 385 / 126 DTR 1 (Delhi)(Trib.)

1565 **S.92C : Transfer pricing – Profit level indicator – Cost of sales – Transactions of providing support services to "Sogo shosha" entities cannot be characterized as trading transaction for purposes of comparison and determining ALP and the cost of sales cannot be included**

On appeal by the assessee to the Tribunal HELD allowing the appeal:

(i) The activities of purchase and sale i.e. trading involves risk and finance whereas in the activity of support services i.e. intending transactions the assessee has neither

to incur any financial obligation nor carries any significant risk. The nature of two activities is absolutely different. The activities of trading i.e. purchase and sale are highly insignificant as compared to activity of support service which constitutes the core business activities of the assessee. The TPO and DRP are wrong in applying the trading margins ignoring the facts of the case that the assessee being a service provider the trading margins cannot be applied. Further, the TPO DRP have gone wrong in including the cost of sales in OP/TC ignoring the fact the value of the sale under no circumstances effects the activities of the assessee company, a service provider. For support services the correct method is the TNMM and the assessee has computed the same on the basis of OP/TC. The OECD guidelines also supports this contention that in TP study business transactions cannot be recharacterized. The support service or intending provided by the assessee company is nothing but a trading facilitation both in form and substance.

(ii) The trading activities are undertaken by Mitsui Japan not by Mitsui India. If it is import of goods for buyers in India, the Mitsui Japan has a contract with the Japanese suppliers and Mitsui Japan also enters into contract with the buyers in India. Similarly for exports from India, Mitsui Japan enters into a contract with Indian supplier directly for the purchase and sales transactions. Thus the role of Mitsui India, the assessee company is a mere facilitator, a mere service provider. Mitsui India does not take title or possession of the merchandise at any moment and bears no price risk. Mitsui India does not take inventory risk, it does not take warranty risk, it does not take credit risk. It does not employ its capital. In purchase and sale, inventory, advances, debtors, Mitsui India's main function is to maintain contact with the suppliers to ensure timely delivery of merchandise to the customers in the quality and grade desired, communicating with Mitsui India or its affiliates, gathering information on demand and supply conditions of the commodities. The above functions are entirely different than the trading business. In trading activities, one ventures himself. Buys and sells goods in its account. It takes price risk, inventory risk, it deploys capital in inventory, debtors. It takes risk in warranty, credit, etc. Thus the functions performed, assets deployed and risk assumed in trading are entirely different than that of business support services. The TPO has gone wrong in holding that margins earned in trading are in identical circumstances as while providing support services.

(iii) As regards the issue of inclusion of cost of sales in the denominator, the reasoning given by the TPO that compensation model in the case of the assessee should be expressed as a percentage of FOB price of goods serviced through the assessee is also wrong. The comparison model as a percentage of the value of the goods can be good where the service provider has knowledge of the product, knowledge of the quality, its usage and has developed competency. In this regard this model can't be applied to an entity which is just providing support services to an entity who in turn has core competency of that business, its product, design, etc. There is a difference in carrying on the business oneself and providing support service to the one who is doing the business. That reasoning given by the TPO for adding cost of goods sold while computing margin is not correct. Rule 10B(e)(i) specifically provides that net profit margin in relation to transaction entered into with an AE is computed in relation to costs incurred, or sales effected or assets employed or to

be employed by the enterprise. The cost incurred here will mean the cost incurred by the enterprise which will in the case of the assessee mean the cost incurred in providing services. Since no sales have been effected by the assessee company it is not appropriate to take cost of sales for computing margin. Even otherwise the compensation model to determine the arm's length price based on a single rate of commission on total FOB value of all types of goods to be sold will not be appropriate. The percentage of brokerage or commission for procuring business in respect of luxury goods or commodities is higher as compared to the percentage of commission or brokerage for high value products like gold, bullion. Similarly the percentage of commission or brokerage for consumer products is always higher as compared to the industrial products. Thus even where commission rate based on value of goods sold to be applied the nature and type of product in respect of which such services have been rendered have to be taken into consideration and then a comparison needs to be made with the commission rate prevalent in respect of such product goods. In the present case the nature of products and items varies a lot. The TPO without even looking at any of these items details has in a most arbitrary manner considered trading as one and the same to support services and applied trading margin in different nature of the product and items to the support services taking turnover of the AE as the basis. The TPO was not justified in re-characterizing the transaction of business support services as that into trading and applying the profit margin in the trading as the PLI. (AY. 2007-08, 2008-09)

Mitsui & Co. India Pvt. Ltd. v. DCIT (2015) 173 TTJ 309 / 125 DTR 241 / 44 ITR 535 (Delhi)(Trib.)

1566 **S.92C : Transfer pricing – Arm's length price – Transactional Net Margin Method – Only companies having related party transactions of less than 15 per cent, can be considered – Companies with turnover more than ₹ 200 crores to be excluded- Functionally dissimilar companies to be excluded.**

Assessee is in the business of Software development services. Tribunal held that while selecting comparables, only companies having related party transactions of less than 15 per cent can be considered. Companies with turnover more than ₹ 200 crores to be excluded. Functionally dissimilar companies to be excluded.(AY. 2006-07)

Tektronix Engineering Devt. India P. Ltd. v. Dy. CIT (2015) 39 ITR 212 / 69 SOT 1 (Bang.) (Trib.)

1567 **S.92C : Transfer pricing – Arm's length price – Transactional Net Margin Method – Selection of comparables – Working capital adjustment – Opening and closing working capital to be considered.**

Assessee is in the business of processing information and data through electronic and information technology services. While determining the arm's length price, company earning major source of income from outsourcing whose major expenditure was data entry charges, cannot be considered comparable. Company functionally similar and not subject to extraordinary events such as acquisition is to be included as comparable. Companies having huge turnover and brand value is to be excluded as comparables. Opening and closing working capital to be considered for determining working capital

deployed by any organization. Transfer Pricing Officer to allow working capital adjustment while determining profit margins of comparables.(AY. 2008-09)
New River Software Services P. Ltd. v. ACIT (2015) 39 ITR 415 (Delhi)(Trib.)

S.92C : Transfer pricing – Arm's length price – Determination – Information technology enabled services – Transactional Net Margin Method – Selection of comparables. 1568
Tribunal held that companies earning majority of income from outsourcing cannot be selected as comparable. Functionally dissimilar companies to be excluded. Companies which had suffered events like merger or demerger to be excluded. Companies consistently making losses to be excluded. Where assessee's financial year different from comparable company's compute Transfer Pricing Officer to compute figures relevant to financial year from audited accounts of comparable.(AY. 2009-10)
Macquarie Global Services P. Ltd. v. Dy. CIT (2015) 39 ITR 390 / 153 ITD 488 (Delhi)(Trib.)

S.92C : Transfer pricing – Arm's length price – Software development services – Selection of comparables – Functionally dissimilar companies to be excluded. 1569
Tribunal held that companies having related party transactions less than 15 per cent alone can be considered. Companies with turnover more than ₹ 200 crores to be excluded. Functionally dissimilar companies to be excluded. Small company cannot be compared to giant company engaged in development of niche products. Difference between operating profit margin determined by Transfer Pricing Officer and by assessee within range of plus or minus five per cent adjustment not warranted. (AY. 2006-07)
Cypress Semiconductor Technology India P. Ltd. v. Dy. CIT (2015) 39 ITR 468 (Bang.)(Trib.)

S.92C : Transfer pricing – Arm's length price – Software development services – Transactional Net Margin Method – Selection of comparables – Functionally dissimilar company to be excluded – Adjustment of depreciation – Matter remanded. 1570
Companies having related party transactions less than 15 per cent can alone be considered as comparable. Company with turnover more than ₹ 200 crores to be excluded. Functionally dissimilar company to be excluded. Adjustment for depreciation can be allowed only if there are operational differences affecting comparability. Matter remanded. (AY. 2005-06)
Dy. CIT v. Novell Software Development (India) P. Ltd. (2015) 39 ITR 331 (Bang.)(Trib.)

S.92C : Transfer pricing – Arm's length price – Company providing high-end services involving specialized knowledge and domain expertise in field could not be compared with assessee company which was mainly engaged in providing low-end services to group concerns. 1571
It was held that a company providing high-end services involving specialized knowledge and domain expertise in field could not be compared with assessee company which was mainly engaged in providing low-end services to group concerns. Also where TPO rejected comparables without even examining as to whether they were functionally comparable or not, comparability analysis carried out by him was vitiated. (AY. 2009-10)
PTC Software (India) (P.) Ltd. v. Dy. DIT (2014) 36 ITR 578 / (2015) 67 SOT 138 (URO) (Pune)(Trib.)

1572 **S.92C : Transfer pricing – Arm's length price – Company reflecting high margins in some year and low margin in some year cannot be taken as comparable.**
It was held that where a company reflected high margins in certain years and very low in other years, being functionally not comparable, margins of said companies could not be applied as comparables while benchmarking international transactions of assessee in IT segments. (AY. 2009-10)
PTC Software (India) (P.) Ltd. v. Dy. DIT (2014) 36 ITR 578 / (2015) 67 SOT 138 (URO) (Pune)(Trib.)

1573 **S.92C : Transfer pricing – Arm's length price – Only current year data is to be utilized for purpose of comparability.**
It was held that only current year data is to be utilized for purpose of comparability. A company offering wide encompassing IT solutions and services cannot be compared with software service provider. It was further held that high turnover and abnormal high profit margin *per se* cannot be a reason for rejecting a company as comparable, unless there are other reasons which do not satisfy FAR analysis. Lastly it was held that comparable undergoing diminishing revenue/persistent losses cannot be selected as comparable. (AY. 2009-10)
Navisite India (P.) Ltd. v. ACIT (2015) 67 SOT 145 (URO)(Delhi)(Trib.)

1574 **S.92C : Transfer pricing – Arm's length price – Payment to third party on behalf of AE for custom clearance services on high value packages could not be included in total costs of assessee for purpose of determining profit margin for bench marking arm's length price of assessee.**
On appeal to the Tribunal it was held from the records, it is evident that for co-coordinating customs clearance services on high value packages, the assessee was not rendering any direct services to the AE, but was getting such services done through third party who had the requisite licence. The assessee's role was confined to making the payments and to get the entire reimbursements of the costs. It is the Jeena Company who had charged for its services and the assessee has merely pass through such cost. In other words, assessee has merely done co-ordinating services, rather than providing full-fledged services. The department's allegations that it was monitoring Jeena's activity does not *per se* lead to any inference that the assessee was performing these services directly. All the activities and services have been rendered by Jeena who had received the payment as per their invoice. Under such a situation, it cannot be held that mark up of 9% should be applied on such costs incurred by the Jeena for benchmarking the arm's length price of the assessee vis-a-vis the transactions with AE. The net profit margin realized from the AE is to be computed only with reference to the cost incurred directly by the assessee itself and its profit margin cannot be computed on the cost incurred by the third party or unrelated parties so as to compute the net profit margin of the assessee with the transactions with the AE. The reason being, no direct cost of assessee is involved and assessee has not undertaken any FAR, i.e., performed any direct functions, deployed any or undertaken any assets risks. In our opinion, the payment made by the assessee to the third party for and on behalf of the AE which has been reimbursed by AE, cannot be included in the total costs of the assessee for the purpose

of determining the profit margin. Thus, TP adjustment by applying 9% mark-up on the cost of customs clearance service rendering through 'J' cannot be made for benchmarking the ALP of the assessee and accordingly such adjustments stands deleted. (AY. 2009-10)
FedEx Express Transportation & Supply Chain Services India (P.) Ltd. v. DCIT (2015) 67 SOT 134 (URO) / 169 TTJ 732 (Mum.)(Trib.)

S.92C : Transfer Pricing – Arm's length price – Abnormal events – Amalgamation – Where one of the comparables considered by TPO had changed business model due to amalgamation and due to which, functionality of said comparable changed, same was to be excluded from list of comparables during transfer pricing study of assessee. 1575
The assessee was a captive contract service provider engaged in providing IT enabled back office services to AE. In order to justify that the transaction was at arm's length, the assessee used Transactional Net Margin Method as the most appropriate method and Operating Profit/Operating Cost as the Profit Level Indicator as 11 comparable companies were taken by the assessee which were rejected by the Transfer Pricing Officer. The margin earned by the assessee at the entity level was 14.2 per cent. Considering the 10 comparables taken by the TPO who had disclosed 28.06 per cent mean margin as a result thereof adjustment was arrived at.
The assessee before the Commissioner (Appeals) succeeded in its alternate prayer without prejudice; the OP/OC margin of NNG was wrongly taken as 89.67 per cent and the correct margin ought to have been 48.64 per cent. However, on the argument that it was wrongly taken as a comparable the taxpayer failed to convince the Commissioner (Appeals).
On Second Appeal:
In the facts of the present case it is seen that the Co-ordinate Bench in the case of *HSBC Electronic Data Processing India Ltd. v. Addl. CIT [2013] 38 taxmann.com 141 (Hyd.) (Trib.)* for this specific year, i.e. 2006-07 assessment year has given a categoric finding that NNG has changed the business model of the company. The said finding on fact has not been canvassed to be a finding contrary to facts or upset by a decision of a higher forum. In these peculiar facts and circumstances there is no merit in the arguments of the Revenue to still restore the issue for verification when a Co-ordinate bench on facts pertaining to the very same assessment year has held that the business model for NNG has changed as a result of the amalgamation.
In view of the above, the sole issue agitated by the assessee praying for the exclusion of the NNG is allowed. (AY. 2006-07)
Ameriprise India (P.) Ltd. v. DCIT (2015) 67 SOT 136 (URO)(Delhi)(Trib.)

S.92C : Transfer pricing – Arm's length price – Comparables and adjustments – Reimbursement would form part of operating profit. 1576
It was held that receipt on account of reimbursement of advertisement expenditure incurred by assessee for its AE would form a part of operating profit either by way of adding to income or otherwise expenditure has to be reduced from total advertisement expenditure to extent of reimbursement; and it should not be excluded while calculating PLI of assessee. (AY. 2003-04, 2004-05)
Panasonic Consumer India (P.) Ltd. v. ACIT (2015) 67 SOT 283 (Delhi)(Trib.)

1577 **S.92C : Transfer pricing – Arm's length price – Comparables and adjustments – Valuation by customs authorities can be guiding factor – Data used must be relating to same financial year in which impugned uncontrolled transaction and comparable international transaction had been entered into.**

It was held that valuation made by customs authorities should be guiding factor for TPO while making adjustment on account of arm's length price. It was further held that financial data to be used in analysing comparability of an uncontrolled transaction with an international transaction shall be data relating to financial year in which impugned uncontrolled transaction and comparable international transaction had been entered into. (AY. 2003-04, 2004-05)

Panasonic Consumer India (P.) Ltd. v. ACIT (2015) 67 SOT 283 (Delhi)(Trib.)

1578 **S.92C : Transfer pricing – Arm's length price – FAR analysis can only be used for segregation.**

Assessee-company was a wholly owned subsidiary of a Japanese company. It had three divisions under which its business was organized, viz., Consumer Product Division (CPD), System Product Division (SPD) and Industrial Sales Division (ISD). Under CPD, assessee used to trade in/distribute household appliances and under SPD, it used to trade in /distribute office automation and telecommunication products and under ISD, it used to provide commission and marketing agency services with respect to electronic components, welding equipments, etc., sold by AEs to Indian customers. TPO observed that aggregation of results of two divisions, CPD and SPD, was not proper as they were not closely interlinked because of differences in nature of products, target consumer group and marketing strategy. He redrew accounts of CPD and SPD divisions and on that basis, recommended two additions as TP adjustments. It was held that under Transfer Pricing Regulations in India only reason which can be used for segregation is FAR analysis as provided in rule 10B(2)(b); since in instant case in both divisions, i.e. CPD and SPD, trading functions had same FAR and had closely linked transactions, same had to be taken as a whole as was done in TP report submitted by assessee. (AY. 2003-04, 2004-05)

Panasonic Consumer India (P.) Ltd. v. ACIT (2015) 67 SOT 283 (Delhi)(Trib.)

1579 **S.92C : Transfer pricing – Arm's length price – TP adjustment is to be made only in respect of purchases made from AE and not from unrelated parties.**

Assessee company was engaged in business of manufacture and sale of textile machinery, related parts, automotive parts and trading material and handling equipments. Assessee had shown its margin at 6.15 per cent. TPO did not accept results shown by assessee. He determined mean margin of comparables at 13.32 per cent and made TP adjustment. Assessee claimed that while computing mean margin of comparables, TPO had included purchases made from unrelated parties and claimed that arithmetic mean of comparables fell within (+-) 5 per cent range provided in proviso to Section 92C and, thus, no adjustment was called for. It was held by ITAT that TP adjustment is to be made only in respect of purchases made from AE and not from unrelated parties and hence matter needed reconsideration. (AY. 2006-07)

Kirloskar Toyoda Textile Machinery (P.) Ltd. v. ACIT (2015) 170 TTJ 30 (UO) / 67 SOT 222 (URO)(Bang.)(Trib.)

S.92C : Transfer pricing – Arm's length price – Royalty on sale by AE – Matter remanded. 1580

Assessee paid royalty in terms of technical know-how agreement for manufacture of finished products. Transfer Pricing Officer characterized assessee as a contract manufacturer and held that royalty paid as percentage of sale to AE was not at arm's length as it amounted to collecting royalty on sale to itself. It was held that where assessee claimed that agreement entered into by assessee with AE was similar to agreement entered into by sister concern with AE in as much as terms and conditions impacting issue were materially similar, TPO was to be directed to consider said claim of assessee after considering decision of co-ordinate Bench in case of sister concern in *Hero Motor Corp Ltd. v. Asstt. CIT.* [IT Appeal No. 5130 (Delhi) of 2010]. (AY. 2008-09). *Honda Siel Power Products Ltd. v. DCIT (2015) 67 SOT 225 (URO)(Delhi)(Trib.)*

S.92C : Transfer pricing – Arm's length price – Bright line test. 1581

Assessee was engaged in business of manufacturing of portable generating sets, I.C. Engines etc. Assessee claimed AMP expenses. Transfer Pricing Officer considering 6 companies was of view that expenditure was in excess of bright line by 1.87 per cent which was considered to be for promotion of brand name which was owned by AE. Thus, assessee was required to be compensated by AE and accordingly a markup of 15 per cent was applied and same resulted in an adjustment. It was held by the ITAT that as in *Asstt. CIT v. L.G. Electronics India (P.) Ltd. [2013] 35 taxmann.com 344 / 148 ITD 671 (Delhi)* certain directions had been given on basis of which AMP was to be calculated, it would be appropriate to restore issue back to file to TPO.(AY. 2008-09) *Honda Siel Power Products Ltd. v. DCIT (2015) 67 SOT 225 (URO)(Delhi)(Trib.)*

S.92C : Transfer pricing – Arm's length price – Additional ground – 50:50 model of revenue split, after deducting transportation costs, is an industry norm in logistics and freight forwarding industry – Matter remanded to Assessing Officer. [S.254(1)] 1582

Tribunal held that there is no dispute about the fact that 50:50 model of revenue split, after deducting transportation costs, is an industry norm so far as the logistics and freight forwarding industry, dealing with transportation of time sensitive consignments from destination in one country to another country, is recognized. The insertion of Rule 10BA is required to be held as retrospective in effect. Going by this Rule, the 50:50 business model, as is said to have been adopted by the assessee, would meet arm's length test. It thus appears to be free from doubt that 50:50 business model, as has been adopted by many assessees in logistics and freight forwarding industry is, as per the recent developments in the legislation and jurisprudence in the transfer pricing, a vital factor in determining the arm's length price of assessee's international transactions. The assessee had specifically taken up the issue of appreciation of this unique 50:50 business model before the DRP in the assessment years 2007-08 and 2008-09. As regards the assessment year 2006-07, it has been noted that the assessee's claim is that the assessee had pleaded for appreciation of this 50:50 business model, which is unique to the assessee's line of business activity, and when the Tribunal did not do so, the assessee even moved a miscellaneous petition under Section 254(2), whatever be the inherent limitations of this provision, on that point. That aspect of the matter is, however, academic because whether or not such a miscellaneous petition is accepted or whether or not even such a point was

specifically taken up in the first round of proceedings, the assessee does indeed, have a right to raise that aspect of the matter in the second round of proceedings before the Tribunal. In view of the above discussions, as also bearing in mind entirety of the case, it is fit and proper to admit the additional ground of appeal in all these three appeals and the matter stand remitted at assessment stage. (AY. 2006-07 to 2008-09)
Geodis Overseas (P.) Ltd. v. DCIT (2015) 67 SOT 220 (URO)(Delhi)(Trib.)

1583 **S.92C : Transfer pricing – Arm's length price – Transactional Net Margin Method – Functionally dissimilar companies to be excluded – Reimbursement of cost to be excluded from operating cost. [S.10A]**
Assessee is providing software development services. Tribunal held that while computing arm's length price by applying Transactional Net Margin method while selecting comparables, functionally dissimilar companies to be excluded. Reimbursement of cost to be excluded from operating cost. (AY. 2009-10)
Dy. CIT v. HSBC Electronic Data Processing India P. Ltd. (2015) 39 ITR 83 (Hyd.)(Trib.)

1584 **S.92C : Transfer pricing – Arm's length price – Even if the loan to the 100% subsidiary is intended to be a long term investment in the subsidiary and it has a crucial role to play in the assessee's business plans, it cannot be treated as "quasi capital". The ALP of the loan has to be determined on the basis of LIBOR interest.[S.92CA(3)]**
Even if the loan to the 100% subsidiary is intended to be a long term investment in the subsidiary and it has a crucial role to play in the assessee's business plans, it cannot be treated as "quasi capital". The ALP of the loan has to be determined on the basis of LIBOR interest. (AY. 2007-08)
Soma Textile & Industries Ltd. v. ACIT (2015) 154 ITD 745 / 172 TTJ 130 / 43 ITR 205 (Ahd.)(Trib.)

1585 **S.92C : Transfer pricing – LIBOR – The transaction of allowing credit period to the AE on realisation of sale proceeds is not an independent transaction and has to be considered along with the main international transaction of sale of goods.[S.92B, 92CA]**
Dismissing the appeal of revenue the Tribunal held that The transaction of allowing credit period to the AE on realisation of sale proceeds is not an independent transaction and has to be considered along with the main international transaction of sale of goods. (AY. 2007-08)
ACIT v. Information Systems Resource Centre Pvt. Ltd. (2015) 42 ITR 203 (Mum.)(Trib.)

1586 **S.92C : Transfer pricing – Arm's length price – Transactional Net Margin Method – Software non-development services – Selection of comparables – Use of multiple years' data – Held to be justified.**
The assessee, a joint venture between MH of the USA and the Tata group, published books for schools, colleges and professional markets and also sold MH products in India. It also provided back office support services in the nature of information technology enabled services, transaction processing and data processing services to its associated enterprises. During the previous year relevant to the assessment year 2007-08, the assessee entered into international transactions with MH of Singapore for rendering information technology support services. The assessee maintained books of account on an aggregate

basis combining the publishing and back office support services segments, but for purposes of its transfer pricing analysis, it split its combined results of the two segments. In its transfer pricing analysis, the assessee adopted the transactional net margin method with the profit level indicator of operating profit to operating cost. It showed its profit level indicator at 22.67 per cent under the publishing business segment and 10 per cent in the back office support segment and selected certain companies as comparables. The Transfer Pricing Officer rejected this and selected 26 companies as comparables with an average margin of 25.96 per cent and determined the arm's length price at ₹ 59,14,548. On appeal: Tribunal held that Selection of comparables (i) Functionally similar companies to be included and others to be excluded Companies undergoing merger and demerger, or having high turnover cannot be considered as comparables Matter remanded for Transfer Pricing Officer to determine arm's length price of international transaction afresh.
(ii) Use of multiple years' data Failure of assessee to establish influence of multiple years' data on determination of transfer pricing Transfer Pricing Officer justified in using current year's data. (AY. 2007-08)
Tata McGraw Hill Education P. Ltd. v. ACIT (2015) 154 ITD 109 / 38 ITR 553 (Delhi)(Trib.)

S.92C : Transfer pricing – Arm's length price – Transactional Net Margin Method – Software development services – Selection of comparables – Functionally different companies to be excluded – Working capital adjustment – Requiring verification by Transfer Pricing Officer – Matter remanded. 1587
The assessee was a subsidiary of the I group of the USA and provided software development services to its associated enterprise. The assessee adopted the transactional net margin method as the most appropriate method for determining the arm's length price and filed its own transfer pricing report. The Transfer Pricing Officer held that the assessee did not use relevant data for the year and used multiple years' data and also found out certain deficiencies in the report. He rejected the transfer pricing report of the assessee. The Transfer Pricing Officer used certain filters and arrived at 20 companies as comparables. The Dispute Resolution Panel confirmed this. The assessee objected to six comparables selected by the Transfer Pricing Officer and exclusion of six comparables selected by the assessee. On appeal:
Held, (i) that the comparables A, K, M, T, I, FSL were functionally different from the assessee and not comparable to a pure software developer like the assessee. Therefore, they were to be rejected as comparables.
(ii) That since working capital adjustment required verification by the Transfer Pricing Officer, the matter was to be remanded to the Transfer Pricing Officer. (AY. 2006-07)
NTT Data India Enterprise Application Services P. Ltd. v. ACIT (2015) 38 ITR 362 (Hyd.) (Trib.)

S.92C : Transfer pricing – Arm's length price – Customer directly entering into contract with either assessee or its associated enterprises – Risk profiles of associated enterprises remain same in both contracts – Contracts directly with associated enterprises not governed by technical strengths of entities – Transfer pricing adjustments to be deleted. 1588
The assessee was engaged in providing information technology services and with the marketing support of its associated enterprises, undertook customised software solution development, information technology facilities management and provided professional

information technology services to several clients across the globe. The assessee had two wholly owned associated enterprises. The customers, based on their individual preferences and requirements, chose to enter into contract with the associated enterprises or directly with the assessee. The Transfer Pricing Officer held that a 25 per cent revenue split in favour of the associated enterprises in the case of contracts entered into directly by the assessee was excessive and the payment only up to a revenue split of 13 per cent in the case of one associated enterprise and 15 per cent in the case of the other was allowable and made adjustments in relation to payments on account of accounting management charges by the assessee to its associated enterprises. The Commissioner (Appeals) deleted the addition. On appeal: Held, dismissing the appeal, that in both the business models, where the customer directly entered into contract with the assessee and where the customer directly entered into contract with its associated enterprises, the contract entered into with customers mentioned the expected standard of services to be provided for software development work. Under the second business model, if a customer raised a claim for non-performance of the non-administrative services, the associated enterprises would eventually pass on such risk to the assessee and the assessee had to bear such risk in accordance with the terms of the "master service agreement" entered into between the assessee and its associated enterprises. It was an internal arrangement between the assessee and the associated enterprises under which the marketing and the administrative functions were performed by the associated enterprises under both business models. The associated enterprises provided the marketing and the administrative services to the assessee and not to the clients. Thus, in both business models, the risk profiles of the associated enterprises remained the same. Further, in the course of negotiation of the contract and mapping of the scope of work, the customer was fully aware of the underlying delivery mechanism, since the technical capabilities of the assessee were always showcased and presented before the customer. Therefore the customers, based on their individual preferences and driven by considerations which were exclusively their own, chose to enter into contract with the associated enterprises or the assessee, which would not make an essential variation in the business model as a global organisation. Hence, the presumption of the Transfer Pricing Officer that the overseas customers' decision to enter into contracts directly with the associated enterprises was essentially governed by the technical strengths of these entities was inappropriate and without basis and therefore, the transfer pricing adjustments made by the Transfer Pricing Officer were to be deleted. (AY. 2005-06, 2006-07)
Dy. CIT v. ITC Infotech India Ltd. (2015) 38 ITR 401 / 67 SOT 289 (URO)(Kol.)(Trib.)

1589 **S.92C : Transfer pricing – Arm's length price – Determination – Transactional Net Margin Method – 3D animation software services – Selection of comparables – Functionally different companies to be excluded. [S.92A(3)]**
The assessee was a subsidiary of a company based in the USA and was engaged in the business of creating and providing 3D animation software to its associated enterprises. In its transfer pricing analysis, the assessee adopted the transactional net margin method with the profit level indicator of operating profit to total cost and selected six comparables. The Transfer Pricing Officer rejected the transfer pricing study of the assessee and selected 16 comparables (including 3 selected by the assessee and

rejecting 3 comparables) with average margin of 21.03 per cent. The assessee objected to the comparable K selected by the Transfer Pricing Officer. The Dispute Resolution Panel, following the order of the Tribunal, excluded the comparable K from the list of comparables. On appeal by the Department:
Held, that the comparable K was engaged in development of software and software products and also running a training centre for training of software professionals. The comparable company offered a variety of software products in the area of web solutions, e-commerce, software consultants, content management ERP applications, etc. It was functionally different from the assessee and not comparable to a pure software developer like the assessee. Therefore, it was to be rejected as comparable. (AY. 2009-10)
ITO v. Prana Studios P. Ltd. (2015) 38 ITR 21 / 69 SOT 12 (URO)(Mum.)(Trib.)

S.92C : Transfer pricing – Arm's length price – Software development services – Transactional Net Margin Method – Selection of comparables – Functionally dissimilar companies to be excluded – Claim for risk adjustment at 0.85 per cent was held to be allowable. 1590
The assessee was a subsidiary of a company based in the United States of America and was engaged in providing software development services to its associated enterprises. In its transfer pricing analysis the assessee adopted the transactional net margin method with the profit level indicator of operating profit to operating cost and identified 18 comparable companies with an average profit margin of 16.97 per cent on cost and worked out the operating profit margin at 8.19 per cent. The Transfer Pricing Officer did not approve the application of multiple years' data. After making certain inclusions and exclusions in or from the list of comparables, the Transfer Pricing Officer selected 17 companies as comparables with average margin of 26.59 per cent, determined a transfer pricing adjustment of ₹ 21,59,03,831, rejected the assessee's claim towards risk adjustment and recomputed the deduction claimed under section 10A of the Income-tax Act, 1961, by reducing the communication charges from the export turnover. The Commissioner (Appeals) confirmed this. On appeal by the assessee against wrong inclusion of eight comparables contending that their functional profiles were different and they were not a purely software development service provider. :
Held, (i) that out of 17 comparable companies ESSL, SIL, FSL, TSL, TEL and ITL were functionally different and BCL failed the related party transactions filter criteria. Therefore, those companies were to be excluded from the list of comparables.
(ii) That the Transfer Pricing Officer himself had concluded that risk adjustment to the extent of 0.85 per cent could be allowed. Therefore, the Transfer Pricing Officer was to allow risk adjustment to that extent. (AY. 2005-06)
DE Shaw India Software P. Ltd. v. ACIT (2015) 38 ITR 276 / 54 taxman.com 407 / 69 SOT 15 (URO)(Hyd.)(Trib.)

S.92C : Transfer pricing – Arm's length price – Bank guarantee Commission paid close to rate charged by ICICI Bank is at arm's length – Loan – Interest rate charged was higher than existing LIBOR Rates, said transaction was held to be at arm's length price. 1591
The Assessee had provided corporate guarantees in respected of advances given to its A.E and had charged guarantee commission @ 0.5% p.a. from the AE. Assessee had an

independent sanctioned LC arrangement where the Assessee paid 0.6% p.a. guarantee commission to ICICI Bank. It was held that the transaction was at arm's length and no adjustment was required.
Assessee had provided loan to Associated Enterprise and charged interest @ 7% p.a. The LIBOR rate for March 2008 was 2.6798 per cent. However the assessee had charged 7 per cent from its AE as per the internal CUP available. Since, the rate of interest charged was higher than LIBOR rates, it was held that the said transaction of providing loan to AE is at arm's length. Additions made by the Assessing Officer were accordingly set aside. (AY. 2008-09)
Everest Kanto Cylinder Ltd. v. ACIT (2014) 52 taxmann.com 395 / 167 TTJ 204 (Mum.) (Trib.)

1592 **S.92C : Transfer pricing – Arm's length price – Net gain or loss has to be considered for assessing tax liabilities and where the arm's length price has benefitted the assessee overall, there is no reason for making transfer pricing adjustment or doubting the transaction.**
Assessee, engaged in business of transportation of packages, documents, cargo etc in international and domestic sectors, entered into international transactions of rendering express delivery & freight forwarding services, cost allocation expenses and reimbursement of costs with its AE. The ALP was benchmarked using TNMM method on 5 comparables based on three years data and weighted average Net Profit Margin was arrived at 0.07%, transaction with AEs being at arm's length. It was demonstrated that the assessee benefitted net consideration wise, if overall inbound and outbound services were taken into consideration. The TPO held that assessee's overall margin needed to be benchmarked under external TNMM with comparables at entity level for entire sales and therefore, an adjustment of ₹ 13.06 crore was proposed. The DRP brought down the adjustment to ₹ 8.92 Crs. The Tribunal held that transfer pricing adjustments could be made only on international transactions with AE and not for entire sales at entity level. Further, where margins shown in freight and expenses segment were at arm's length margin, transfer pricing adjustment was to be deleted. (A.Y 2009-10)
Aramex India (P.) Ltd. v. DIT (2015) 167 TTJ 476 (Mum.)(Trib).

1593 **S.92C : Transfer pricing – Arm's length price – Comparables and adjustments – Hiring of equipments and dredgers from more than one AE – Aggregation of transaction was permitted only with respect to those which are between assessee and each AEs separately.**
Assessee, a partnership firm incorporated in Netherlands to undertake international dredging contract, had international transaction with its AEs with respect to hiring the dredger/vessels on lease and consideration was paid to the AEs for the same. The TPO relied upon the OECD guidelines on transfer pricing and held that as the leasing of all equipments were done separately by the assessee and the transactions are neither linked or continuous, the transactions are required to be evaluated separately. The CIT (A) confirmed the action of the TPO. Tribunal directed the TPO to determine the ALP by aggregating the various transactions between the assessee and each associate enterprise separately and not by clubbing the transactions with all AEs. (AY. 2002-03)
Boskalis International Dredging International CV v. DDIT (IT) (2014) 47 taxmann.com 150 / (2015) 67 SOT 118 (UO) / 167 TTJ 737 (Mum.)(Trib.)

S.92C : Transfer pricing – Arm's length price – Profit level indicator – Cash profit margin on sales – Principle of consistency was followed. [S.92CA] 1594

Tribunal held that following the principle of consistency as the AO has accepted the same method in earlier years as well as later year, PLI is to be arrived at by applying the same cash profit margin to sals ratio; filter representing NFA to sales ratio for selection of comparables cannot be applied as NFA to sales ratio has nothing to do with the cash profit margin generated by an assessee. Appeal of assessee was allowed.(AY.2005-06, 2006-07)

AT&S India Pvt. Ltd. v. DCIT (2015) 118 DTR 171 (Kol.)(Trib.)

S.92C : Transfer pricing – Transactional Net Margin Method-(TNMM) – Most Appropriate Method (MAM) – Notional interest-Receivable outstanding beyond 180 days-While an adjustment for working capital investment is required, the transaction of sale of goods and receivables arising therefrom can be aggregated. If the differential impact of working capital has been factored in the pricing of the transaction of sale, no further adjustment can be made-Appeal of assessee was allowed. 1595

The Tribunal had to consider whether the AO/DRP is justified in enhancing the income of the assessee on account of notional interest charged on receivables outstanding beyond 180 days. HELD by the Tribunal:

(i) An uncontrolled entity will expect to earn a market rate of return on its working capital investment independent of the functions it performs or products it provides. However, the amount of capital required to support these functions varies greatly, because the level of inventories, debtors and creditors varies. High levels of working capital create costs either in the form of incurred interest or in the form of opportunity costs. Working capital yields a return resulting from a) higher sales price or b) lower cost of goods sold which would have a positive impact on the operational result. Higher sales prices acts as a return for the longer credit period granted to customers. Similarly in return for longer credit period granted, a firm should be willing to pay higher purchase price which adds to the cost of goods sold. Therefore, high levels accounts receivable and inventory tend to overstate the operating results while high levels of accounts payable tend to understate them thereby necessitating appropriate adjustment. The appropriate adjustments need to be considered to bring parity in the working capital investment of the assessee and the comparables rather than looking at the receivable independently. Such working capital adjustment takes into account the impact of outstanding receivables on the profitability.

(ii) The principle of aggregation is a well-established rule in the transfer pricing analysis. This principle seeks to combine all functionally similar transactions wherein arm's length price can be determined for a number of transactions taken together. The said principle is enshrined in the transfer pricing regulation itself and has also been advocated by the OECD Guidelines. As the assessee had earned significantly higher margin than the comparable companies (which have been accepted by the TPO) which more than compensates for the credit period extended to the AEs. Thus, the approach by the assessee of aggregating the international transactions pertaining to sale of goods to AE and receivables arising from such transactions which is undoubtedly inextricable connected is in accordance with

established TP principles as well as ratio laid down by the Hon'ble jurisdictional High Court in the case of Sony Ericson Mobile Communication India Pvt. Ltd.

(iii) Any separate adjustment on the pretext of outstanding receivables while accepting the comparables and transfer price of underlying transaction i.e. sale of goods by application of TNMM is unjustified. The differential impact of working capital of the assessee *vis-a-vis* its comparables has already been factored in the pricing/ profitability of the assessee and therefore, any further adjustment to the margins of the assessee on the pretext of outstanding receivables is unwarranted and wholly unjustified. (AY. 2010-11)

Kusum Healthcare Pvt. Ltd. v. CIT (2015) 118 DTR 361 / 170 TTJ 411 / 42 ITR 77 (Delhi)(Trib.)

1596 **S.92C : Transfer pricing – ALP of funds lent to AE should be as per LIBOR +2% as arm's interest – ALP of corporate guarantee to be at 0.5% as guarantee commission charges in respect of the guarantee provided by the assessee for obtaining the loan by the AE.**

Tribunal held that; The ALP of loan granted by the assessee to its subsidiary, though from its internal accruals and without incurring any cost, has to be determined as per LIBOR and not the average yield rates considered by the TPO and the transaction of giving corporate guarantee to the bank, though held not to be an international transaction in Bharti Airtel Ltd. (ITA No 5816/Del/2013) dated 11 March 2014, the arm's length guarantee commission charges can be considered at the rate of 0.5% as held by the Tribunal in a series of other decisions.(ITA No. 4761/Mum/2013, dt. 25.3.2015) (AY. 2008-09)

Manugraph India Ltd. v. DCIT (2015) 43 CCH 348 (Mum.)(Trib.); www.itatonline.org

1597 **S.92C : Transfer pricing – Share application money cannot be treated as loan amount merely because there is a delay in issuance of shares – Adjustment made by the TPO was deleted.**

Though there was a delay in issuing the shares against the share application money given by the assesse to its AE, however, the assessee has duly explained the cause of delay and it was not a deliberate delay for using the money by subsidiary in the garb of share application money or by providing the fund by the assessee in the garb of share application money. The delay was due to obtaining necessary approval from the Securities and Exchange Commission, Philippines. Finally, the shares were issued as per the share certificate dated 25-5-2008 which has been produced by the assesse as additional evidence. Since the document of issuance of equity shares in the name of the assessee by the subsidiary/AE vide share certificate were not before the authorities below, therefore, to the extent of limited purpose of considering the said document, Tribunal set aside this issue to the record of AO/TPO to consider the same. As far as the re-characterization of the share application money as loan, the Tribunal note that the Hon'ble Jurisdictional High Court in the case of *DIT v. Besix Kier Dabhol* S.A. dated 30th August 2012 in ITA No. 776 of 2011 has considered an identical issue. Accordingly, the share application money cannot be treated as loan amount merely because there is a delay in issuance of shares by the subsidiary in the name of the assessee, which was duly explained by the assessee. (AY. 2007-08)

Aditya Birla Minacs Worldwide Ltd. v. DCIT (2015) 69 SOT 18 (URO)(Mum.)(Trib.)

S.92C : Transfer pricing – Arm's length price – Proposed interest rate to be charged at rate of 8.9 per cent on interest – Free loan advanced to its subsidiary company to determine ALP 1598

Assessee had advanced interest free loan to its AE. It proposed interest at rate of 8.9 per cent to determine ALP of same transaction but DRP levied rate of 11.40 per cent on basis of BBB Bond yield. Since loan given to subsidiary had lower risk as assessee had indirect control on it and LIBOR + nominal adjustment, interest rate proposed by assessee was reasonable. (AY.2007-08)

Glamour Enterprises (P.) Ltd. v. Dy. CIT (2015) 152 ITD 412 (Jaipur)(Trib.)

S.92C : Transfer pricing – Arm's length price – Software development services – TNMM – Comparables – Service of replacement of spares to customers – Administrative and management support services – Matter remanded.[S.92CA] 1599

The assessee was a subsidiary of a company based in Mauritius and was engaged in providing software development services to its parent company. In its transfer pricing analysis the assessee adopted the transactional net margin method as the most appropriate method for determining the arm's length price. TPO has rejected the comparables selected by assesseee. DRP confirmed the order of TPO. On appeal the Tribunal held that the assessee adopted the operating profits to cost as the profit level indicator. Companies having export turnover less than 75 per cent of total sales to be excluded. Functionally different companies cannot be treated as comparable. Functionally similar companies to be included. Matter remanded.

Service of replacement of spares to customers Matter remanded to Transfer Pricing Officer to determine arm's length price in light of directions of Tribunal for assessment year 2006-07. Administrative and management support services. Companies having related party transactions to extent of 88.23 per cent cannot be considered as comparable. Functionally dissimilar companies excluded and functionally similar to be included. Foreign exchange gain to be included in operating income. Matter remanded to Transfer Pricing Officer to recompute arm's length price after affording opportunity of being heard. (AY. 2009-10)

CISCO Systems (India) P. Ltd. v. Dy. CIT (2014) 66 SOT 82 (URO) / (2015) 37 ITR 133 (Bang.)(Trib.)

S.92C : Transfer pricing – Arm's length price – Transactional Net Margin Method – Computation of operational profit to total cost – Non-operative items of income and expenses to be excluded – Matter remanded. [S.92CA] 1600

On appeal by revenue the Tribunal held that, the major item of "other income" of the assessee was interest, which deserved exclusion from the operating profit. The assessee took all the expenses, including the non-operating expenses, in the calculation of operating profit of E. If the items of non-operating income were excluded from the computation of operating profit, then the items of non-operating expense should also be excluded. The assessee had carried out a one-sided exercise to bring down the operating profit to total cost of E. The assessee included bank charges also in computing the operating profit. The bank interest also assumed same character of non-operating nature and therefore, was to be excluded. Similarly, there could be other non-operating expenses which were not excluded by the assessee. Hence, the operating profit to total cost of E calculated by the assessee was neither the operating profit nor the net profit

and it lay somewhere between the two as it was the excess of operating income over total expenses. Therefore, the matter was remitted to the AO for *de novo* determination of operating profit to total cost of E. Matter remanded. (AY. 2004-05)
Dy. CIT v. Exxon Mobil Gas (India) (P.) Ltd. (2015) 152 ITD 220 / 37 ITR 22 / 118 DTR 387 / 170 TTJ 299 (Delhi)(Trib.)

1601 **S.92C : Transfer pricing – Administrative support services fee – Matter remanded.**
Failure by assessee to establish its claim of receiving services. Matter remanded to Transfer Pricing Officer for readjudication. (AY. 2008-09)
Cisco Systems Capital (India) P. Ltd. v. Add. CIT (2015) 37 ITR 343 (Bang.)(Trib.)

1602 **S.92C : Transfer pricing – Arm's length price – Functionally dissimilar companies to be excluded – Software development services – Selection of comparables – operational loss – Foreign exchange loss – Working capital – Provision for doubtful debts part of operating expenses.**
The assessee was a subsidiary of a company based in the United States of America and was engaged in providing software services to its associated enterprises. On appeal Tribunal held that;
Functionally dissimilar companies to be excluded. Software product companies not comparable with companies rendering software services. Segmental information for associated and non-associated enterprises. Transfer Pricing Officer to verify whether assessee maintained separate books of account which were audited by auditor. Matter remanded.
Foreign exchange loss to be considered as operative in nature. Included in profit level indicator of assessee. Direction to Transfer Pricing Officer to consider only foreign exchange loss attributable to associated enterprises transactions. Matter remanded. Working capital adjustment, requiring verification by Transfer Pricing Officer. Matter remanded. Provision for doubtful debts part of operating expenses. Direction to Transfer Pricing Officer to re compute margins of comparable companies by including provision for bad and doubtful debts as operating expenses for computing profit and loss of comparable companies. (AY. 2009-10)
Kenexa Technologies P. Ltd. v. Dy. CIT (2015) 37 ITR 306 / 67 SOT 195 (URO)(Hyd.)(Trib.)

1603 **S.92C : Transfer pricing – Arm's length price – Determination – Marketing support services – Engineering services rendered by five comparables, functionally different and not comparable – Matter remanded to Transfer Pricing Officer for decision afresh.**
Held, that the services rendered by the assessee's associated enterprises were in the nature of market support services which were different from the set of services in the nature of engineering and consultancy services rendered by the five comparables. Therefore, those companies, being functionally different from the assessee, were to be excluded from comparables. Consequently, the Transfer Pricing Officer was to re compute the arm's length price of the international transaction of provision of market support services afresh by excluding these five comparables from the list of comparables after affording the assessee a reasonable opportunity of being heard. Matter remanded. (AY. 2006-07)
Microsoft Corporation India P. Ltd. v. Add. CIT (2015) 37 ITR 290 / 67 SOT 340 / 168 TTJ 314 (Delhi)(Trib.)

S.92C : Transfer pricing – Arm's length price – TNMM – Corporate support and research and development services segments – Matter remanded. [S.92CA] 1604

Tribunal held that; Companies having related party transactions to extent of more than 25 per cent cannot be treated as comparable. Companies having outsourcing activity, functional dissimilarity, diversified activities and element of brand value associated with them not comparable. Company earning substantial revenue from research and development activity to be treated as comparable. Risk or working capital adjustment. Requiring verification by Transfer Pricing Officer. Matter remanded.(AY. 2009-10)

International Specialty Products (I) P. Ltd. v. ITO (2015) 37 ITR 787 (Hyd.)(Trib.)

S.92C : Transfer pricing – 'risk' and 'location savings' – UN Manual, is basically view of Indian tax administration and is not binding on Appellate authorities. [S.92CA] 1605

Tribunal has laid down following principles while determining the risk and location savings: (1) The risk adjustment up to 2.25% which is the difference between Bank Fixed deposit rate (which undertakes little more risk) and risk free Government bond (which undertakes risks) should be allowed.

(ii) The assessee as well as the AE operates in a perfectly competitive market and the assessee does not have exclusive access to the factors that may result in the location specific advantages. As a result, there is no super profit that arises in the entire supply chain. Thus there is no unique advantage to the assessee over competitors. We are basing our opinion on the fact that the Revenue authorities were not able to substantiate the adjustments made either from the present day scenario or any authenticated and globally material.

(iii) The comparables selected by the assessee to determine arm's length price of transaction relating to contract manufacturing and contract research and development are local Indian comparables operating in similar economic Circumstances as the assessee. This according to us are in line with the decision of co-ordinate Bench of the ITAT, Delhi, in the case of GAP International Sourcing (India) Pvt. Ltd. (supra), wherein the Tribunal held, "The arm's length principle requires benchmarking to be done with comparables in the jurisdiction of tested party and the location savings, if any, would be reflected in the profitability earned by comparables which are used for benchmarking the international transactions. Thus in our view, no separate/additional allocation is called for on account of location savings".

(iv) OECD and G20 in Action 8: Guidance on Transfer Pricing Aspects of Intangibles which is part of Base Erosion and Profit Shifting Project, has provided guidance on issue of location savings and concluded that where local market comparables are available specific adjustment for location saving is not required. All the G20 countries have give their concurrence to this position and India is part of G20 countries.

(v) The calculation based on location savings by TPO is also infirm, as it is based on assumptions and not in accordance with the provisions of the Income-tax Act, 1961, because for computing cost savings TPO has relied on an article published in year 2012 whereas assessee's case is for Financial Year 2008-09. Therefore interpolation cannot be taken into consideration, unless specified.

(vi) Once the TNMM method is accepted as method of considering assessee as a tested party then any benefit/advantage accruing to AE is irrelevant if the PLI is within the range of comparables.

(vii) We also take into consideration the reliance placed on UN TP Manual by the TPO, about which we are convinced was incorrect reliance, because UN Manual, is basically view of Indian tax administration and is not binding on Appellate authorities.
(viii) TPO has based his computation on a method, which is not ascribed by the provisions of the Act. No doubt, clause (f) of section 92C(1) says, "such other method as may be prescribed by the Board". For adoption of this method, the TPO has to take care that the method has to be prescribed by the Board, which can do so through relevant Rules. Even relevant Rules do not talk about the method adopted by the revenue authorities. This, in unison with the decision of the co-ordinate Bench on incorrect method of computation, we are of the view that the TPO/AO and DRP erred in making the adjustment on account of location savings. (AY.2009-10)
Watson Pharma Pvt. Ltd. v. DCIT (2015) 38 ITR 97 / 168 TTJ 281 (Mum.)(Trib.)

1606 **S.92C : Transfer pricing – Closely linked international transactions can be aggregated to determine the ALP. [S.92CA, R.10AB]**
On a combined reading of Rule 10A(d) and 10B of the Rules, a number of transactions can be aggregated and construed as a single 'transaction' for the purposes of determining the ALP, provided of course that such transactions are 'closely linked'. Ostensibly the rationale of aggregating 'closely linked' transactions to facilitate determination of ALP envisaged a situation where it would be inappropriate to analyse the transactions individually. The proposition that a number of individual transactions can be aggregated and construed as a composite transaction in order to compute ALP also finds an echo in the OECD guidelines. As per an example noted by the Institute of Chartered Accountants of India ('ICAI') in its Guidance Notes on transfer pricing in para 13.7, it is stated that two or more transactions can be said to be 'closely linked', if they emanate from a common source, being an order or contract or an agreement or an arrangement, and the nature, characteristic and terms of such transactions substantially flow from the said common source;
On facts, the international transactions of import of spare parts, export of spare parts, IT support services, access to customized parts catalogue and amount received for warranty consideration are inter-related transactions, which were the sourcing activities of the assessee company and have to be aggregated in order to benchmark the international transactions. The assessee had benchmarked the arm's length price of all the transactions by comparing results of the comparable companies which were found to be at arm's length price. (AY. 2005-06)
Cummins India Ltd. v. ACIT (2015) 119 DTR 182 / 170 TTJ 746 / 68 SOT 14 (URO)(Pune) (Trib.)

1607 **S.92C : Transfer pricing – ALP of interest on funds advanced to AEs has to computed on LIBOR and not as per domestic prime lending rate (PLR)[S.92CA]**
ALP of interest on funds advanced to AEs has to computed on LIBOR and not as per domestic prime lending rate (PLR). (AY. 2008-09)
Varroc Engineering Pvt. Ltd. v. ACIT (2015) 168 TTJ 514 (Pune)(Trib.)

S.92C : Transfer pricing – Comparables have to be excluded by the turnover filter without a FAR analysis being required to be conducted. The AO cannot rely on information obtained u/s. 133(6). [S.92CA, 133(6)] 1608

(i) In Genisys Integrating Systems (India) P. Ltd. the Tribunal has held that turnover is an important filter which has to be adopted for determination of the ALP. The Tribunal has been consistently following the said decision. The FAR analysis would not alter the turnover of the company. In view of the same, we do not find it necessary to remand the issue of comparability of these companies to the AO/ TPO for re-determination of the ALP. In view of the turnover being higher than ₹ 200 crores in the case of the above companies, we direct the AO to exclude these companies from the list of comparables.

(ii) The TPO has drawn conclusions on the basis of information obtained by issue of notice u/s.133(6) of the Act. This information which was not available in public domain could not have been used by the TPO. (AY. 2006-07) (ITA no. 1129/ Bang/2010, dated 31.12.2014)

Yahoo Software Development India P. Ltd. v. DCIT (2015) 54 taxmann.com 362 (Bang.) (Trib.) www.itatonline.org

S.92C : Transfer pricing – To apply the "Cost Plus Method", there must be a "comparable uncontrolled transaction". The fact that the same product is sold by the assessee to its AEs as well as to third parties does not mean that the two sets of transactions are comparable if the business model, marketing, sales promotion etc is different.[S.92CA] 1609

Tribunal held that to apply the "Cost Plus Method", there must be a "comparable uncontrolled transaction". The fact that the same product is sold by the assessee to its AEs as well as to third parties does not mean that the two sets of transactions are comparable if the business model, marketing, sales promotion etc. is different. (AY. 2003-04 to 2006-07)

Wrigley India Pvt. Ltd. v. ACIT (2015) 167 TTJ 561 / 67 SOT 205 (URO)(Delhi)(Trib.)

S.92C : Transfer pricing – Certification by CA – The Transfer pricing study and certification by the CA does not inspire any confidence. The level of professionalism is "pathetic". No purpose is served by relying on such reports. [S.92CA] 1610

The transfer pricing reports with respect to the impugned determination of ALP leave a lot to be desired. Just because the action of the authorities below, in adopting cost plus method in the above manner, is legally unsustainable, the ALP determination by the assessee cannot be taken as correct. These TP reports as also certifications by the chartered accountants inspire no confidence and, quite to the contrary, raise doubts about efficacy of the built in checks and balances in transfer pricing regulations. It is somewhat fashionable to criticize the Revenue authorities for their lack of objectivity or even inefficiency but what in the world can justify such a pathetic level of professional work relied upon by even the large corporate entities. If the tax judicial system is clogged by frivolous litigation today and if the tax finality still takes decades to reach, these saviours of taxpayers are as much to be blamed for this situation as anybody else. No purpose can be served in reporting by a chartered accountant when such reports

do not even point out glaring infirmities in taxpayer's approach *vis-à-vis* the transfer regulation, in a comparison of budgeted profits margin with actual profit margins realized by the comparables which is stated to be ascertainment of ALP on the basis of the TNMM. It appears that in an alarming number of cases, these audit reports, rather than painting a true and fair picture of the relevant facts, tend to epitomize the art of constant hedging and manoeuvring by the professionals so as they stay within the confines of permissible professional conduct and are yet able to sidestep the inconvenient realities. Of course, it will be much worse a situation if they are actually so naïve as to be oblivious of simple provisions of law, of their onerous responsibilities or of the legitimate public expectations. It is not to belittle the brilliant work being done by many a professionals but it is just to point out the dilemma of those who explore the possibilities of relying upon such audit reports and certifications, and also the inertia of those who can do something to salvage this situation and, to thus avoid an inevitable systemic rejection of the ritualistic certifications. We are particularly pained today as the financial period before us is mostly even more than a decade old and yet since the TP reports and certifications before us are, in our considered view, so much devoid of credibility that, instead of deciding the things one way or the other, we have no choice except to remit the matter to the file of the TPO for fresh ascertainment of ALP on the basis of residuary method, i.e. TNMM. (AY. 2003-04, 2004-05, 2005-06)
Wrigley India Pvt. Ltd. v. ACIT (2015) 68 SOT 10 / 169 TTJ 60 (Delhi)(Trib.)

1611 **S.92C : Transfer pricing – Transactions which are not closely linked cannot be aggregated for determining ALP. Cherry-picking is not allowed. If there are a number of comparable uncontrolled transactions, the average price has to be taken.**
Tribunal held transactions which are not closely linked cannot be aggregated for determining ALP. No side can be allowed cherry-picking. The best course in our considered opinion is to average the prices charged by the assessee from its non-AEs in the same quarter and then make its comparison with the price charged from the AE. When we consider the mandate of section 92C in conjunction with that of Rule 10B, it transpires that if there is a single comparable uncontrolled transaction, then the price in such transaction is to be considered but if there are number of such comparable uncontrolled transactions, then the arithmetic mean of such prices charged or paid should be identified. Neither the Revenue can pick a single highest price from a number of comparable uncontrolled transactions, nor the assessee can argue for taking the lowest of such comparable uncontrolled transactions. It, therefore, follows that the average of the prices charged by the assessee from its non-AEs in the same quarter should be considered for identifying the benchmark price of the same product sold to AE in the same quarter. (AY. 2008-09) (ITA No. 521/Del/2013, dated 30-1-2015)
ITW India Ltd. v. ACIT (Delhi)(Trib.); www.itatonline.org

1612 **S.92C : Transfer pricing – Arm's length price – Selection of comparable – Functionally different – Huge turnover and abnormal profit.**
Assessee, a wholly owned subsidiary of C3i Inc., USA was a technical help desk for end users. TPO opined that method adopted by assessee for selecting comparables suffered from defects and TPO selected 12 companies as comparables and made T.P.

adjustment. Assessee objected to selection of six out of twelve comparables. It was found that, on similar facts, in earlier year, four entities had been directed to be excluded by Tribunal from list of final comparables, in view of fact that some of comparables were functionally different and some other comparables were having huge turnover and earning abnormal profits but claim of assessee for exclusion of other two entities had not been accepted. Tribunal held that on facts, said four entities had to be excluded from comparables list.
C3i Support Services (P.) Ltd. v. Dy. CIT (2015) 152 ITD 279 (Hyd.)(Trib.)

S.92C : Transfer pricing – Arm's length price – Reimbursement of expenses – ALP adjustment was deleted. 1613
The assessee was engaged in international trading of tyres, tubes and flaps through 'tyretech global division'. In transfer pricing proceedings, the TPO noticed that the assessee had reimbursed its AE, sales promotion expenses without any mark-up.
The TPO was of the view that the assessee was not under any contractual obligation to perform marketing function and, as such, no such reimbursement would have been made in arm's length situation. While TPO did not dispute that the assessee may have benefitted from said exercise, he was of the view that such a benefit was only incidental and such incidental benefits cannot be regarded as giving rise to an arm's length transaction. He thus proceeded to hold that this payment was not for intra group services, was purely for an incidental benefit and its arm's length price to the assessee was zero. Accordingly, an ALP adjustment of ₹ 44.28 lakhs was proposed by the TPO. The DRP rejected objection raised by the assessee. On appeal Tribunal held that the question of incidental benefit to the assessee, for expenses incurred by the AE, would arise only when the expenses are incurred by the AE in its own right though for the common benefit of group as a whole. The impugned ALP adjustment is, therefore, devoid of legally sustainable basis on the facts of this case. Accordingly, the AO is directed to delete the same. (AY. 2006-07)
Apollo International Ltd. v. Addl. CIT (2015) 152 ITD 229 / 166 TTJ 881 (Delhi)(Trib.)

S.92C : Transfer pricing – Arm's length price – Functionally different – Turnover filter – Wrong comparison taken in the transfer pricing report can be corrected and brought to the notice of Tribunal. 1614
Companies engaged in software product development are functionally different and dissimilar to assessee company engaged in providing software development services and were, therefore, to be omitted from list of comparables while determining ALP of international transaction in question. Turnover filter is an important criteria in choosing comparables. Where turnover of assessee company was less than ₹ 30 crores, companies having turnover of more than ₹ 200 crore could not be compared with assessee and had to be excluded from comparable. Where in a company there was consistent change in operating margins, same had to be excluded. Even if assessee had taken a company as comparable in its transfer pricing audit, still it was entitled to point out to Tribunal that said enterprise had wrongly been taken as a comparable. (AY. 2006-07 & 2009-10)
Aptean Software India (P.) Ltd. v. ITO (2015) 152 ITD 311 (Bang.)(Trib.)

1615 **S.92C : Transfer pricing – Arm's length price – ALP adjustments cannot be extend to transaction with non-AEs.**
Tribunal held that ALP adjustments can only be made in respect of international transactions with AEs and cannot extend to transactions with non-AEs. (AY. 2003-04)
Dy. CIT v. Alcatel India Ltd. (2015) 152 ITD 289 (Delhi)(Trib.)

1616 **S.92C : Transfer pricing – Arms' length price – Foreign exchange loss could not be adjusted.**
Tribunal held that where assessee-company having purchased bearings and other products from its AE located abroad, sold said products to Indian customers, in absence of any documentary evidence to show that purchases and sales were made against pre-determined rates, foreign exchange fluctuation loss could not be adjusted in hands of assessee. (AY. 2009-10)
NSK India Sales Co. (P.) Ltd. v. ACIT (2015) 152 ITD 239 / 119 DTR 107 / 170 TTJ 424 (Chennai)(Trib.)

1617 **S.92C : Transfer pricing – Arm's length price – Where items of non-operating income are excluded, then items of non-operating expenses should also be excluded.**
Tribunal held that, if items of non-operating incomes are excluded from computation of operating profit under TNMM, then items of non-operating expenses should also be excluded. (AY. 2004-05)
Dy. CIT v. Exxon Mobil Gas (India) (P.) Ltd. (2015) 152 ITD 220 / 37 ITR 22 / 118 DTR 387 / 170 TTJ 299 (Delhi)(Trib.)

1618 **S.92C : Transfer pricing – Arm's length price – Allocation of expenses – Ratio of employee – Gross profit ratio – Ratio adopted by TPO was affirmed.**
For allocation of expenses, assessee had adopted ratio of employee for rent, depreciation etc. TPO was of firm belief that gross profit ratio would be appropriate to allocate various expenses. Tribunal held that since expenses like rent, depreciation, electricity, insurance charges, office maintenance and other miscellaneous expenses had no co-relation with number of employees and had a direct bearing to revenue generation, method adopted by TPO was slightly better than method adopted by assessee particularly when allocation by assessee was not supported by any certificate from management. Order of TPO was confirmed.(AY. 2008-09)
Varian India (P.) Ltd. v. Addl. CIT (2015) 67 SOT 17 (URO)(Mum.)(Trib.)

1619 **S.92C : Transfer pricing – Arm's length price – Transactions with each associated enterprises to be computed separately and not by clubbing with all AEs – Matter remanded.**
Tribunal held that where for execution of project, assessee company had hired equipments and dredgers from more than one associated enterprise, in determining ALP, aggregation of transaction would be permitted only to extent of transactions or to extent of members of transactions with each associated enterprise separately and not by clubbing transactions with all AEs. Matter remanded. (AY. 2002-03)
Boskalis International Dredging International CV v. Dy. DIT (2015) 67 SOT 118 (URO) / 167 TTJ 737 (Mum.)(Trib.)

S.92C : Transfer pricing – Arm's length price – Lease rental – TPO has not brought on record any material to show that rent paid by assessee was in excess of comparable case – Matter remanded. 1620

Assessee claimed to have paid lease rentals even for period beyond period of project i.e., for time spent on demobilization and transportation of dredger and vessel to port for redelivery. Tribunal held that the assessee had not produced any record to show that such payment was a standard practice in this field of business on other hand, TPO had not brought on record any material to show that rent paid by assessee was in excess of comparable case. Matter was to be readjudicated. Matter remanded. (AY. 2002-03)

Boskalis International Dredging International CV v. Dy. DIT (2015) 67 SOT 118 (URO)/ 167 TTJ 737 (Mum.)(Trib.)

S.92C : Transfer pricing – TPO/ DRP's action of reducing the quantum of royalty paid to AE by applying the "benefit test" is surprising and improper.[S.37(1)] 1621

Tribunal held that TPO/ DRP's action of reducing the quantum of royalty paid to AE by applying the "benefit test" is surprising and improper. (AY. 2010-11)

R.A.K. Ceramics India Pvt. Ltd. v. DCIT (2015) 169 TTJ 759 / 42 ITR 368 (Hyd.)(Trib.)

Section 92CA : Reference to Transfer Pricing Officer.

S.92CA : Transfer pricing – Reference to TPO – Jurisdiction of AO to allow expenses u/s. 37 and TPO u/s. 92CA is distinct and, therefore, a referral made by AO to TPO for determining ALP does not take away the power of AO to determine whether payment to AE for services received is an allowable expenditure u/s. 37(1) of the Act. Authority of TPO is to conduct a TP analysis to determine ALP and not to determine whether there is a service or not from which the assessee benefits. [S.37(1)] 1622

With respect to payment of referral fees, the Tribunal had reversed the finding on two grounds: (i) AO, after having referred that matter to the TPO, could not reopen or re-examine the transaction (ii) On merits, the Tribunal held that the assessee had submitted ample evidence to support the expenditure. However, the High Court held that the jurisdiction of the AO u/s. 37 and the TPO u/s. 92CA were distinct; the TPO determines whether the stated transaction value represents the ALP or not (including whether the ALP is Nil), while the AO makes the decision as to the validity of the deduction u/s. 37. This means that the decision as to whether the expenditure was laid down 'wholly and exclusively for the purpose of business' is a fact to be determined or verified by the AO. Accordingly, the AO cannot reassess or draw adverse inference as to the quantum of payment; however, the AO may determine whether services were actually rendered.(AY.2006-07)

CIT v. Cushman and Wakefield (India) (P.) Ltd. (2015) 233 Taxman 250 / 277 CTR 368 / 119 DTR 261 (Delhi)(HC)

1623 **S.92CA : Reference to transfer pricing officer – Post amendment to section 92CA(4) with effect from 1-6-2007 AO has to pass an order in conformity with order of TPO.**
The Appellate Tribunal held that order passed by TPO is binding on AO and he has no choice but to pass an order in conformity with order of TPO post amendment to section 92CA(4) with effect from 1-6-2007. (AY. 2009-10)
Tianjin Tianshi Biological Development Company Ltd. v. DCIT (2015) 168 TTJ 454 / 37 ITR 260 / 120 DTR 46 (Delhi)(Trib.)

1624 **S.92CA : Transfer pricing – Transaction of past years cannot be referred to TPO.**
Allowing the appeal of assessee, the Tribunal held that Assessing Officer cannot refer international transactions for determination of ALP that were carried on in any of past years and whose assessments had already been completed. (AY.2004-05, 2006-07)
Perstorp Chemicals India (P.) Ltd. v. ITO (2015) 155 ITD 16 (Mum.)(Trib.)

Section 94 : Avoidance of tax by certain transactions in securities.

1625 **S.94(7) : Transaction in securities – Dividend stripping – Loss – Set-off – Loss arising in the course of a dividend stripping transaction before the insertion of S.94(7) w.e.f 1st April 2002 cannot be disallowed.**
Loss arising in the course of a dividend stripping transaction before the insertion of S.94(7) w.e.f. 1st April 2002 cannot be disallowed. Followed *CIT v. Walfort Share & Stock Brokers (P) Ltd. (2010) 326 ITR 1 (SC)*
CIT v. Globe Capital Market Ltd. (2015) 373 ITR 58 / 278 CTR 264 / 120 DTR 311 (SC)

Section 94A : Special measures in respect of transactions with persons located in notified jurisdictional area.

1626 **S.94A : Special measures in respect of transactions with persons located in notified jurisdictional area – Writ petition assailing Notification No. 86/2013, dated 1-11-2013 – Cyprus declared as a notified jurisdictional area – Government of Cyprus was not co-operating with Government of India – DTAA-India-Cyprus [Art. 28]**
The assessee filed a writ petition assailing the notification dated 1-11-2013, mainly on the basis that "Cyprus" ought not to have been declared as a notified jurisdictional area in view of the international treaty between the Government of India and Government of Cyprus. The assessee contended that the very basis of issuing the impugned notification dated 01-11-2013 i.e., that the Government of Cyprus was not co-operating with the Government of India and, despite several requests, not supplying the information sought by the authorities of the Government of India, on the face of it, was wrong in view of the Press Release made by the Cyprus authorities that they had never denied any information and they had been ready and willing to supply the information sought by the Government of India.
The Court held that while exercising the writ jurisdiction under Article 226 of the Constitution of India, the Court ordinarily should not proceed to look into as to whether information sought by the Indian authorities was ever declined by the Government of

Cyprus or if the Government of Cyprus is ready and willing to supply the information sought by the Indian authorities. Moreover, there seems to be no valid reason to disbelieve the satisfaction so recorded by the Indian authorities. Accordingly, the writ filed by the assessee was rejected.
Expro Gulf Ltd. v. UOI (2015) 230 Taxman 331 / 115 DTR 17 / 274 CTR 390 (Uttarakhand) HC)

CHAPTER XII
DETERMINATION OF TAX IN CERTAIN SPECIAL CASES

Section 111A : Tax on short-term capital gains in certain cases.

S.111A : Tax on short term capital gains – Equity shares – Inadvertent mistake of not mentioning short-term capital gain in a column of ITR 4 is not fatal to assessee's claim for concessional rate of tax. [S.139] 1627
Allowing the appeal the Tribunal held that the assessee could not be denied concessional rate of tax u/s. 111A on short-term capital gains on sale of equity shares on ground of not mentioning such income in one of columns of income-tax return when in same form of return of income, at more than one place, assessee had shown such income to be entitled for concessional rate of taxation. (AY.2008-09)
Himanshu Nalin Kajiv. Dy. CIT (2015) 155 ITD 41 (Mum.)(Trib.)

Section 113 : Tax in the case of block assessment of search cases.

S.113 : Tax – Block assessment – Surcharge – Levy of surcharge was held to be not valid. [S.158BC] 1628
Where pursuant to search proceedings, assessee filed return for block period declaring certain undisclosed income, following order passed by Supreme Court in case of *CIT v. Vatika Township (P.) Ltd. (2014) 367 ITR 466*, Tribunal was justified in deleting surcharge levied by Assessing Officer under provisions of Finance Acts, 1999 and 2000.
ACIT v. Uttamchand V. Sethiya (2015) 230 Taxman 566 (Guj.)(HC)

S.113 : Tax – Block assessment – Surcharge – Law applicable – Period prior to amendment of section 113 – Surcharge could be levied. 1629
Held, that surcharge could be levied even before the amendment of section 113 in view of the Finance Act passed by Parliament in the respective assessment year. Therefore, the Commissioner (Appeals) was not justified in deleting the surcharge levied by the Assessing Officer.
ACIT v. Sabarigiri Trust (2015) 152 ITD 637 / 170 TTJ 586 / 39 ITR 308 (Cochin)(Trib.)

Section 115BB : Tax on winnings from lotteries, crossword puzzles, races including horse races, card games and other games of any sort or gambling or betting of any form or nature whatsoever.

1630 **S.115BB : Rate of tax – Income from betting on horse races – Losses cannot be set off against such income – Taxable at rate of forty percent. [S 2(24)(ix), 58(4)]**
Business loss from same source also could not be set-off from winnings from betting and gambling income, as they would be taxed on gross basis. (AY. 1998-99)
CIT v. Dr. M.A.M. Ramaswamy (No.1) (2015) 373 ITR 428 / 230 Taxman 494 (Mad.)(HC)
CIT v. Dr. M.A.M. Ramaswamy (No.2) (2015) 373 ITR 437 (Mad.)(HC)

Section 115BBC : Anonymous donations to be taxed in certain cases.

1631 **S.115BBC : Anonymous donations – Charitable activities part of religious activity – Fall within broad conspectus of Hindu religious activity – Special rate not attracted.**
Dismissing the appeal of Revenue the Court held that the question of receipt of anonymous donations could not be addressed within the narrow scope of the specific wording of some of the clauses of the trust deed but in the overall context of the actual activities in which the trust was involved in including imparting spiritual education to persons of all castes and religions, organising samagams, distribution of free medicines and clothes to the needy and destitute, provision of free ambulance service for needy and destitute patients and so on. What can constitute religious activity in the context of the Hindu religion need not be confined to the activities incidental to a place of worship like a temple. A Hindu religious institution like the assessee is also engaged in charitable activities which were very much part of the religious activity. In carrying on charitable activities along with organising of spiritual lectures, the assessee by no means ceased to be a religious institution. The activities described by the assessee as having been undertaken by it during the assessment year in question could be included in the broad conspectus of Hindu religious activity when viewed in the context of the objects of the trust and its activities in general. Thus, the Tribunal was justified in coming to the conclusion that the assessee was entitled to the benefit of section 115BBC as far as the anonymous donations received by it were concerned.(AY. 2009-10)
CIT(E) v. Bhagwan Shree Laxmi Naraindhan Trust (2015) 378 ITR 222 / 235 Taxman 51 / 280 CTR 335 (Delhi)(HC)

1632 **S.115BBC : Anonymous donations when no record maintained – Additions cannot be as cash credits. [S. 68]**
Assessment u/s. 143(3) r.w.s. 153C was made and amount added being anonymous amount u/s. 115BBC for AY. 2007-08 and corpus donation received for AY 2008-09 and also added an amount on failure to establish creditworthiness of creditor as unexplained cash credit for AY. 2009-10. On appeal before the CIT(A), held that since Assessee society was not able to establish identity and capacity of donors, addition done by AO was sustained and appeal of assessee was dismissed. The Tribunal held that section 115BBC only mandates names and addresses of donors are to be recorded. The CIT(A) wrongly applied section 68 on assessee society, hence appeal allowed as CIT(A) erred

in confirming the addition as anonymous donations u/s. 115BBC. Hence ground taken by Assessee was allowed for AY. 2007-08, and for disallowance of expenditure u/s. 40(a)(ia), capital expenditure and addition of suppressed receipts for AY. 2008-09. Assessing Officer has to verify and examine and arrive at the amount, for AY. 2009-10. Assessee proved with enough proof and deleted addition answering in favour of assessee. Appeals disposed of and statistically allowed by common order.(AY. 2007-08 to 2009-10)
Vaishnavi Educational Society v. DCIT (2014) 36 ITR 446 (2015) 167 TTJ 774 (Hyd.)(Trib.)

Section 115E : Tax on investment income and long-term capital gains.

S.115E : Non-residents – Capital gains – Benefit of concessional rate of tax would not be available on short-term capital gains arising from sale of shares. [S. 2(24), 2(42B] 1633
Assessee, a non-resident, earned short-term capital gain on sale of bonus shares. He paid tax at the concessional rate of 20%, claiming benefit of s. 115E, on the basis that the original shares were purchased in convertible foreign exchange. The AO held that concessional rate of tax was not available for short-term capital gains. The HC held that if the phrase "investment income" is interpreted to include all kinds of income defined in S. 2(24), then the phrase "income by way of long-term capital gain" would become redundant. Income derived from shares would normally include dividend income and not income from sale of shares, since in the case of latter rights over the shares are extinguished. Thus, income arising on sale of assets leading to short-term capital gains would not be investment income derived from foreign exchange asset and thus benefit of section 115E would not be available to short-term capital gains. (AY. 1992-93)
CIT v. Sham L. Chellaram (2015) 373 ITR 292 / 116 DTR 118 / 275 CTR 245 (Bom.)(HC)

Section 115J : Special provisions relating to certain companies.

S.115J : Book profit – Profits or loss to be taken into account must relate to relevant previous year – Amount taxed earlier but shown in books – Not includible in book profits. 1634
For the assessment year 1990-91, in its book profits, the assessee posted a sum of ₹ 4,28,17,995. This included a sum of ₹ 3,81,48,960 stated to be interest on intercorporate deposits for the four consecutive previous years, i.e., 1985-86 to 1988-89. A note was appended to the return with a request to exclude the amount of ₹ 3,81,48,960 from assessment stating that the amount was referable to the earlier assessment years and had also suffered tax. The Assessing Officer did not accept that plea. The Commissioner (Appeals) partly allowed the appeal deleting the profits for the assessment years 1986-87 and 1987-88 on the ground that section 115J of the Act was not in force at the relevant point of time. However, he did not allow such deduction for the assessment years 1988-89 and 1989-90. The Tribunal accepted the contention of the assessee for all the four years.
The High Court held, dismissing the appeal, that the Assessing Officer did not doubt the plea of the assessee that the amount was referable to four assessment years and the corresponding break-up was also given. On the undisputed facts, those figures could not be said to be the income or book profit "for the relevant previous year". From a perusal

of the Explanation to section 115J, it becomes clear that notwithstanding the freedom given to an assessee to state its book profit in its annual report submitted as part of its obligation under the Companies Act, 1956, it is kept under an obligation to be truthful. The book profit is liable to be increased or decreased, depending upon the factors that are mentioned in the Explanation. One central theme that runs through the provision, is that the profit and loss shall be with reference to the relevant previous year. (AY. 1990-91)
CIT v. Nagarjuna Fertilizers and Chemicals Ltd. (2015) 373 ITR 252 / 231 Taxman 643 (T & AP)(HC)

1635 **S.115J : Book profit – Depreciation – Accounts maintained as per companies Act – Adjustment by the AO was held to be not justified. [S.32, Companies Act, 1956, Parts II and III of Schedule VI]**
Assessee provided the depreciation in its profit and loss account as per the books of account maintained in accordance with Parts II and III OF Schedule VI of Companies Act, 1956. AO recomputed the book profit and disallowed the depreciation claimed. On appeal Tribunal held that where accounts of assessee were certified by auditors as having maintained in accordance with provisions of Companies Act, AO could not contend that accounts were not properly maintained. Adjustments made by the AO was deleted. (AY. 2007-08, 2008-09)
Shree Nirmal Commercial Ltd. v. Dy. CIT (2014) 52 taxman.com 478 / (2015) 67 SOT 78 (URO)(Mum.)(Trib.)

Section 115JA : Deemed income relating to certain companies.

1636 **S.115JA : Book profit – 'lease equalization charges' is not in nature of a reserve and, therefore, same cannot be added back when computing book profits.**
Dismissing the appeal of revenue the Court held that; 'lease equalization charges' is not in nature of a reserve and, therefore, same cannot be added back when computing book profits.(AY. 1999-2000)
CIT v. ICICI Venture Funds Management Co. Ltd. (2015) 234 Taxman 569 (Karn.)(HC)

1637 **S.115JA : Book profit – Provision for bad debts – There is no debt payable by the assessee hence would not stand covered by clause (c) of the explanation to section 115JA(2).**
ITAT deleted addition of ₹ 20,05,744/- being provision for doubtful debt on the ground, that provision for such debt were doubtful for recovery and could not be equated with liability. Advances were towards sister concern that was not trade debts and it could not be treated as unascertained liability u/s. 115JA. On revenue's appeal dismissing the appeal of revenue the Court held that; ₹ 20.5 lakhs sought to be added to book profits, was provision made in respect of unlikely recovery of advance made by Assessee to its sister concern. Same was not in nature of liability of Assessee, but in nature of debt recoverable from its sister concern. Clause (c) of explanation to S. 115JA(2) would have no application to present facts no debt payable by Assessee, but it was debt receivable and would not stand covered by clause (c) of the explanation to Section 115JA(2) of the Act. (AY.1997-98)
CIT v. Salgaokar Mining Industries (P) Ltd. (2015) 122 DTR 260 / 235 Taxman 96 (Bom.)(HC)

S.115JA : Book profit – Interest is chargeable even in case of assessment under section 115JA. [S.234B, 234C] 1638

Interest u/s. 234B, 234C is chargeable even in case of assessment under section 115JA. (AY.1997-98)

CIT v. Salgaokar Mining Industries (P.) Ltd. (2015) 122 DTR 260 / 235 Taxman 96 (Bom.) (HC)

S.115JA : Book profit – Non-compete fee – Consideration not brought to profit and loss account but taken as reserves to Balance sheet cannot be added to the "book profits". [S.28(va)] 1639

On appeal by revenue, The High Court had to consider :

"Whether non-compete consideration taken as Reserves to the Balance sheet cannot be added to the Book Profit under Section 115JA of the Act even in terms of clause (b) of the Explanation thereto?" HELD by the High Court:

For the Explanation to section 115JA of the Act to be invoked it is necessary that the amount which has been carried to the reserves should have necessarily been first debited to the Profit and Loss account resulting in a reduction in the profit declared by the assessee Company. In *National Hydroelectric Power Corpn. Ltd. v. CIT (2010) 320 ITR 0374* it has been held that to invoke clause (b) of the Explanation below Section 115JB (identical to Section 115JA) of the Act, two conditions must be satisfied cumulatively viz. there must be a debit of the amount to the Profit and loss account and the amount so debited must be carried to Reserves. Admitted position in this case is that there is no debit to the Profit and loss account of the amount of Reserves. The impugned order has view of the self evident position taken that in the absence of the amount being debited to Profit and Loss account and taken directly to the reserve account in the balance sheet, the book profits as declared under the Profit and Loss account cannot be tampered with. (AY.1999-2000)

CIT v. Bisleri Sales Ltd. (2015) 377 ITR 144 (Bom.)(HC)

S.115JA : Book profit – Bad and doubtful debts – Matter remanded. [S.115JB] 1640

While computing book profits, where bad and doubtful debts is reduced from loan and advances from debtors, Explanation to section 115JA or section 115JB is not attracted - Held, yes - Whether since from material on record it was not possible to figured out whether bad and doubtful debts were reduced from loan and advances from debtors, matter was to be remanded back. (AY. 1999-2000)

CIT v. Syndicate Bank Syndicate House (2015) 229 Taxman 384 (Karn.)(HC)

S.115JA : Book profit – Provision for bad and doubtful debts not deductible from book profits for assessment year 1998-99. 1641

Allowing the appeal of Revenue the Court held that, the amount claimed as deduction of provision for bad and doubtful debts representing unascertained liability should not be deducted from the book profit for the purpose of determining the income, in view of the retrospective amendment by the insertion of clause (i) under Explanation (1) to section 115JA of the Income-tax Act, 1961, with effect from April 1, 1998.(AY. 1998-99)

CIT v. Tamil Nadu Small Industries Development Corporation Ltd. (2015) 370 ITR 449 (Mad.)(HC)

1642 **S.115JA : Book profit – Provision for debts and non performing assets – Addition was held to be justified.**

The AO held that the assessee made the provision for debts and non performing assets. According to the AO the same was not covered by clause (c) of Explanation of sub-section (2) of section 115JA, so he made the addition of said amount. The CIT(A) as well as the Tribunal deleted said addition. On Revenue's appeal:

The Court held that while computing book profit of assessee-company under section 115JA, Assessing Officer was justified in making addition in respect of provision for debts and non-performing assets taking a view that same was not covered by clause (c) of Explanation to sub-section (2) of section 115JA. Appeal of Revenue was allowed. (AY. 1998-99)

CIT v. Kailash Auto Finance Ltd. (2015) 228 Taxman 39 (Mag.)(All.)(HC)

Section 115JB : Special provision for payment of tax by certain companies.

1643 **S.115JB : Book Profit – Provisions of S.115JB, do not apply to a foreign company. [Companies Act, 1956, S. 380]**

The assessee was a company incorporated under the laws of Mauritius. It filed an application before the AAR for understanding applicability of MAT provisions to the assessee. AAR held that provisions of S. 115JB are equally applicable to a foreign company to determine the taxability of the transaction.

On appeal before the Supreme Court, based on – Circular No. 9/2015 and Press Release dated 24th Sept. 2015, it was held that the provisions of S. 115JB are not applicable to a foreign company w.e.f. 1-4-2001, if the foreign company is a resident of a country having DTAA with India and such foreign company does not have a permanent establishment within the definition of the term in the relevant DTAA, or the foreign country is a resident of a country which does not have a DTAA with India and such foreign company is not required to seek registration u/s. 592 of the Companies Act, 1956 or S. 380 of the Companies Act, 2013.

Castleton Investment Ltd. v. DIT (IT) (2015) 379 ITR 363 / 280 CTR 409 / 235 Taxman 347 / 126 DTR 153 (SC)

Smithkline Beecham Port Louis Ltd. v. DIT (IT) (2015) 379 ITR 363 / 235 Taxman 347 / 280 CTR 409 / 126 DTR 153 (SC)

1644 **S.115JB : Book profit – Disallowance of expenditure – Exempt income – Appeal was held to be not maintainable. [S.14A, 260A]**

Assessing Officer while making MAT calculation under section 115JB had also added expenditure disallowed under section 14A to book profit. On appeal, Tribunal restored issue to Assessing Officer to decide same after examining relevant accounts, nature of term loans and availability of interest-free funds with assessee. Revenue filed appeal against Tribunal's order. Dismissing the appeal of Revenue the Court held that since matter was sent back to Assessing Officer for reconsideration and while working out deduction in terms of section 14A read with Rule 8D, Assessing Officer would take note of clause (f) of Explanation to section 115JB, no appeal could be entertained against Tribunal's order. (AY. 2006-07)

CIT v. JSW Energy Ltd. (2015) 379 ITR 36 / 234 Taxman 133 (Bom.)(HC)

S.115JB : Book profit – Sale of rights directly taken to balance sheet – Adjustment to book profit cannot be made, if auditors and ROC have not found fault with Account. 1645
On appeal by the department to the High Court HELD dismissing the appeal: The observations of the Apex Court in *Apollo Tyres Ltd. v. CIT 255 ITR 273* concludes the issue by holding that the Assessing Officer does not have power to embark upon the fresh enquiry with regard to the entries made in the books of account of the Company when the accounts of an assessee Company is prepared in terms of Part II Schedule VI of the Companies Act scrutinized and certified by the statutory auditors, approved by the Company in general meeting and thereafter filed before the Registrar of Companies who has a statutory obligation also to examine and be satisfied that the accounts of the company are maintained in accordance with the requirements of the Companies Act. If the grievance of the revenue is to be accepted, then the conclusiveness of accounts prepared and audited in terms of Section 115JB of the Companies Act would be set at naught. This without successfully impeaching the Auditor's certificate or without the Registrar of Companies holding that the accounts have not been prepared in accordance with the provisions of the Companies Act. There is no distinction between s. 115JA and 115JB and the principles laid down in Apollo Tyres applies to s. 115JB as well. (AY.2004-05)
CIT v. Forver Diamonds Pvt. Ltd. (Bom.)(HC); www.itatonline.org

S.115JB : Book profit – Brought forward losses – Unabsorbed depreciation – Whichever is less. 1646
As per clause (iii) of Explanation 1 to section 115JB, book profit is to be reduced by amount of brought forward losses or unabsorbed depreciation, whichever is less. Appeal of assessee was dismissed. (AY. 2004-05)
Filatex India Ltd. v. CIT (2015) 229 Taxman 555 (Delhi)(HC)

S.115JB : Book profit – Securities Transaction Tax (STT) – Tax remission under section 88E has to be and should be taken into consideration both under normal provisions as well as book profits [S.87, 88E] 1647
While computing profit under section 115JB assessee claimed tax remission under section 88E. Tribunal allowed assessee's claim by following decision of Delhi High Court in *CIT v. MBL & Co. Ltd. [2013] 358 ITR 1(Delhi)(HC)* in which it was held that while computing tax payable under section 115JB, remission in form of Securities Transaction Tax (STT) in terms of section 88E, read with section 87 would be available to assessee. Tax remission under section 88E has to be and should be taken into consideration both under normal provisions as well as book profits computed under section 115JB and amount of remission under section 88E would get reduced from tax payable under both methods/manners of computing taxable income.(AY. 2007-08, 2008-09)
CIT v. CNB Finwiz Ltd. (2015) 229 Taxman 454 (Delhi)(HC)

S.115JB : Book profit – Liable to pay interest. [S.115JB, 143(1), 234B, 234C] 1648
An assessees covered by provisions of sections 115JA and 115JB is under obligation to pay advance tax and delay or failure to pay said tax would result in levy of interest u/s 234B and 234C. (AY. 2001-02)
Fenoplast Ltd. v. Dy. CIT (2015) 229 Taxman 541 (AP)(HC)

1649 **S.115JB : Book profit – The income and expenditure attributable to eligible undertaking under section 10A of the Act had to be allowed in the case of the assessee while computing the book profits – Amendment is w.e.f. 1-4-2008. [S.10A, 10B]**
Dismissing the appeal of Revenue, prior to April 1, 2007, the Explanation to section 115JB referring to the term "book profits" included the expenditure and income relatable to any income to which section 10A or section 10B applied for the purpose of increase in the book profit and the income itself for the purpose of decreasing the book profit. Held accordingly, the income and expenditure attributable to eligible undertaking under section 10A of the Act had to be allowed in the case of the assessee while computing the book profits under section 115JB. (AY. 2006-07)
CIT v. ACE Software Exports Ltd. (2015) 370 ITR 21 / 230 Taxman 88 (Guj.)(HC)

1650 **S.115JB : Book profit – Reserve – Provision – Statutory reserve created u/s. 45-IC of RBI Act is not a "diversion of income at source" and cannot be excluded from book profits. [Reserve Bank of India Act, 1934. S. 45-IC]**
Statutory reserve created u/s. 45-IC of RBI Act is not a "diversion of income at source" and cannot be excluded from book profits. (AY. 2006-07, 2007-08)
SREI Infrastructure Finance Ltd. v. ACIT (2015) 230 Taxman 1 (Delhi)(HC)

1651 **S.115JB : Book profit – Capital receipt – Even a non-taxable capital receipt credited to the P&L A/c cannot be excluded while computing the book profits. The fact that the notes to the A/cs. state that the receipt is on capital account is irrelevant.**
Even a non-taxable capital receipt credited to the P&L A/c cannot be excluded while computing the book profits. The fact that the notes to the A/cs. state that the receipt is on capital account is irrelevant. (AY. 2005-06)
B&B Infotech Ltd. v. ITO (2015) 155 ITD 1040 (Bang.)(Trib.)

1652 **S.115JB : Book profit – Provision for deferred tax is to be added back to book profit.**
Provision for deferred tax is to be added back to book profit computed under section 115JB.(AY 2003-04, 2005-06)
Aditya Birla Nuvo Ltd. v. ACIT (2015) 68 SOT 403 (Mum.)(Trib.)

1653 **S.115JB : Book profit – Transfer of development rights to subsidiary – (i) Even if an amount is credited to the P&L Account, the assessee can seek exclusion of that amount for purposes of "book profits" if a note to that effect is inserted in the Accounts. (ii) The exemption conferred by S. 115JB to sums exempt u/s. 10 should be extended to all sums which are not chargeable to tax. [S. 2(24)(vi), 10, 47(iv)]**
Even if an amount is credited to the P&L Account, the assessee can seek exclusion of that amount for purposes of "book profits" if a note to that effect is inserted in the Accounts. The exemption conferred by S. 115JB to sums exempt u/s. 10 should be extended to all sums which are not chargeable to tax.(AY. 2009-10)
Shivalik Venture Pvt. Ltd. v. DCIT (2015) 70 SOT 92 / 173 TTJ 238 / 43 ITR 187 (Mum.)(Trib.)

S.115JB : Book profit – Industrial undertaking – Deduction allowed – Not to be adjusted for calculating book profit. [S.80IB] 1654
Deduction under section 80-IB is not to be adjusted for calculating book profit under section 115JB (AY. 2003-04)
Aditya Birla Nuvo Ltd. v. ACIT (2015) 68 SOT 403 (Mum.)(Trib.)

S.115JB : Book profit – Amount towards waiver of loan under OTSS, credited to "General Reserves" and not to the P&L Account cannot be added to "book profits". 1655
Amount towards waiver of loan under OTSS, credited to "General Reserves" and not to the P&L Account cannot be added to "book profits". (AY. 2007-08)
DCIT v. Garware Polyester Ltd. (Mum.)(Trib.); www.itatonline.org

S.115JB : Book profit – Income not includible in total income – Disallowed amount can be adopted while arriving at book profits – Provision for wealth tax liability – Matter remanded. [S. 14A] 1656
Assessing Officer adding amount disallowed under section 14A to net profits. Failure by assessee to challenge quantum of expenditure disallowed under section 14A in computation of total income. Disallowed amount under section 14A can be adopted while arriving at book profits. 14A, 115JB(2), Expln. 1(f).
Tribunal also held, that wealth-tax liability provision was not covered under Explanation 1(a) to section 115JB(2) of the Act. Regarding applicability of Explanation 1(c) to section 115JB(2) of the Act, the matter to be remanded for fresh consideration to verify whether the provision for wealth-tax was based on the actual wealth-tax returns filed by the assessee and if so, then it could not be considered as unascertained liability. Matter remanded. (AY. 2009-10)
Dy. CIT(LTU) v. Microlabs Ltd. (2015) 39 ITR 585 / 70 SOT 774 (Bang.)(Trib.)

S.115JB : Book profit – Once it is concluded that assessee has set up business during year, profit and loss account has to be prepared in accordance with Parts II & III of Schedule VI of Companies Act and has to be certified by auditor – Matter remanded. 1657
The AO took the view that the assessee had commenced business of providing services and had operated along commercial lines in the impugned assessment year and therefore, the receipt being revenue in nature was liable for taxation. In appellate proceedings, the assessee did not challenge the finding of the AO. that the business had commenced during the impugned assessment year even though the assessee challenged the computation of the book profit u/s. 115JB. CIT (Appeals) reduced the amount of book profit after allowing certain deduction for various expenditure incurred by assessee. On appeal by Revenue the Tribunal held that the assessee had not prepared any Profit and Loss account on the presumption that it has not commenced the business during the year. Once the assessee had set up the business during the year, the Profit and Loss account had to be prepared in accordance with Part II & III of Schedule VI of the Companies Act and has to be certified by the auditor. Matter remanded. (AY. 2005-06)
ACIT v. South West Port Ltd. (2015) 153 ITD 1 (Panaji)(Trib.)

1658 **S.115JB : Book profit – Capital gains – In computing the "book profits" the entire capital gains have to be included without computing the benefits of indexation. [S. 10(38), 45]**

During the year ending on 31-3-2009, the assessee company sold shares and thereby earned a surplus of ₹ 1,90,78,63,394 which was net of STT paid. This amount was credited to the Profit & loss account as on 31-3-2009. In the computation of book profit u/s. 115JB, the assessee had made a note stating that the long term capital gain should be taken at ₹ 1,72,55,70,760, which is after indexation. The Tribunal had to consider whether while computing the book profit u/s. 115JB the income on account of Long term capital gain should include ₹ 1,90,39,06,630 i.e. net amount credited or the sum of ₹ 1,72,55,70,760 computed after indexation. HELD by the Tribunal:

For computing the profit and the taxability u/s. 115JB, it is mandatory for the assessee to compute profit as per Profit & loss account prepared under the relevant provisions of the Companies Act. The relevant Schedule under the Companies Act for the preparation of statement of Profit & Loss account provides that in case of sale of investments, net gain/loss should be disclosed. The net gain/loss means sale minus purchase and other cost. The Companies Act does not speak about Long term/Short term capital gain. From the harmonious reading of the relevant provision as discussed above, it is evident that firstly, the book profit shall be reduced by the amount of income to which provision of section 10 applies. However, income under the provisions contained in section 10(38) will not be reduced. Thus, the income arising from transfer of long term capital asset is to be included in the book profit. The book profits as contemplated in section 115JB means the net profit, which has been shown/credited in the profit & loss account as prepared under the relevant provisions of the Companies Act. The concept of indexation while computing the Long term capital gain cannot be imported to the computation of book profit u/s. 115JB as per the expressed provisions of the said section itself which is a complete code in itself. Thus, in our opinion, the net amount on account of sale of shares of ₹ 1,90,39,06,630 will alone be taken into account in computation of book profit and not the amount of Long term capital gain of ₹ 1,72,55,70,760 after indexation. (AY. 2009-10)

Dharmayug investment Ltd. v. ACIT (2015) 69 SOT 433 (Mum.)(Trib.)

1659 **S.115JB : Book Profit – State Electricity Board – Is owned by either Central or State Government – Provisions is not applicable.**

The Assessing Officer took the view that no exemption to companies engaged in the generation and/or distribution of electricity had been granted under section 115JB but the Commissioner (Appeals) observed that the provisions of section 115JB were not applicable to the assessee. On appeal by the Department Held, that the Electricity Board or bodies which were totally owned by the Government, either State or Central, had no shareholders. Profits, if at all, made would be for the benefit of the entire body politic of the State. Therefore, the enquiry as to the mischief sought to be remedied by the amendment was irrelevant. Therefore, the fiction fixed under section 115JB could not be pressed into service against the Electricity Board while making the assessment of the tax payable under the Income-tax Act. (AY. 2008-09)

ACIT v. Kerala State Electricity Board (2015) 38 ITR 458 (Cochin)(Trib.)

S.115JB : Book profit – Exempt income – In the absence of exempt income, S.14A disallowance cannot be added to book profits even if assessee has accepted disallowance in the normal computation. [S.14A] 1660

Tribunal held that the assessee may have accepted the disallowance under section 14A but once it is a settled legal position, in the light of the law laid down in *CIT v. Holcim India Pvt. Ltd. (Del.)* that there cannot be any disallowance under section 14A unless there is corresponding exempt income and the assessee has no such exempt income, adjustment under clause (f) of Explanation to Section 115JB(2) cannot indeed be made. The adjustment has to meet the tests of law and what cannot be considered to be 'expenditure relatable to exempt income' under the law, cannot be subjected to the adjustment either. There is no estoppel against the law. The mere fact that the assessee has accepted this disallowance affects that disallowance only and nothing more than that; it does not clothe such an adjustment, in computation of book profit under section 115JB, with legality. (AY. 2009-10)

Minda Sai Ltd. v. ITO (2015) 167 TTJ 689 / 114 DTR 50 (Delhi)(Trib.)

CHAPTER XII-G
SPECIAL PROVISIONS RELATING TO INCOME OF SHIPPING COMPANIES

Section 115VB : Operating ships.

S.115VB : Shipping business – Tonnage tax scheme – Tonnage income – Non qualifying ships – Computation – Income from slot charter operations – Includible. [S.15VC, 115VD] 1661

The assessee was a qualifying tonnage tax company which operated its qualifying ship and had also slot charter arrangements in other ships. The Department did not accepted its computation of shipping income. The Tribunal dismissed the assessees appeals against the orders of the Commissioner (Appeals) holding that in order to avail of the benefit of the provisions of Chapter XII-G in relation to slot charter arrangements, it was necessary to show that the ships in which the assessee had operations under slot charter arrangements were also qualifying ships and that such operation had to be evidenced by a valid certificate in terms of section 115VX(1)(b) in relation to each such ship. On appeals:

Held, allowing the appeals, (i) that under the Act and the Rules, the slots hired are converted into net tonnage. This is enjoined by providing a formula since slots are hired for a sector voyage or on long-term basis, all round the year, in different vessels and in varying numbers and thus cannot be converted to the net tonnage identifying the particular vessel on which the slot is hired. Therefore, the income derived from the slot charter operations of a tonnage tax company was not liable to be excluded while determining the tonnage income under the tonnage tax scheme on the ground that such operations were carried on in ships which were not qualifying ships in terms of the provisions of Chapter XII-G. The Assessing Officer was directed to modify the assessment orders in conformity with law.

(ii) That the order of the Commissioner in the *suo motu* proceedings would be binding on the Assessing Officer but would not bind the superior tribunals and courts when questions of law arise for consideration; more particularly, when such questions arise as

a consequence of the proceedings following the Commissioner's decision. Such decision of the Commissioner to the extent it is contrary to the findings would not stand.
Trans Asian Shipping Services P. Ltd. v. CIT (2015) 371 ITR 194 / 229 Taxman 455 / 280 CTR 576 (Ker.)(HC)

CHAPTER XII-H
INCOME-TAX ON FRINGE BENEFITS

Section 115W : Definitions.

1662 **S.115W : Fringe benefits – Employer and employee relationship is a prerequisite for levy of fringe benefit tax – Subscription to Tata brand equity contribution under contractual agreement between assessee and group companies – Not liable to pay fringe benefit tax. [S.115WA]**
Dismissing the appeal of revenue the Court held that, subscription to Tata brand equity contribution under contractual agreement between assessee and group companies is not liable to pay fringe benefit tax. Employer and employee relationship is a pre-requisite for levy of fringe benefit tax. (AY. 2007-08)
CIT v. Tata Consultancy Services Ltd. (2015) 374 ITR 112 (Bom.)(HC)

Section 115WA : Charge of fringe benefit tax.

1663 **S.115WA : Fringe benefits – Valuation – Tea company – Net profit and loss of business to be arrived at after deducting all expenses – 40% of net profit and loss to be worked out chargeable to tax – Expenditure would be reduced to 40%. (S. 115WB, 115WE, IT Rule 8)**
Allowing the appeal of assessee Court held that the expenditure incurred was both for the purpose of business and for the purpose of agriculture. The submission that the expenditure on account of fringe benefits had already been taken into account was not correct. The net profit and loss of the business had to be arrived at after deducting all the expenses. Once that was done 40% of the net profit and loss had to be worked out which shall be chargeable to tax. Once this was done the expenditure on account of fringe benefits would automatically stand reduced to 40%. *CIT v. Doom Dooma India Ltd. [2009] 310 ITR 392 (SC)* applied.
Apeejay Tea Ltd. v. CIT (2015) 370 ITR 775 / 120 DTR 379 (Cal.)(HC)

Section 115WB : Fringe benefits.

1664 **S.115WB : Fringe benefits – Perquisite – Uniform and washing allowance paid to employees is liable to FBT and is not taxable in the hands of the employees. [S. 17, 192]**
The assessee, a government undertaking, made certain payments to employees being 'Conveyance and Maintenance Allowance' and 'Other (Taxable)' and 'Other (Non-taxable)' in the nature of uniform and washing allowance. During the course of survey, the AO observed that the Form 16 did not reflect the 'Other (Non-taxable)' amounts. During the course of the assessment proceedings, the assessee clarified that the payments were mere

reimbursements and hence the same were being offered to FBT and were not taxable in the hands of the employees. The AO disagreed with the said contention, however, the CIT(A) and Tribunal partly allowed the assessee's appeal.
The High Court dismissed the departmental appeal and held that since the assessee was governed by the FBT provisions and the payment was rightly subject to FBT and the provisions of salary would not apply. (AY. 2006-07 to 2009-10)
CIT v. Oil & Natural Gas Corporation (India) Ltd. (2015) 118 DTR 96 (Guj.)(HC)

S.115WB : Fringe benefits – Other amenities to employees free of cost can be ₹ 500 per employee and not more than that. 1665
Amount allowed towards perquisites in respect of free supply of gas, electricity, water, etc., and other amenities to employees free of cost can be ₹ 500 per employee and not more than that. (AY. 1998-99 & 1975-76)
CIT v. Coromandal Fertilisers Ltd. (2015) 228 Taxman 318 (Mag.)(AP)(HC)

Section 115WJ : Advance tax in respect of fringe benefits.

S.115WJ : Fringe benefits – Refund – Assessee paying tax in advance – Registration of assessee with retrospective effect upon registration under section 12AA – Effect – Assessee not liable to pay fringe benefit tax or to file such return at that time – Amount paid under a mistake by assessee not under any provision of Act – Assessee entitled for refund with interest – Revenue should not insist on any unnecessary formalities.[S.12AA] 1666
The assessee, paid fringe benefit tax of ₹ 22,12,04,513 in advance under section 115WJ of the Act. Upon registration of the assessee under section 12AA with effect from April 1, 2005, the assessee ceased to be liable for fringe benefit tax with retrospective effect from April 1, 2005. On a writ petition contending that it was entitled to the refund of the fringe benefit tax paid in advance together with statutory interest:
Held, allowing the petition, that the effect of the registration of the petitioner under section 12AA with retrospective effect was that at the point of time when the fringe benefit tax was paid by the assessee, it was not liable to pay such tax or to file such return. Therefore, the amount of ₹ 22 crores could be said to be money paid under a mistake by the assessee not under any provision of the Act. If money had been received by the Government on a mistake committed by the assessee it was liable to refund the sum. While making such refund it should not insist on unnecessary procedural formalities. (AY. 2006-07)
Kolkata Port Trust v. Dy. DIT (E) (2015) 372 ITR 403 / 281 CTR 518 (Cal.)(HC)

CHAPTER XIII
INCOME-TAX AUTHORITIES

Section 127 : Power to transfer cases.

1667 **S.127 : Power to transfer cases – The Order of transfer of case without issuing notice to the assessee is bad in law. [S. 132, 142, 282]**
The assessee, a partnership firm, carried on business from Delhi. Subsequently, the place of business was shifted to some other area. The necessary information regarding change of place of business was filed with the department. A search took place under section 132 at the new premises of the assessee and certain documents and cash was seized. The Commissioner transferred the case to an Assessing Officer in Meerut after issuing notice to the assessee at its old address. On Writ Petition, it was held by the High Court that the order passed by Commissioner transferring the case to Meerut is patently illegal and in gross violation of principles of natural justice and it was imperative on the part of the Commissioner to give notice and an opportunity of being heard to the assessee. (AY. 2002-03 to 2008-09)
RPS Associates v. DIT (Inv.) (2015) 280 CTR 582 / (2016) 236 Taxman 129 (All.)(HC)

1668 **S.127 : Power to transfer cases – No independent finding recorded by authorities that parties were linked in such a manner – Transfer was held to be not valid.**
Allowing the petition the Court held that there was no independent finding recorded by authorities that parties were linked in such a manner where there was major flow of finances from one side to other therefore proceedings in question could not be transferred.
RSG Foods (P.) Ltd. v. CIT (2015) 234 Taxman 468 (P&H)(HC)

1669 **S.127 : Power to transfer cases – Natural justice – Order was set aside.**
Assessee carried on business as builders and developers in Mumbai - On basis of search carried out at 'J' groups of companies by Director (Inv.), Nagpur, revenue transferred assessee's pending case with Mumbai to Aurangabad for sake of co-ordinated investigation. On writ the assessee contended that it was in no manner connected with said 'J' groups of companies and, hence, transfer of its case from Mumbai to Aurangabad was not warranted. It was found that letter of Director (Inv.) was not made available to assessee even though impugned order had been passed relying upon same and, thus, impugned order had been passed in breach of principles of natural justice. Therefore, impugned order was to be set aside.
Zodiac Developers (P.) Ltd. v. PCIT (2015) 234 Taxman 66 (Bom.)(HC)

1670 **S.127 : Power to transfer cases – Reasons recorded by the Assessing Officer did not satisfy the criteria, hence the order was set aside.**
Assessing Officer held that the transfer was being effected to facilitate effective and co-ordinate investigations in connected case of petitioner, in which search and seizure operations under section 132 was conducted by Director of Investigations, Mumbai. On writ allowing the petition the Court held that aforesaid reasons recorded by Assessing

Officer would not satisfy criteria of reasons as indicated under section 127, therefore, impugned order of transferring assessee's case was to be set aside and matter was to be remanded back for disposal afresh.
Farooq Ali Khan v. PCIT (2015) 234 Taxman 319 (Karn.)(HC)

S.127 : Power to transfer cases – Natural justice – No opportunity was given – Matter was remanded back. 1671
Dismissing the appeal of revenue, against the judgment of single Judge, the Court held that where no opportunity of being heard was granted before transferring the case from one place to another, matter was to be remanded back for an appropriate order in accordance with law
ITO v. Madeeha Enterprises (2015) 379 ITR 93 / 61 taxmann.com 360 / 126 DTR 67 (Karn.)(HC)

S.127 : Power to transfer cases – Assessee should be supplied the information which formed basis of issuance of notice for centralization of their cases. 1672
Assessees were issued show cause notices for centralization of their cases. They requested to supply material information, which formed basis for issuance of notices. Request of assessees was turned down holding that such material would be supplied to them during course of assessment proceedings. On writ, allowing the petition the Court held that assessees should know gist of enquiry carried out against them and were also to be supplied adverse material gathered against them in order to enable them to represent their cases effectively before Commissioner and assessees were entitled to pre-decisional hearing in order to contest show cause notices.
Virbhadra Singh v. CIT (2015) 233 Taxman 269 (HP)(HC)

S.127 : Power to transfer cases – Chairman of assessee – Trust running institutions in Kerala in his individual capacity – Undisclosed income detected in hands of chairman – Transfer of assessee's case from Tamil Nadu to Kerala for making effective assessment and co-ordinated investigation – Held to be valid. 1673
Transfer of assessee's case from Tamil Nadu to Kerala for making effective assessment and co-ordinated investigation – Held to be valid.
CIT v. Noorul Islam Educational Trust (2015) 375 ITR 226 / 231 Taxman 407 (Mad.)(HC)
Editorial : Order of the single judge in Noorul Islam Educational Trust v. CIT [2011] 332 ITR 97 (Mad.) is set aside

S.127 : Power to transfer of cases – Notice for transfer of assessee's case from Bengaluru to Hyderabad – Ten plots purchased at Hyderabad, two in the name of managing director of assessee and eight in the name of his wife – Consideration for all plots paid to purchaser from assessee's accounts and from account of firm and individual account of managing director and his wife – Centralisation of inquiry necessary – Transfer is held to be valid. 1674
Allowing the petition of revenue the Court held that ten plots were purchased in Hyderabad, two in the name of the managing director of the assessee and eight in the name of his wife. The consideration for these ten plots was paid to the purchaser

from the account of the assessee and from the account of the firm and the individual account of the managing director and his wife. Thus, it was necessary to centralise all the returns in order to find out the true nature of the transaction. The managing director was fully acquainted with all these facts. It was he who had given all the information and he had no difficulty in going to Hyderabad for being present during the assessment proceedings of his individual account and his wife's account. He would have no difficulty if the account of the company, of which he was the managing director, was also processed at the same time where his individual and his wife was processed. (Decision of the single judge in *Span Design and Development (P) Ltd v. CIT (2013) 1 ITR–OL 322 (Karn)*, set aside) (AY. 2007-08 to 2009-10)
CIT v. Span Design and Development (P) Ltd. (2015) 372 ITR 432 / 232 Taxman 633 (Karn.)(HC)

1675 **S.127 : Power to transfer cases – Transfer of case without serving a notice or affording an opportunity of hearing was held to be bad in law.**
Where revenue authorities transferred assessee's jurisdiction from one place to another without serving it a notice or affording an opportunity of hearing, order so passed being in violation of provisions of section 127(2), deserved to be set aside.
Piyush Shelters India (P.) Ltd. v. CIT (2015) 230 Taxman 636 (P&H)(HC)

1676 **S.127 : Power to transfer cases – Opportunity of being heard – Reasons specified in order transferring assessees cases to other jurisdiction were totally different from what was spelt out in show cause notices, impugned order was to be quashed.**
The assessee filed writ petition as he was aggrieved with the action of the Departments whereby their cases were transferred to Chandigarh. Assessee's contention was that before their could have been ordered to be transferred, they were entitled to fair and proper hearing and principles of natural justice were required to be complied with and the adjudicating was under an obligation to furnish the relevant material which formed the basis of issuance of show cause notices. This material was never disclosed either in the show cause notices or at the time of hearing and the same was disclosed only in the impugned order. Non-disclosure of the same had caused serious prejudice to them. The HC allowed the Writ Petition and held that the reasons in the impugned order were totally different from what was spelt out in the show cause notices, impugned order was passed after taking into consideration the extraneous material which had never been brought to the notice of the assessee prior to passing of the impugned order, impugned order was hit by violation of principles of natural justice and was not sustainable.
Anand Chauhan v. CIT (2015) 273 CTR 296 / 231 Taxman 76 (HP)(HC)
Virbhadra Singh v. CIT (2015) 113 DTR 1 / 273 CTR 296 / 126 DTR 185 (HP)(HC)
Vikramaditya Singh v. CIT (2015) 113 DTR 1 / 273 CTR 296 (HP)(HC)
Pratibha Singh v. CIT (2015) 113 DTR 1 / 273 CTR 296 (HP)(HC)
Aprajita Kumari v. CIT (2015) 113 DTR 1 / 273 CTR 296 (HP)(HC)
Chunni Lal Chauhan v. CIT (2015) 113 DTR 1 / 273 CTR 296 (HP)(HC)

S.127 : Power to transfer cases – CBDT – Commissioner – Circular or a direction or an order issued by CBDT under section 119 cannot mitigate powers of Director General or Chief Commissioner or Commissioner under section 127. [S.119] 1677

Commissioner has jurisdiction to transfer cases only within his jurisdiction whereas, power of CBDT is wider and it can transfer cases from one jurisdiction of one Commissioner to another, therefore, a circular or a direction or an order issued by CBDT under section 119 cannot mitigate powers of Director General or Chief Commissioner or Commissioner under section 127. (AY. 2010-11)

C. Krishnan v. ITO (2015) 228 Taxman 163 / 274 CTR 371 / 115 DTR 19 (Mad.)(HC)

S.127 : Power to transfer cases – Once authorities followed due process for transferring case from one city to another for purpose of effective investigation and completion of assessment – Transfer order cannot be challenged before Tribunal. [S. 132, 254(1)] 1678

Search was conducted under section 132 at assessee's company's premises and at premises of director of that company. For conducting consolidated enquiry/investigation assessments of assessees were transferred from Bengaluru to Ernakulam. Transfer was made after giving due notice to assessees as required under section 127 which was not challenged by assessees. However, later on assessees challenged said order of transfer. It was held that once authorities followed due process for transferring case from one city to another for purpose of effective investigation and completion of assessment by one Assessing Officer, assessee could not challenge said order of transfer before Tribunal. (AY. 2007-08, 2008-09)

DCIT v. Damac Holdings (P.) Ltd. (2014) 33 ITR 331 / (2015) 67 SOT 148 (URO)(Cochin) (Trib.)

Section 132 : Search and seizure.

S.132 : Search and seizure – Satisfaction – While the revenue has to record reasons to show that "satisfaction" for the search was proper and the same is justiciable, the assessee is not entitled (till the start of the assessment proceedings) to inspect the documents or the reasons as it would be counter-productive and confer an unfair advantage on the assessee – Possibility of manipulation of records as found by the High Court cannot be accepted, authorisation could not be quashed. [R.112] 1679

The finding of the High Court that as the satisfaction recorded is justiciable, the documents pertaining to such satisfaction can be allowed to be inspected by the assessee is plainly incorrect. The necessity of recording of reasons, despite the amendment of Rule 112(2) with effect from 1st October, 1975, has been repeatedly stressed upon by this Court so as to ensure accountability and responsibility in the decision making process. The necessity of recording of reasons also acts as a cushion in the event of a legal challenge being made to the satisfaction reached. Reasons enable a proper judicial assessment of the decision taken by the Revenue. However, the above, by itself, would not confer in the assessee a right of inspection of the documents or to a communication of the reasons for the belief at the stage of issuing of the authorization. Any such view would be counter productive of the entire exercise contemplated by Section 132 of the Act. It is only at the stage of commencement of the assessment proceedings after

completion of the search and seizure, if any, that the requisite material may have to be disclosed to the assessee (BP 2004-05, 2009-10)
DCIT v. Spacewood Furnishers Pvt. Ltd. (2015) 374 ITR 595 / 277 CTR 322 / 119 DTR 201 / 232 Taxman 131 (SC)
Editorial: Decision of the Nagpur Bench of Bombay High Court in Spacewood Furnishers (P) Ltd. v. DGI (Inv.) (2012) 340 ITR 393 / 246 CTR 313 / 65 DTR 281 (Bom.) (HC), reversed.

1680 **S.132 : Search and seizure – Huge cash and incriminating documents were found – Survey converted into search was held to be valid. [S. 133A]**
During course of survey under section 133A, certain huge cash and incriminating documents were found from business premises of assessee-company. Director of assessee in a statement recorded under section 131(1A) failed to explain source of cash and various dubious entries in seized documents. Department converted survey into search. Assessee filed the writ petition; dismissing the petition the Court held that on facts it could be said that authority had reasons to believe that an action under section 132 was warranted and department was justified to convert survey into search and seizure under section 132 after due approval of competent authority. (AY. 2014-15)
Rich Udyog Network Ltd. v. CCIT (2015) 235 Taxman 313 (All.)(HC)

1681 **S.132 : Search and seizure – Disclosure of material or information to persons against whom action under section 132 is taken is not mandatory and it is only where petitioner furnishes adequate and cogent material in support of his denial of a valid information that Court can justifiably call upon department to disclose information – Search action was held to be valid. [S.158BD]**
Petitioners challenged search and seizure operations initiated against them by department under section 132 in consequence of a search warrant, which was not issued in their names. They also challenged seizure and attachment of their bank accounts and lockers based on aforesaid search on ground that no search warrant was issued relating to their lockers. Dismissing the petition the Court held that since warrant of authorisation indicated premises where search and seizure operation was to be conducted and said premises had not been partitioned by metes and bounds, while searching said premises, search of portions occupied by petitioners in said premises was valid and proper, even though their names were not mentioned in authorisation of search and in such case provisions of section 158BD would be attracted. When information received on first date of search by itself caused a reasonable belief for issuance of warrant of authorisation against petitioners for search of their lockers, search and seizure of petitioners' lockers was perfectly valid.
Harbhajan Singh Chadha v. DIT (2015) 231 Taxman 735 / (2016) 380 ITR 100 (All.)(HC)

1682 **S.132 : Search and seizure – Validity of search – Warrant authorization in the name of assessee and not in name of bank account of assessee – Search valid.**
Survey was conducted at premises of assessee on 14th December 2009 which was subsequently converted into search under section 132(1). In consequence to the search, prohibitory orders under section 132(3) were passed in case of the assessee addressing to

their banker not to allow any operation to the assessee either in premises or in the bank locker. Subsequently again a search was conducted on 11th February, 2010. The search warrant was issued in the name of bank account maintained by assessee with bank.
Regarding the validity of search, ITAT held that on the basis of the panchanama, it gives an impression that search has taken place not on the assessee but in respect of the bank account of the assessee. Submission of the Counsel is based on the panchanama and not on the basis of the warrant of authorization. The copy of the warrant of authorization was not produced by the assessee. Panchanama is not the conclusive evidence that the search is not in the name of the assessee or search warrant is not in the name of the assessee. In this case, the Tribunal directed the learned Departmental representative to produce search warrant. It was found that the warrant of authorization is in favour of the assessee not in the name of the bank account and therefore, search cannot be held to be invalid. (AY. 2004-05 to AY 2006-07)
ACIT v. Budhiya Marketing Pvt. Ltd. (2015) 44 ITR 617 / 154 ITD 650 / 173 TTJ 649 (Kol.) (Trib.)
ACIT v. Edward Supply Pvt. Ltd. (2015) 44 ITR 617 / 154 ITD 650 / 173 TTJ 649 (Kol.) (Trib.)

S.132 : Search and seizure – Unexplained investment – Gold jewellery – Central Board of Direct Taxes instructing that gold jewellery and ornaments to extent of 500 grams for a married lady need not be seized – Jewellery of 471 grams found during search can be treated as explained. 1683
In a search and seizure conducted under section 132 of the Income-tax Act, 1961, gold jewellery and silver articles were found in the possession of the assessee. The assessee submitted that about 471 grams of gold were streedhan of his wife received on different occasions. The Assessing Officer treated the jewellery as unexplained and the Commissioner (Appeals) sustained the order of the Assessing Officer. On appeal :
Held, allowing the appeal, that the Central Board of Direct Taxes had laid down the guidelines that in the case of a person not assessed to wealth tax, gold jewellery and ornaments to the extent of 500 grams for a married lady need not be seized. Hence, the gold jewellery of 471 grams found during the course of search could reasonably be treated as explained and the addition was to be deleted. (2010-11)
R. Umamaheswar v. Dy. CIT (2015) 38 ITR 790 / 155 ITD 149 (Hyd.)(Trib.)

S.132 : Search and seizure – Undisclosed income – Date of search falling with financial year 2005-06, relevant to assessment year 2006-07 – Source can be examined only for assessment year 2006-07. 1684
Date of search falling with financial year 2005-06 relevant to assessment year 2006-07. Source of income can be examined only for assessment year 2006-07. Regular transactions duly recorded in books of account and hence, there is no infirmity and addition deleted. (AY. 2003-04, to 2006-07)
Dy. CIT v. Yuvanshankar Raja (2015) 37 ITR 355 (Chennai)(Trib.)

1685 **S.132(4) : Search and seizure – Statement on oath – Undisclosed income – Estimation – Method of accounting – Statement during search must be correlated to records which are discovered – Explanation of assessee must be taken into account – Deletion of addition by the Tribunal was held to be justified. [S. 68, 132, 145]**

Dismissing the appeals the Court held that that the Commissioner (Appeals) had after taking into account the statement of the assessee, in which it had surrendered the income, and having referred it to the books of account, disagreed with the quantum of the additions made by the assessing authority. The assessment made by the Commissioner (Appeals) was not found to be incorrect by the Tribunal. The decision of the Tribunal was justified. The statements made during search must be correlated with the records which are found, and if there is any ambiguity the explanation given by the assessee should be taken into consideration before making the assessment. (AY. 1989-90)

CIT v. Jagdish Narain Ratan Kumar (2015) 373 ITR 394 / 234 Taxman 39 (Raj.)(HC)

1686 **S.132(4) : Search and seizure – Statement on oath – Affidavit – Not disclosing in the return will amount to retraction – Unexplained advance – Addition made on the basis of statement was deleted. [S. 153A]**

The Tribunal held that during the course of search, at the time of recording of statement, the main Director of the Company Shri Raj Kumar Mathur had categorically admitted that the company had made unaccounted payment to these persons on account of advance against the land purchased but transaction could not be materialized and advances returned back. The assessee by not disclosing the full disclosure in the return of ₹ 47 lakhs had retracted from the statement given u/s. 132(4) of the Act. Further at the time of assessment proceedings the assessee filed affidavit to substantiate his returned income filed on account of disclosure. It is undisputed fact that these transactions were unrecorded/undisclosed but same time the cash has been returned back to these parties as admitted by the Director during the course of recording of statement itself. The affidavit was the further support against the contention made by the assessee during the course of search. It is also a fact that when unrecorded transactions are made, the concerned parties always become non-cooperative, therefore, it is difficult to assessee either filed the confirmation or produced the concerned persons for verification with whom unaccounted transactions were made. The statement made u/s. 132(4) is binding but rebuttable. As the Director of the company at the time of search in his statement had clear cut admitted these facts that he returned back the cash from these parties. The affidavit filed during the course of assessment proceedings is also an evidence as per Evidence Act. The case laws relied by the assessee for submission of affidavit are squarely applicable, therefore, we reverse the order of the CIT(A) and addition made by the AO and confirmed by the CIT(A) was deleted. (AY. 2008-09)

Shree Ram Balaji Developers & Infrastructure (P) Ltd. v. ACIT / (2015) 129 DTR 153 / (2016) 175 TTJ 462 (Jaipur)(Trib.)

S.132(4) : Search and seizure – Disclosure – Addition made solely on the basis of a disclosure and without any incriminating material is not sustainable if facts show that disclosure was under duress – CBDT Instruction dated 10-3-2003 relied upon. [S. 133A, 143(3), 153A] 1687

Addition made solely on the basis of a disclosure and without any incriminating material is not sustainable if facts show that disclosure was under duress. CBDT Instruction dated 10-3-2003 relied upon. (AY. 2008-09)

Shri Basant Bansal v. ACIT (2015) 171 TTJ 603 (Jaipur)(Trib.)

Shri Roop Bansal v. ACIT (2015) 171 TTJ 603 (Jaipur)(Trib.)

S.132(4) : Search and seizure – Statement recorded during the course of a search and seizure – Part of seized material – Part of addition was held to be justified. 1688

On the basis of statement part of addition was held to be justified and addition made for low withdrawal of housing expenses was held to be not proper. (AY. 2003-04 to 2009-10)

K. Govinda Pillai v. Dy. CIT (2015) 37 ITR 772 (Cochin)(Trib.)

S.132(4A) : Search and seizure – Presumption – Seized paper did not reflect the name of assessee – Deletion of addition was held to be justified.[S. 132] 1689

Tribunal found that though materials were seized in search, said materials did not reflect name of assessee. Most of cheques were stale and some other cheques were either blank or were in name of third parties, therefore, Tribunal held that revenue was not justified in drawing presumption under section 132(4A). Dismissing the appeal of revenue the Court held that since finding recorded by Tribunal could not be found fault with, same was to be upheld. (AY. 1998-99, 2000-01 to 2003-04)

CIT v. Blue Lines (2015) 231 Taxman 49 (Karn.)(HC)

Section 132A : Powers to requisition books of account, etc.

S.132A : Powers to requisition books of account, etc. – Income-tax authorities requisitioning silver articles of assessee from Railway police for purpose of investigation – No addition was made on account of seized articles – Income-tax authorities to hand over seized articles to assessee. 1690

Allowing the petition the Court held that the silver ornaments weighing 219.841 kilograms were requisitioned by the Income-tax authorities in exercise of the powers under section 132A in the financial year 2011-12. Thereafter, the assessment was framed by the Assessing Officer of the assessee for the assessment year 2012-13, whereby after taking note of such requisition made by the authorities, the return as filed by the assessee was accepted without making any addition on account of such seizure. Under the circumstances, without entering into the merits of the validity of the authorisation issued under section 132A and in view of the assessment order made in the case of the assessee, the Income-tax authorities could no longer continue with the seizure of the ornaments and the seized ornaments were required to be returned to the assessee. (AY. 2012-13)

K.S. Jewellers P. Ltd. v. DIT (2015) 379 ITR 526 (Guj.)(HC)

Section 132B : Application of seized or requisitioned assets.

1691 **S.132B : Application of seized or requisitioned assets – Assets retained by department for more than 19 years without renewal and encashment which resulted in loss of revenue – Department was directed to pay the interest to the assessee.**

During search at bank of assessee in year 1994, certain cash along with Fixed Deposit Receipts, Kisan Vikas, Patras, and Indira Vikas Patra were seized. Assessment proceedings were completed in year 1996. Seized cash was adjusted against tax demand but remaining assets were retained by department for more than 19 years without renewal and encashment which resulted in loss of interest on said investment. Kisan Vikas Patras, Indira Vikas Patras, Fixed Deposit Receipts, etc., would have earned interest in normal course of things, if they would have been revalidated/encashed as per option available to revenue and if revenue had failed to do so and money all along continued to remain deposited with Union of India and available for utilization by revenue itself, it should pay interest on aforesaid Kisan Vikas Patras, Indira Vikas Patras, Fixed Deposit Receipts, etc., at par with interest, which money would have earned, had investments revalidated/renewed been encashed by department.

Chander Prakash Jain v. CIT (2015) 234 Taxman 358 (All.)(HC)

1692 **S.132B : Application of seized or requisitioned assets – Adjustment of cash seized towards tax liability – Treating the same as advance tax was held to be justified – Explanation 2 as inserted by Finance Act, 2013 w.e.f. 1-6-2013 is prospective. [S.234A, 234B, 234C]**

The assessee requested for adjustment of cash seized during the search towards advance tax liability. The same was denied by the Assessing Officer. CIT(A) following decision of Bombay High Court in ITA. No. 3741 of 2010 dated 21-9-2011 in the case of *CIT v. Jotindra B. Mody* directed the Assessing Officer to treat the amount seized as payment to advance tax. On further appeal to the Tribunal, the revenue contended that the CIT(A) erred in applying the decision of jurisdictional High Court which is contrary to the extant provisions of S. 132B(1). Dismissing the appeal of revenue the Tribunal held that as per the existing provision of section 132B, it cannot be said that tax liability relating to the assessment year in question would crystallize only after the assessment is completed and, therefore, the request of the assessee for adjustment of amounts in question towards the advance tax could not be entertained. Now to overcome this decision the Explanation to section 132B had been inserted to provide that 'for removal of doubt it is hereby declared that the existing liability does not include advance tax payable in accordance with the provisions of Part C of Chapter 17'. Admittedly, this Explanation aims at subverting the above decision without removing the statutory basis of the decision that tax liability cannot be said to crystallize only after the assessment is complete. Hence, this Explanation will act prospectively. Hence, the reliance by the revenue on the insertion of this Explanation to section 132B cannot help as the Explanation has been inserted much after the conclusion of the assessment year under consideration. Revenue cannot keep the assessee's money with itself and claim that it has no liability or less liability towards the assessee by way of an Explanation inserted to negate the effect of judicial decisions without removing the statutory basis of the decisions.(AY. 2009-10)

ACIT v. Concreta Developers (2015) 155 ITD 65 / 174 TTJ 681 / (2016) 130 DTR 82 (Nag.)(Trib.)

Section 133 : Power to call for information.

S.133 : Power to call for information – The AO can call for information u/s. 133(6) even if no proceedings are pending – Legislative powers – Constitutional validity – Greater latitude in tax matters. [S. 133(6), Constitution of India, Article 19(1)(g)] 1693

The assessee challenged the validity of notice u/s. 133(6) calling for information of its depositors against which no proceedings are pending.

The High Court held that by virtue of section 133(6) of the Income-tax Act, 1961, the Department has the power to call for information in relation to such points or matters which would be useful for, or relevant to any proceeding under the Act, from "any person" including a "Banking Company" or "any Officer" thereon. Further, the amendment made by the Finance Act, 1995 whereby, the words "enquiry or" were inserted before the word "proceeding" in Section 133(6) widened its scope and therefore, even in a case where no proceeding was pending, such information could be called for as part of the enquiry.

Pattambi Service Co-operative Bank Ltd. v. UOI (2015) 374 ITR 254 / 115 DTR 289 / 275 CTR 202 / 53 taxmann.com 453 (Ker.)(HC)

Section 133A : Power of survey.

S.133A : Power of survey – Statement on oath – Retraction – Addition was held to be valid. [S. 131, 132(4), 245C, 245D] 1694

Assessee was engaged in transport business. Department carried out a survey at business premises of assessee. Certain papers were impounded showing an investment outside books of account. Assessee gave his statement and surrendered certain amount for imposition of tax. Assessee approached Settlement Commission – Commission directed Assessing Officer to compute tax and charge penalty and interest. Based on the order Assessing Officer computed tax penalty and interest. The assessee challenged the said order of Settlement Commission by filing writ petition and submitted that his statement under section 133A was not on oath and was liable to be rectified. Dismissing the petition the Court held that even though there was no provision to administer oath under section 133A, it did not mean that statement could be retracted at whim and fancy of assessee. (AY. 2007-08)

Sanjeev Agrawal v. ITSC (2015) 231 Taxman 71 (All.)(HC)

S.133A : Power of survey – Income from undisclosed source – Retraction of statement – No other evidence of suppression of income – Addition of income not justified. [S.69] 1695

Dismissing the appeal of revenue, the Court held that while making the additions in the hands of the partner as well as in the hands of the firm, the Assessing Officer solely relied upon the statement of the partner recorded at the time of search, which subsequently came to be retracted or explained within the period of 19 days. Except the statement recorded at the time of search which was subsequently retracted, there was no other material or corroborative material with the Assessing Officer, on which, the addition of ₹ 6 lakhs in the hands of the partner and ₹ 7,00,500 cash in hand and ₹ 25,50,320 as unexplained investment in stock in the hands of the firm could be

justified. Under the circumstances, the deletion of the additions was justified. (AY. 2007-08)
CIT v. M.P. Scrap Traders (2015) 372 ITR 507 (Guj.)(HC)

1696 **S.133A : Power of survey – Statements recorded during survey – Evidentiary value – Assessment solely on basis of statements recorded during survey – Statements retracted – Specific plea that statements recorded from partners by applying pressure – Retracted statement cannot constitute the sole basis for fastening liability – Assessment was held to be not valid. [S.131, 132(4), 143(3), Code of Criminal Procedure 1973, S.164]**

Allowing the appeal of assessee the Court held that the assessees specifically pleaded that the statements were recorded from them by applying pressure, till midnight, and that they had been denied access to outside society. The Assessing Officer made an effort to depict that the withdrawal or retraction on the part of the assessees was not genuine. On these undisputed facts of the case, there was absolutely no basis for the Assessing Officer to fasten the liability upon the assessees. The Circular dated March 10, 2003, issued by the Central Board of Direct Taxes took exception to the initiation of the proceedings on the basis of retracted statements. Assessment was held to be not valid.(AY. 1992-93)
Gajjam Chinna Yellappa v. ITO (2015) 370 ITR 671 (T&AP)(HC)
Gajjam Anjaiah v. ITO (2015) 370 ITR 671 (T&AP)(HC)
Gajjam Ramulu v. ITO (2015) 370 ITR 671 (T&AP)(HC)

1697 **S.133A : Power of survey – Assessee not provided opportunity to cross examine statement of third party – No corroborative material with AO – Statement on oath neither bore the signature of deponent nor of the officer – Addition to be deleted. [S. 131]**

The assessee engaged companies for doing liaisoning work on their behalf. A survey under Section 133A was conducted in the premises of one such company named LPL where statement of the director was recorded under Section 131 of the Act. The director stated that payment of commission by assessee was not genuine and were merely book entries. Another survey was conducted at the assessee's branch office and statement of the director was recorded under Section 131 of the Act, wherein he stated that the commission charges paid to LPL were bogus and not genuine. Subsequently another partner of the assessee and its sister concern retracted the statement stating that the same were taken under undue pressure. It was contended that the commissions were paid by account payee cheques and were accepted by the parties on which tax at source was deducted and service tax was duly paid. The AO disallowed the commission on the ground that the same were bogus and not genuine. On appeal to Tribunal, it was held that Section 133A does not empower any authority to examine any person on oath. A statement made thereunder has no evidentiary value and an admission made while making such statement cannot by itself be made the basis of addition unless the AO has corroborative material in hand to make that addition. The AO relied upon statement of a third party without affording cross examination of that party despite the assessee specifically seeking cross examination. There was no corroborative material on record against the assessee other than statement made under Section 131. Further the statement

on oath neither bore the signature of deponent nor of the officer. Thus the addition made was to be deleted. (AY. 2006-07)
D. S. Agencies and Associates v. Addl. CIT (2015) 44 ITR 46 (Mum.)(Trib.)
Usha Distributors v. Addl. CIT (2015) 44 ITR 46 (Mum.)(Trib.)

Section 139 : Return of income.

S.139 : Return of income – Duty to file return – Income exempt not liable to file the return. [S. 10(23C] 1698
Educational institutions which are exempt under section 10(23C), are not obliged to file the return.
All India Personality Enhancement and Cultural Centre For Scholars AIPECCS Society v. DIT(E) (2015) 379 ITR 464 / 281 CTR 1 / 126 DTR 353 (Delhi)(HC)

S.139 : Return of income – One day delay in filing of return – Refusal of CBDT to grant refund claimed by the assessee was held to be not justified. [S.119, 139(4), 239] 1699
Petitioner assessee filed its return of income one day late and refund claimed was not granted by department – Assessee filed an application under section 119(2) with CBDT to condone delay but same was dismissed. On writ allowing the petition the Court held that approach adopted by CBDT in refusing to condone delay was a pedantic resulting great hardship to petitioner assessee. CBDT was directed to consider the petition on merits. (AY. 2006-07)
Cosme Matias Menezes (P.) Ltd. v. CIT (2015) 379 ITR 31 / 233 Taxman 293 / 280 CTR 190 (Bom.)(HC)
CMM Logistics P. Ltd. v. CIT (2015) 379 ITR 31 / 233 Taxman 293 / 280 CTR 190 (Bom) (HC)

S.139 : Return of income – Interest for late filing of return – Assessment restored – Assessee is liable to pay interest – Fresh notice of demand need not be issued every time. [S. 139(8), 156, 215, 220(2)] 1700
Where assessment is restored, may be partially/fully, and original demand gets revived then assessee is liable to pay interest under sections 139(8), 215 and 220(2) as case may be, and, in such a situation, fresh notice under section 156 need not be issued every time when total income undergoes a change due to appeal or revisional orders. (AY. 1973-74)
CIT v. Udaipur Mineral Development Syndicate (P.) Ltd. (2015) 232 Taxman 393 / 275 CTR 533 (Raj.)(HC)

S.139 : Return of income – Extension of date – CBDT directed to forthwith issue an order u/s. 119 to extend the due date for filing ROI to 31-10-2015 [S.119] 1701
The order has been dictated in the open Court which is in the process of being transcribed. However, due to urgency, we are issuing the following operative order:
(i) The Respondent No.2 i.e. CBDT is directed to forthwith issue the order/ notification under Section 119 of the Income-tax Act and extend the due date for E-filing of the Income Tax Returns in respect of the assessee who are required to file return of income by 30th September, 2015 to 31st October, 2015;

(ii) It is made clear that at this stage we have not opined any other issue except to the extent of the aforesaid directions. It is made clear that this order will not affect any other obligation that may arise under the Act.

Chamber of Tax Consultants v. UOI (2015) 378 ITR 188 / 280 Taxman 273 / 125 DTR 371 (Bom.)(HC)

1702 **S.139 : Return of income – Extension of date – Strictures passed against CBDT for being lax and delaying issuing of the Forms and then taking adamant stand by not extending due date for filing ROI. CBDT directed to issue order u/s. 119 to extend due date for filing ROI to 31-10-2015 [S.119]**

Strictures passed against CBDT for being lax and delaying issuing of the Forms and then taking adamant stand by not extending due date for filing ROI. CBDT directed to issue order u/s. 119 to extend due date for filing ROI to 31-10-2015.

All Gujarat Federations of Tax Consultants v. CBDT (2015) 378 ITR 160 / 280 Taxman 248 / 125 DTR 305 (Guj.)(HC)

1703 **S.139 : Return of income – Extension – As the CBDT delayed the issue of Income-tax Return Forms, the due date for filing the returns is extended to 31-10-2015. CBDT is directed to issue an appropriate order u/s.119 [S.119]**

As the CBDT delayed the issue of Income-tax Return Forms, the due date for filing the returns is extended to 31-10-2015. CBDT is directed to issue an appropriate order u/s.119.

Vishal Garg v. UOI (2015) 378 ITR 145 / 280 CTR 290 / 125 DTR 292 (P&H)(HC)

1704 **S.139 : Return of income – Extension – Power to relax provisions of filing of return – Policy decision – High Court not to interfere such decision – CBDT is directed to make available forms for audit report and filing of returns on April 1 of assessment year. [S.119]**

Dismissing the writ petition the court held that Power to relax provisions of filing of return is policy decision of Government hence the High Court not to interfere such decision, however the CBDT is directed to make available forms for audit report and filing of returns on April 1st of assessment year. (AY. 2015-16]

Avinash Gupta v. UOI (2015) 378 ITR 137 / 280 CTR 282 / 125 DTR 283 (Delhi)(HC)

1705 **S.139 : Return of income – Interest – Agent – Non-resident – Held not liable to pay interest – DTAA-India-UK. [S.90, 139(8), 163]**

Order under sec. 163(2) treating assessee as agent was passed on 19th November, 1990 and hence there was no obligation on the assessee to file returns on behalf of the non-resident for AY 1988-89 and 1989-90 for which the time of filing return had already expired. Therefore it was not liable to pay interest u/s. 139(8). (AY. 1988-89, 1989-90)

CIT v. Andhra Petrochemicals Ltd. (2015) 373 ITR 207 / 114 DTR 41 / 230 Taxman 402 / 275 CTR 58 (T&AP)(HC)

CIT v. Davy Mackee (London) Ltd. (2015) 373 ITR 207 (T&AP)(HC)

S.139 : Return of income – Revised return – Wrong legal advice – Claim in the course of assessment to withdraw the revised return – Claim of assessee was accepted. [S.11, 12] 1706

Assessee foundation filed a return declaring nil income. Later on, assessee filed a revised return declaring income of certain amount. During course of assessment proceedings, assessee claimed that revised return be ignored and first return should be treated as correct and true return. AO held that assessee could not have filed revised computation and said claim could have been only made by way of a re-revised return. However, assessee stated that it proceeded on wrong legal advise and would like to withdraw revised return and would rely upon original return. Issue was to be decided in favour of assessee. (AY. 2006-07)

DIT v. Ajay G. Piramal Foundation (2015) 228 Taxman 332 (Delhi)(HC)

S.139 : Return of income – Audit report – Delay due to assessee not furnishing necessary statements to auditor – Rejection of application for condonation of delay was held to be justified. [S.44AB, 119(2)(b), Article 226] 1707

Dismissing the petition the Court held that where assessee society failed to file its return within due date on account of delay in getting audit report, in view of fact that said delay was attributable to assessee as it did not supply necessary statements to auditors in time, Commissioner was justified in rejecting application seeking condonation of delay filed under section 119(2)(b). (AY. 2006-07, 2008-09)

Travancore Cements Employees Co-operative Bank Ltd. v. CIT (2015) 228 Taxman 43 (Mag.)(Ker.)(HC)

S.139 : Return of income – In terms of Electronic Furnishing of Return of Income Scheme 2007, return of income of assessee would be deemed to be filed when Form ITR-V duly verified is submitted within 15 days from the date of filing of e-return. [S. 80-IB] 1708

The assessee had filed return of income through electronic filing on 30-9-2008 which was the due date of filing of return of income under section 139(1). In the return the assessee claimed deduction under section 80-IB(10). The assessee verified the Form ITR-V and physically filed the same on 16-10-2008. The AO denied the claim of deduction under section 80-IB(10) on the ground that the assessee had not complied with the provisions of section 80AC because the physical return was not filed within the time period as per the CBDT notification No. SO1281 (E) dated 27-7-2007 which is 15 days from the date of filing of e-return. On appeal the Tribunal held that in terms of Electronic Furnishing of Return of Income Scheme, 2007, assessee would be deemed to have furnished valid return of income if duly verified Form ITR-V is filed within 15 days after e-filing of return. If ITR-V is filed thereafter, no deduction for section 80-IB, etc. would be allowed. (AY. 2008-09)

Dwarakadas G. Panchmatiya v. ACIT (2015) 44 ITR 74 / 153 ITD 625 / 172 TTJ 70 (Mum.) (Trib.)

Section 140A : Self-assessment.

1709 **S. 140A : Self-assessment – Penalty – Restricting the penalty to 25% was held to be justified. [S.221]**

Assessee had paid the self-assessment tax before the issuance of show cause notice by AO. Details of bank statements were submitted to prove that delay in payment of tax was due to financial hardship beyond the control of the assessee. AO levied penalty of 100% of the tax liability which was reduced by CIT(A), and upheld by the Tribunal, to 25% since the assessee did not intend to evade tax. On appeal, the High Court held that the CIT(A) and the Tribunal were justified

In restricting the penalty to 25% based on cogent material and finding, more so when it is discretionary, as is clear from reading of S.221. It is not the legislative mandate to levy maximum penalty in all cases. (AY. 2009-10)

CIT v. Naresh Kumar Jaggi (2015) 370 ITR 401 / 114 DTR 401 (Delhi)(HC)

Section 142 : Inquiry before assessment.

1710 **S.142(2A) : Inquiry before assessment – Special audit – Complexity in the books of account cannot be judged from the material seized during the search, it must be based on the perusal of the books of accounts. [S.132]**

The assessee, a partnership firm, carried on business from Delhi. A search took place under section 132 at the business premises of the assessee and certain documents and cash was seized. Subsequently, a notice was issued by the Assessing Officer to produce the books of account. On 4th December, the assessee appeared before the Assessing Officer however, the hearing did not take place and the Assessing Officer could not peruse the books of account as he was busy with some official work. On 7th December, the Assessing Officer issued notice proposing to conduct a special audit under section 142(2A) on the basis of the seized material found during the search. The assessee filed its objections against the notice however, by order dated 18th December the Assessing Officer directed the Special Audit. On Writ Petition, it was held that the complexity in the books of account can be judged only from the perusal of books of account and cannot be judged from the material seized during the search. (AY. 2002-03 to 2008-09)

RPS Associates v. DIT (Inv.) (2015) 280 CTR 582 / (2016) 236 Taxman 129 (All.)(HC)

1711 **S. 142(2A) : Enquiry before assessment – Special audit – Reasonable opportunity of being heard – Not granted an opportunity of being heard – Such defect could not be cured by reference to queries raised with respect to accounts that preceded show cause notice – Order was held to be nullity.**

The Dy. CIT passed an order under section 142(2A) directing the petitioner to get its accounts audited from an auditor specified by him. The assessee was called upon to file a reply. The reply was filed but an opportunity of hearing, as required by the first proviso to section 142(2A) was not afforded to the petitioner much less, was the petitioner called upon to clarify averments in the reply. The assessee challenged the said notice by filing writ petition: The question that calls for an answer, is whether section 142(2A) renders it imperative that before passing an order an Assessing Officer is required to afford a reasonable opportunity of being heard to an assessee. Allowing the

petition the Court held that; the first proviso to section 142(2A) prohibits an Assessing Officer from directing such an audit unless the assessee has been afforded a 'reasonable opportunity of being heard'. The expression 'reasonable opportunity of being heard' in hers an obligation to afford a reasonable opportunity of being heard. The mere calling upon the assessee to file a reply would not fulfil the preemptory condition set out in the first proviso to section 142(A). The grant of a reasonable opportunity of being heard, is a statutory precondition to the exercise of power under section 142(2A), and if an Assessing Officer fails to afford a reasonable opportunity of being heard, before passing an order under section 142(2A), such an order would be null and void. The absence of an opportunity of being heard, cannot be cured by reference to queries that preceded the show cause therefore, renders the impugned order, a nullity. (AY. 2011-12)
Isolux Corsan India Engineering & Construction (P.) Ltd. v. Dy. CIT (2015) 229 Taxman 507 / 127 DTR 396 (P&H)(HC)

Section 142A : Estimation of value of assets by Valuation Officer.

S.142A : Estimate by Valuation Officer – Cost of construction – Reference to DVO cannot be made without rejecting the books of account on some legal or justified basis. [S.147] 1712
Where books of account in respect of cost of construction are maintained, reference to DVO cannot be made without rejecting said books of account on some legal or justified basis. (AY. 2004-05, 2005-06, 2007-08, 2009-10)
CIT v. Freedom Board & Paper Mills (2015) 231 Taxman 719 (P&H)(HC)

S.142A : Estimate by Valuation Officer – No defects in the books of account – Cost of construction – Addition was held to be not valid. [S. 69B] 1713
The assessee-firm, engaged in the business of building construction work, filed return of income and showed the certain amount as value of cost of construction. The AO valued cost of construction relied on the report of valuation officer and made addition under section 69B.
On appeal, the CIT(A) deleted addition made by AO Officer holding that the cost of construction should be accepted as per the books of account.
On revenue's appeal, the Tribunal upheld the order of CIT(A). On appeal by revenue the Court held that the deletion of addition is concerned, the AO was not confronted with any defects in the books of account maintained by the assessee. The AO has not given any valid reasons for not accepting the cost shown by the assessee though he accepts that the method of accounting was mercantile. Hence, the deletion was justified.(AY. 1983-84)
ITO v. Chitalia Builders (2015) 229 Taxman 438 (Guj.)(HC)

Section 143 : Assessment.

S.143(1)(a) : Assessment – *Prima facie* adjustment – Payment received was more than the bill amount – Not justified in taking difference as *prima facie* adjustment on the basis of TDS certificates. [S.5, 143(3), 194C] 1714
Assessee had carried out certain work on behalf of one 'R' as sub-contractor and towards same, it had received various amounts from time to time during relevant year.

Assessee had received ₹ 16.30 lakhs from 'R', who had deducted 2 per cent TDS from said amount. It was found that assessee carried out work and received payment towards same throughout year, however, it raised bill at end of year and on account of that, payment amount was more than bill amount Assessing Officer has made the *prima facie* adjustment on the basis TDS certificate. Adjustment made by the Assessing Officer was conformed in appeal. On appeal to High Court by the assessee, allowing the appeal the Court held that since actual work carried out by assessee during relevant year was to extent of bill raised, assessee was justified in not showing income to extent to the extent of excess amount received from 'R', therefore, Assessing officer was not justified in taking difference as *prima facie* adjustment under section 143(1)(a). (AY. 1996-97)
Rudraksh Builders v. ACIT (2015) 232 Taxman 181 (Guj.)(HC)

1715 **S.143(1)(a) : Assessment – Intimation – *Prima facie* adjustment – Only where facts are undisputed – Customs duty – Refund of substantial amount – Debatable issue – Assessing Officer determining nature of receipt as revenue receipt by *prima facie* adjustment – Impermissible.[S.4, 143(3)]**
The assessee, claimed deduction of a sum representing refund of customs duty. The Assessing Officer made a *prima facie* adjustment under section 143(1)(a) treating it as a revenue receipt and disallowed the deduction. The Tribunal held that the determination as to the character of the amount could not have been done at the stage of *prima facie* adjustment. On appeal.
Held, dismissing the appeal, that the assessee claimed the deduction of a substantial amount which was in the form of refund of customs duty. A return, wherein such a deduction was claimed, could have been the subject matter of a *prima facie* adjustment under section 143(1)(a) only if the Assessing Officer accepted the version or the contention of the assessee. Once he had decided not to accept that contention, there was no occasion or basis for him to invoke section 143(1)(a) (AY. 1995-96).
CIT v. Nagarjuna Fertilizers and Chemicals Ltd. (2015) 371 ITR 118 / 232 Taxman 349 (T&AP)(HC)

1716 **S.143(1)(a) : Assessment – *Prima facie* adjustment – AO denied claim for exemption u/s. 54F, he had overstepped his authority to deny claim of assessee beyond jurisdiction.[S.54F, 143(3), 154]**
Assessee had sold a property in Chennai and made investment in a residential property in United States of America. Return of income filed for assessment year 2009-10 by claiming exemption u/s. 54F. A.O. processed return u/s. 143(1)(a) and denied claim for exemption. Capital gain arose in hands of assessee was exempted or not was not a question in nature of mistake apparent from information in return, nor it was possible to say *prima facie* that claim made by assessee was incorrect. Therefore, the A.O. had overstepped his authority to deny claim of assessee beyond jurisdiction of s. 143(1)(a). (AY. 2009-10)
Sushiela Natarajan (Ms.) v. ITO (2013) 28 ITR 237 / (2015) 153 ITD 534 (Chennai)(Trib.)

S.143(IA) : Assessment – Additional tax – As the object of S. 143(1A) is to prevent tax evasion, it can apply only to tax evaders and not to honest assessees. The burden of proving that the assessee stated a lesser amount in the return in an attempt to evade tax is on the revenue – Retrospective clarificatory amendment was held to be valid. [S.143(3)] 1717

Section 143(1A)(a) was substituted with retrospective effect by the Finance Act of 1993 from 1-4-1989 to provide that even a reduction of loss on account of a *prima facie* adjustment would entail levy of additional tax. The retrospective amendment was enacted to supercede the judgments of the Delhi High Court in *Modi Cement Limited v. Union of India, (1992) 193 ITR 91* and *JK Synthetics Limited v. Asstt. Commissioner of Income-Tax, (1993) 2000 ITR 594*, and the Allahabad High Court in *Indo Gulf Fertilizers & Chemicals Corpn. Ltd. v. Union of India, (1992) 195 ITR 485* which held that losses were not within the contemplation of Section 143(1A) prior to its amendment. The assessee challenged the retrospective amendment as being arbitrary and *ultra vires.* This was upheld by the Guwahati High Court. The High Court held that the retrospective effect given to the amendment would be arbitrary and unreasonable inasmuch as the provision, being a penal provision, would operate harshly on assessees who have made a loss instead of a profit, the difference between the loss showed in the return filed by the assessee and the loss assessed to income tax having to bear an additional income tax at the rate of 20%. On appeal by the department to the Supreme Court HELD reversing the High Court:

(i) The object of Section 143(1A) is the prevention of evasion of tax. By the introduction of this provision, persons who have filed returns in which they have sought to evade the tax properly payable by them is meant to have a deterrent effect and a hefty amount of 20% as additional income tax is payable on the difference between what is declared in the return and what is assessed to tax;

(ii) The definition of "income" in Section 2(24) of the Income-tax Act is an inclusive one. Further, it is settled law at least since 1975 that the word "income" would include within it both profits as well as losses. This is clear from *Commissioner of Income Tax Central, Delhi v. Harprasad & Company Pvt. Ltd., (1975) 3 SCC 868*;

(iii) Even on a reading of Section 143(1)(a) which is referred to in Section 143(1A), a loss is envisaged as being declared in a return made under Section 139. It is clear, therefore, that the retrospective amendment made in 1993 would only be clarificatory of the position that existed in 1989 itself. All assessees were put on notice in 1989 itself that the expression "income" contained in Section 143(1A) would be wide enough to include losses also.

(iv) The object of Section 143(1A) is the prevention of tax evasion. Read literally, both honest assessees and tax evaders are caught within its net, an example being *Commissioner of Income Tax, Bhopal v. Hindustan Electro Graphites, Indore, (2000) 3 SCC 595*. We feel that since the provision has the deterrent effect of preventing tax evasion, it should be made to apply only to tax evaders. In support of this proposition, we refer to the judgment in *K. P. Varghese v. ITO, (1982) 1 SCR 629.* Taking a cue from *K.P. Varghese v. ITO, (1982) 1 SCR 629*, we therefore, hold that Section 143(1A) can only be invoked where it is found on facts that the lesser amount stated in the return filed by the assessee is a result of an attempt to evade

tax lawfully payable by the assessee. The burden of proving that the assessee has so attempted to evade tax is on the revenue which may be discharged by the revenue by establishing facts and circumstances from which a reasonable inference can be drawn that the assessee has, in fact, attempted to evade tax lawfully payable by it. Subject to the aforesaid construction of Section 143(1A), we uphold the retrospective clarificatory amendment of the said Section and allow the appeals. (AY. 1989-90, 1991-92)

CIT v. Sati Oil Udyog Ltd. (2015) 372 ITR 746 / 276 CTR 14 / 116 DTR 417 / 230 Taxman 521 / AIR (2015) SC 3244 (SC)

1718 **S.143(IA) : Assessment – Additional tax – Subsequent Supreme Court decision – Additional tax cannot be automatic – Additional tax could not be levied. [S.143(3)]**

Dismissing the appeal of revenue the Court held that the additional tax was not leviable even if the liability to pay tax according to the Supreme Court decision accrued after filing of the return but before the last date of filing of the return.(AY.1995-96)

Dy. CIT v. Surat Electricity Company Ltd. (2015) 376 ITR 121 / 61 taxmann.com 370 (Guj.)(HC)

1719 **S.143(2) : Assessment – Issue of notice is mandatory – Non issue of notice is not a curable defect. [S. 143(3), 292BB]**

Dismissing the appeal of revenue the Court held that since the Assessing Officer failed to issue notice within the specified period under section 143(2) of the Act, the Assessing Officer had no jurisdiction to assume jurisdiction under section 143(2) of the Act and this defect could not be cured by recourse to the deeming fiction provided under section 292BB of the Act. Consequently, the Tribunal was justified in setting aside the order of the Assessing Officer as well as the order of the Appellate Authority. (AY. 2006-07 to 2011-12)

ACIT v. Greater Noida Industrial Development Authority (2015) 379 ITR 14 / 281 CTR 204 / 126 DTR 176 (All.)(HC)

1720 **S.143(2) : Assessment – Notice – Failure to issue a S. 143(2) notice renders the reassessment order void. S. 292BB saves a case of "non service" of the notice but not a case of "non issue" – Reassessment order was held to be unsustanable. [S.143(3), 147, 148, 292BB]**

The failure of the AO, in reassessment proceedings, to issue notice under Section 143(2) of the Act, prior to finalising the reassessment order, cannot be condoned by referring to Section 292BB of the Act. Section 292BB applies insofar as failure of "service" of notice is concerned and not with regard to failure to "issue" notice. The non-issue of the said notice is fatal to the order of reassessment. Reassessment order was held to be unsustanable. (AY.2008-09)

PCIT v. Shri Jai Shiv Shankar Traders Pvt. Ltd. (2016) 383 ITR 448 / 282 CTR 435 / 129 DTR 63 (Delhi)(HC)

S.143(2) : Assessment – Notice – Order passed without issue of notice u/s. 143(2) is held to be bad in law. [S. 143(3)] 1721

Where no notice was issued under section 143(2), no assessment order under section 143(3) could be passed and, therefore, assessment order passed under section 143(3) was void *ab initio*.

CIT v. Meenakshi Devi (Smt.) (2015) 229 Taxman 365 (All.)(HC)

S.143(2) : Assessment – Notice – Limitation – Service of notice within prescribed time limit mandatory – Assessment was held to be non est in law. [S.143(3)] 1722

Dismissing the appeal of revenue, the Court held that; the section makes it clear that service of notice under section 143(2) of the Act within the time limit prescribed is mandatory and it is not a mere procedural requirement. Held, that the objection in relation to non-service of notice contemplated under section 143(2) of the Act was not an issue before the Assessing Officer and the Commissioner (Appeals) and was raised for the first time before the Tribunal. It was a legal plea which went to the root of the matter and, therefore, the assessee was entitled to raise it before the Tribunal. (AY. 2007-08)

CIT v. Gitsons Engineering Co. (2015) 370 ITR 87 / 231 Taxman 506 (Mad.)(HC)

S.143(2) : Assessment – Notice – Limitation – Service of notice beyond one year – Order void ab initio.[S.143(3)] 1723

Notice under section 143(2) served upon assessee beyond period of one year barred by limitation. Assessment was held to be void *ab initio*. (AY. 1999-2000)

CIT v. Gujarat Foils Ltd. (2015) 377 ITR 324 (Guj.)(HC)

S.143(2) : Assessment – Notice – Within period of six months – Mandatory – Defect cannot be cured by taking recourse to deeming fiction under section 292BB. [S.143(3), 292BB] 1724

Dismissing the appeal of the revenue the Court held that where AO fails to issue a notice within period of six months as spelt out in proviso to clause (ii) of section 143(2), assumption of jurisdiction under section 143(3) would be invalid and this defect cannot be cured by taking recourse to deeming fiction under section 292BB. Applied the ratio in *ACIT v. Hotel Blue Moon [2010] 321 ITR 362 / 188 Taxman 113 (SC)*. (AY. 2008-09)

CIT v. Salarpur Cold Storage (P.) Ltd. (2015) 228 Taxman 48 (Mag.)(All.)(HC)

S.143(2) : Assessment – Service of notice – Limitation – Failure to issue notice with in prescribed time – Assessment was null and void. [S. 143(3)] 1725

Assessing officer to issue notice to address mentioned in return of assessee. Failure by Assessing officer to issue notice to correct address and before six months of date of filing of return. Assessment was held to be null and void. (AY. 2008-09)

Total Presentation Device P. Ltd. v. Dy. CIT (2015) 41 ITR 10 (Delhi)(Trib.)

S.143(2) : Assessment – Service of notice – Validity of service by speed post – No reason to doubt – Assessment was held to be valid. [S. 143(3), 282, 292BB, General Clauses Act, 1897, S.27, Indian Evidence Act, 1882, S. 114] 1726

The Tribunal held that very fact of delay in the delivery of notice as recorded with reference to 30-8-2010 implies acceptance of veracity of dispatch register/document

maintained by the Assessing Officer's office and there is no reason to doubt the validity or authenticity of same in view of the presumption under section 114 of the Evidence Act. Thus, service of notice on the assessee is proved and assessment cannot be assailed on that score. (AY. 2009-10)
Color Craft v. ITO (2015) 172 TTJ 273 (Mum.)(Trib.)

1727 **S.143(2) : Assessment – Notice – Amalgamation – Notices issued in the name of the non-existent amalgamating company are void and render the assessment order null and void. [S.124(3), 143(3) 153C, 292B]**
Dismissing the appeal of revenue the Tribunal held that; (i) For making the assessment, it is absolutely essential that the person so to be assessed should be in existence at the time of making the assessment. In the present case the assessment has been framed by the AO on a date when the present assessee was not in existence therefore, the assessment framed by the AO *vide* assessment order dated 31.12.2010 was not valid. Moreover it is seen that on 26-10-2010 the assessee intimated to the Assessing Officer with regard to amalgamation of the assessee company with M/s. Instronics Ltd. and also furnished a copy of the order of the Hon'ble Jurisdictional High Court. At that time the Assessing Officer could have issued the notice under Section 153C in the name of the transferor company i.e. M/s. Instronics Ltd. As the notice under section 143(2) of the Act was sent to the company which was not in existence on the date of the issue of notice. Similarly in the case of the assessee notice under Section 153C was issued in the name of M/s. Computer Engineering Services (P) Ltd. on 4-10-2010 when this company was not in existence. Therefore, the ratio of the decision of Hon'ble jurisdictional High Court in the case of M/s Spice Entertainment Ltd. (supra) would be squarely applicable to the issue of notice under Section 153C in the case of the assessee.
(ii) As regards the applicability of Section 292B of the Act, Section 292B, *inter alia,* prescribes that proceedings etc. initiated cannot be deemed invalid "merely by reason of mistake, defect or omission" in any return of income, assessment or notice. The revenue had argued that this provision neutralizes procedural defects in jurisdiction. In these circumstances, it was submitted, having regard to the assessee's omission to urge the so-called illegality at the threshold, the Court ought to interfere with the order of the ITAT. This question, too, has been dealt with – in *CIT v. Dimension Apparels Pvt. Ltd. reported in (2015) 370 ITR 288*. In that case, after noticing Section 292B, the Court discussed the ruling in Spice Entertainment (supra), wherein it had been held that since the assessment made in such cases is against an amalgamated company in respect of income of the amalgamating company for the period prior to the amalgamation, the Income tax authorities are nevertheless under an obligation to substitute the successor in place of the amalgamated company. Thus, "such a defect cannot be treated as procedural defect". In any event, it is to be noted that the fact of amalgamation of the assessee with the transferee company had been intimated and disclosed in response to the notice under Section 153C on 22-11-2010. Accordingly, this ground, too, has no merit and is rejected. (ITA No. 5874 to 5878/Del/2013, dt. 29-5-2015) (AY. 2003-04 to 2007-08)
Computer Engineering Service India (P) Ltd. v. ACIT (2015) 172 TTJ 317 (Delhi)(Trib.)
Foryu Overseas (P) Ltd. v. DCIT (2015) 172 TTJ 317 (Delhi)(Trib.)

S.143(3) : Assessment – Natural justice – Denial of opportunity to cross examine witness – Failure to give the assessee the right to cross-examine witnesses whose statements are relied up results in breach of principles of natural justice. It is a serious flaw which renders the order a nullity. [Central Excise Act, 1944, S.3, Rules 1944, R. 173C) 1728

The assessee raised a plea that it was not allowed to cross-examine the dealers whose statements were relied upon by the Adjudicating Authority in passing the order. However, the Tribunal rejected the plea on the basis that "The plea of no cross-examination granted to the various dealers would not help the appellant case since the examination of the dealers would not bring out any material which would not be in the possession of the appellant themselves to explain as to why their ex-factory prices remain static". On appeal by the assessee to the Supreme Court HELD allowing the appeal:

Not allowing the assessee to cross-examine the witnesses by the Adjudicating Authority though the statements of those witnesses were made the basis of the impugned order is a serious flaw which makes the order nullity inasmuch as it amounted to violation of principles of natural justice because of which the assessee was adversely affected. It is to be borne in mind that the order of the Commissioner was based upon the statements given by the aforesaid two witnesses. Even when the assessee disputed the correctness of the statements and wanted to cross-examine, the Adjudicating Authority did not grant this opportunity to the assessee. It would be pertinent to note that in the impugned order passed by the Adjudicating Authority he has specifically mentioned that such an opportunity was sought by the assessee. However, no such opportunity was granted and the aforesaid plea is not even dealt with by the Adjudicating Authority. As far as the Tribunal is concerned, we find that rejection of this plea is totally untenable. The Tribunal has simply stated that cross-examination of the said dealers could not have brought out any material which would not be in possession of the appellant themselves to explain as to why their ex-factory prices remain static. It was not for the Tribunal to have guess work as to for what purposes the appellant wanted to cross-examine those dealers and what extraction the appellant wanted from them.

Andaman Timber Industries v. CCE (2015) 127 DTR 241 / 281 CTR 241 (SC)

S.143(3) : Assessment – Amalgamation – Non-existent assessee – Successor – Company – Null and void – Not curable defects. [S. 292B] 1729

Assessee-company was amalgamated with respondent-company, with effect from 1-4-2004. For relevant assessment year, assessee filed its return on 28-11-2003 and assessment order was passed on 27-3-2006. On appeal CIT(A) gave partial relief to assessee. Assessee and revenue filed appeal before the Tribunal. The Tribunal allowed the appeal of the respondent company and quashed the assessment order by the Assessing Officer holding that the assessment proceedings against SSS Ltd. (which was non-existent on the date of passing of the assessment order) was not valid proceedings. On appeal by the revenue dismissing the appeal the Court held that Assessment order passed by Assessing Officer on assessee after being intimated about its merger with respondent company was without jurisdiction and null and void. Provisions of section

292B would not make assessment valid as a defect/omission to incorporate name of successor company in assessment order was not a procedural irregularity but it went to root of matter. (AY. 2003-04)
CIT v. Intel Technology India (P.) Ltd. (2015) 232 Taxman 279 / (2016) 380 ITR 272 (Karn.) (HC)

1730 **S.143(3) : Assessment – Assessment set aside by Commissioner and fresh assessment ordered – Initial order of assessment ceases to be operative – Previous sanction of Deputy Commissioner not required for notice. [S. 143(2), 263]**
Dismissing the appeal of assessee the Court held that; when an order is set aside by the Commissioner and fresh assessment ordered, initial assessment order ceases to be operative hence previous sanction of Deputy Commissioner is not required. (AY.1985-86)
Damodarlal Badruka v. ITO (2015) 378 ITR 494 / 234 Taxman 3 (T&AP) (HC)

1731 **S.143(3) : Assessment – Estimate of income – Enquiry by excise authorities cannot be sole basis for estimation of income – Method adopted by the Tribunal was held to be justified.**
Dismissing the appeal of revenue the Court held that the provisions under the two laws, viz., the Central Excise Act and the Income-tax Act, operate in two different fields. Without there being an independent enquiry by the taxing authorities the demand made under the provisions of the Central Excise Act cannot be incorporated as such, especially when the notice of demand had been modified by the adjudicating authority. The method adopted by the Commissioner (Appeals) with regard to taxation under the Income-tax Act, as affirmed by the Tribunal, was the correct method of determining the income based on the unaccounted turnover. (AY. 2002-03, 2003-04, 2004-05)
CIT v. Amman Steel and Allied Industries (2015) 377 ITR 568 (Mad.)(HC)

1732 **S.143(3) : Assessment – Business expenditure – Claim made for first time in the course of assessment proceedings – No revised return was filed – Held to be allowable. [S.139(1)]**
Claim of revenue expenditure made for first time in course of assessment proceeding without revising return of income, was allowable. (AY. 1991-92)
CIT v. Gujarat Alkalies & Chemicals Ltd. (2015) 231 Taxman 787 (Guj.)(HC)

1733 **S.143(3) : Assessment – Benefit not dependant on treatment on facts by assessee – Estoppel does not apply against statute. [S.10A]**
An assessee's treatment of facts in any given manner is not relevant for the purpose of determining liability under the Income-tax Act, 1961. If on an application of the statutory provision, the party is entitled to the benefits under the Act, the mere circumstances that for the last 5 to 7 years, or even 10 years, it did not claim such benefit would not preclude it from availing of it in the assessment year in question. What the assessee cannot resile from is the exercise of a given set of facts which it has not challenged earlier. Referred *CIT v. C. Parikh and Co. (India) Ltd. (1956) 29 ITR 661 (SC), CIT v. Mr. P. Firm, Muar (1965) 56 ITR 67 (SC*) (AY. 2005-06)
HCL Technologies v. ACIT (2015) 377 ITR 483 / 278 CTR 345 / 231 Taxman 895 (Delhi) (HC)

S.143(3) : Assessment – Alleged suppression of sales – Finding by Commissioner (Appeals) and Tribunal that there was no suppression of sales – Deletion of addition was held to be justified. 1734

Dismissing the appeal of revenue that the finding that there had been no suppression of sales was a finding of fact. The deletion of the addition on that account was justified. (AY. 1994-95, 1995-96)

CIT v. Tony Electronics Ltd. (2015) 375 ITR 431 / 128 DTR 281 (Delhi)(HC)

S.143(3) : Assessment – Undisclosed income – Agricultural income – Amnesty scheme – Addition as undisclosed income was held to be justified. [S.2(IA),69] 1735

Assessee filed returns for assessment years 1984-85 to 1988-89 separately under Amnesty Scheme declaring agricultural income and paid tax. Affirming the reassessment proceedings all authorities gave concurrent finding and Tribunal held that agricultural income of ₹ 25.50 lakhs declared in Amnesty Scheme was, in fact, not agricultural income and entire income was required to be assessed in relevant years under consideration as undisclosed income. (AY. 1978-79 to 1986-87)

Mahnedara R. Patel (HUF) v. ITO (2015) 231 Taxman 445 (Guj.)(HC)

S.143(3) : Assessment – Capital gains – Protective assessment – Assessment order could be assailed in appeal and, hence, extraordinary jurisdiction of High Court under Article 226 of Constitution could not be invoked bypassing effective alternative remedy. [Constitution of India, Article 226] 1736

In course of enquiry, statement made by petitioners was that sale transaction took place in year 2007-08. Department, however, doubted said stand, therefore, assessment made was a protective assessment to find out taxable nature of transaction be either in 2007-08 or 2008-09 The assessee challenged the assessment order for the assessment year 2008-09 stating that this assessment was irregular as short-term capital gains, which was subject matter of assessment year 2008-09 on protective basis was not relatable to transaction, because transaction took place in year 2007-08. Dismissing the petition the Court held that assessment order for 2008-09 could be assailed in appeal and, hence, extraordinary jurisdiction of High Court under Article 226 of Constitution could not be invoked bypassing effective alternative remedy.(AY. 2007-08, 2008-09)

S. Balasubramanian Adityan v. Dy. CIT (2015) 231 Taxman 56 (Mad.)(HC)

S.143(3) : Assessment – Death of original assessee and legal representative filing return for period up to date of death and paying tax – Trust as a legatee paying tax for subsequent period – Assessing Officer cannot levy tax for same period on testator also – Matter remanded to Assessing Officer on a limited aspect as directed by court. 1737

Death of original assessee and legal representative filing return for period up to date of death and paying tax. Trust as a legatee paying tax for subsequent period. Assessing Officer cannot levy tax for same period on testator also. Matter remanded to Assessing Officer on a limited aspect as directed by court. (AY. 1995-96)

A. Venkateswara Rao v. ACIT (2015) 372 ITR 136 (T&AP)(HC)

1738 **S.143(3) : Assessment – Joint venture – Project work done by one of assessee's constituents – Receipts for project work reflected in books of account and in return of constituent – Return accepted and assessment completed – Income cannot be taxed in hands of assessee. [S. 3, 4]**

Assessee entered in to joint venture agreement. Project work done by one of assessee's constituents. Receipts for project work reflected in books of account and in return of constituent. Return accepted and assessment completed. Income cannot be taxed in hands of assessee.

CIT v. SMSL UANRCL (JV) (2015) 372 ITR 429 / 233 Taxman 216 / 116 DTR 430 / 277 CTR 47 (Bom.)(HC)

1739 **S.143(3) : Assessment – Limitation – Assessment order completed within time prescribed by Act – Department not dispatching assessment order to assessee – No indication that Assessing Officer revised order after completion – Assessment order served on assessee's representative when he visited Department – Assessment order not barred by limitation.[S. 153]**

The assessment for the AY. 2002-03 was completed on March 31, 2005, on the last date within the time prescribed by section 153 of the Income-tax Act, 1961. The Department made no attempt to despatch the order of the assessment. The assessee's representative filed an affidavit in which he had stated he was served with the assessment order on April 13, 2005, when he visited the office of the Income-tax Department. The Commissioner stated whatever records were available, he had produced, which record did not contain the despatch register. He opined that once the assessment order including the demand notice was served on the assessee on April 13, 2005, by hand, there was no question of any entry in the despatch register. The Tribunal held that the assessment order under section 143(3) dated March 31, 2005, received by the assessee on April 13, 2005, was barred by limitation. On appeal:

Held, allowing the appeal, that a representative of the assessee, on his own volition and without intimation to the Department, visited the office and found the assessment order ready to be served upon him. From the oral evidence of the Commissioner it was clear that all records were produced and the Department had not made any attempt to despatch the order for service on the assessee. On the facts there was no indication that the Assessing Officer revised the order after March 31, 2005. The probability of the order being made and ready to be collected by the representative of the assessee as on April 1, 2005, could not also be ruled out. Thus, the order of the Tribunal was set aside. (AY. 2002-03)

CIT v. Binani Industries Ltd. (2015) 372 ITR 414 / 233 Taxman 14 (Cal.)(HC)

1740 **S.143(3) : Assessment – Additions to income – Benami transactions – Statement on oath – Retraction – Addition merely on the basis of statement was held to be not justified. [S. 132, 132(4)]**

During search conducted at assessee's business premises, his statement was recorded under section 132(4) wherein he admitted that few benami concerns were being run by assessee in name of his employees, thereafter, during assessment proceeding, he retracted from said admission contending that it was made at mid night under pressure

and coercion. Assessing Officer, however, made addition on basis of disclosure made by assessee in statement recorded under section 132(4). Tribunal deleted the addition. On appeal by revenue, dismissing the appeal the Court held that merely on basis of admission that few benami concerns were being run by assessee, assessee could not be subjected to such addition when despite retraction revenue could not furnish any corroborative evidence in support of such admission. (AY. 1989-90 to 1991-92)
CIT v. Chandrakumar Jethmal Kochar (2015) 230 Taxman 78 (Guj.)(HC)

S.143(3) : Assessment – Income from undisclosed sources – Suppressed sales – Rejection of accounts – Estimate of income – Estimate cannot be based solely on consumption of electricity – Deletion of addition by the Tribunal was held to be justified. [S.69] 1741
Dismissing the appeal of revenue, the Court held that estimate cannot be based solely on consumption of electricity. Deletion of addition by the Tribunal was held to be justified. (AY. 2005-06)
CIT v. Ram Steel Industries (2015) 371 ITR 373 (P &H)(HC)

S.143(3) : Assessment – Estimation of income – Contractor – Application of net profit at 8 per cent – Pure finding of fact – Appeal of revenue was dismissed. [S.260A] 1742
On appeal by revenue dismissing the appeal the Court held that the findings of the Tribunal were pure findings of fact. The court could not reappreciate and reappraise the factual findings. The Tribunal's exercise in upholding the order of the Commissioner (Appeals) and his estimation could not be interfered with at the behest of the Revenue without any perversity being demonstrated. The Revenue's estimation was on the higher side and based on the Assessing Officer's order was rightly termed as abnormal and unreasonable. In these circumstances, the appeal did not raise any substantial question of law. Application of 8 per cent of net profit was held to be justified. (AY. 2007-08)
CIT v. Ratansingh M. Rathod (2015) 371 ITR 135 (Bom.)(HC)

S.143(3) : Assessment – Extrapolation' principle – The AO is entitled to make an estimation based on guesswork – However, the estimate must not be arbitrary and should be based on material. [S.153A] 1743
The ratio of the Hon'ble Supreme Court judgment in the case of *CIT v. HM Eusafali HM Abdulalli (1973) 90 ITR 271 (SC*) has been explained in the later judgment of this Court in *CIT v. Dr. M. K. E. Memon (2001)248 ITR 310 (Bom.)*. There also a professional has been dealt with and the Supreme Court's judgment in HM Eusafali HM Abdulala was followed. However, this Court cautioned as to how for a period of one year the estimation could not be made and it could be, therefore, arbitrary. An arbitrary method cannot be adopted. On facts, there is no arbitrariness. The Tribunal found that the additions have been made in the assessment years 2000-01 and 2001-02, the benefit of set off may be given. So far as assessment year 2000-2001 is concerned, the addition is sustained to the extent of ₹ 20,00,000/- which was the payment made by the assessee to Shri Doke. So far the addition on account of suppressed profession receipts of ₹ 14,30,225/- the Tribunal relied on the admissions and which can be gathered from the maintenance of a parallel record. The modus operandi was admitted. The addition as made by the AO

were not confirmed in the absence of direct evidence. In the circumstances, when the Tribunal relied on the decision of the Supreme Court to not uphold the entire addition as made by the Assessing Officer, but sustained it to the extent of 10%, then no substantial question of law arises for determination and consideration. In the matter before this Court in *Commissioner of Income Tax v. Dr. M.K.E. Memon (2001) 248 ITR 310 (Bom.)*, the arbitrariness was writ large because there was a block assessment of ten years. The Supreme Court judgment must be read in the backdrop of the facts and that is clear. The finding of fact by this Court is that it is improbable that the rate of fees charged by a professional in 1983 would remain static for the entire block period of ten years. It is in these circumstances the proportionate amount of refund could not have been considered as static for ten years. With the other admitted facts and pertaining to the reduction of migration to Gulf countries on account of Gulf war that this Court found complete arbitrariness in the estimation by the assessee. At the same time, this Court held that it is open for the Assessing Officer to make an estimation and in that process there could be a certain guesswork as well. That element cannot be discarded totally. Appeal of assessee was dismissed. (AY.2002-03)
Prakash K. Kankariya v. JCIT (2015) 119 DTR 183 (Bom.)(HC)

1744 **S.143(3) : Assessment – Sale of shares – The AO cannot treat a transaction as bogus only on the basis of suspicion or surmise. He has to bring material on record to support his finding that there has been collusion/connivance between the broker and the assessee for the introduction of its unaccounted money. A transaction of purchase and sale of shares, supported by Contract Notes and demat statements and Account Payee Cheques cannot be treated as bogus. [S. 10(38), 153A]**
The assessee sold shares of various listed companies and declared long term capital gains. The assessee submitted details of purchase and sale of the shares in aforesaid companies before the AO and stated that the payment has been made to the stock brokers through account payee cheque from the disclosed bank accounts. The shares were held as an Investment. During the course of assessment proceedings, the details of contract notes for purchase and sale of shares were duly filed by the assessee. The entire sale consideration for sale of these shares were received by the assessee from the stock brokers through account payee cheques. The assessee also duly paid the Securities Transaction Tax (STT) at the time of sale of shares. The AO doubted the computation of capital gains on sale of the aforesaid shares by stating that the shares of said companies could not have been sold at the prevailing market rates as per the Calcutta Stock Exchange and treated the long term capital gains as bogus and held that it is only assessee's own unaccounted money that had surfaced in the form of long term capital gains with the connivance of the brokers and accordingly brought to tax under the normal provisions of the Act instead of concessional rate of tax applicable to long term capital gains. On First Appeal, the assessee pleaded that there was a search and seizure operation conducted u/s. 132 of the Act on Aparna Group of cases which includes assessee herein, wherein, no incriminating materials with regard to the subject mentioned issue before Tribunal was found by the search party. The CIT(A) duly appreciated the contentions of the assessee and rejected the contentions of the AO. On appeal by the department to the Tribunal HELD dismissing the appeal:

(i) The decisions of the Hon'ble Calcutta High Court in the case of *CIT v. Carbo Industrial Holdings Ltd. 244 ITR 422* and *CIT v. Emerald Commercial Ltd. 250 ITR 549* are also relevant to the issue where the Hon'ble Court has held that where the payments are made by Account Payee Cheques and the existence of the brokers is not disputed the assessee cannot be punished for the default of the brokers and share transactions cannot be held to be bogus. The Hon'ble ITAT, Kolkata bench in the case of Rajkumar Agarwal ITA 1330/Kol/2007 dated 10/08/07 has held that when purchase and sale of shares were supported by proper Contract Notes, deliveries of shares were received through demat accounts maintained with various agencies, the shares were purchased and sold through recognised broker and the sale considerations were received by Account Payee Cheques, the transactions cannot be treated as bogus and the income so disclosed was assessable as LTCG.

(ii) In the assessment orders under consideration the AO has not considered any of these facts. He has treated the transactions as bogus only on the basis of the suspicion that the difference in purchase and sale price of these shares are unusually high. It is a settled law that assessment cannot be made on the basis of suspicion or surmise. The AO has not brought any material on record to support his finding that there has been collusion/connivance between the broker and the appellant for the introduction of its unaccounted money. (ITA Nos. 714 to 718/Kol/2011, dated 28.10.2015) (AY. 2001-02 to 2005-06)

DCIT v. Sunit Khemka (Kol.)(Trib.); www.itatonline.org

S.143(3) : Assessment – Admission of undisclosed income – Fact that assessee admitted undisclosed income for one year does not mean that AO can assume that similar undisclosed income is earned in earlier years as well – Deletion of addition was held to be justified. [S. 69C, 132(4), 153A] 1745

The assessing officer estimated the professional income of the assessee for assessment years 2002-03 to 2007-08. The reasoning given by the AO is explained in brief. The excess cash found at the time of search was declared by the assessee as his income for the AY 2008-09. Accordingly, the assessee included the same in the professional receipts. Accordingly the professional receipts for AY 2008-09 was shown at ₹ 328.70 lakhs. The AO took the total number of working days for that year as 300 and accordingly worked out the average collection per day as ₹ 1,09,000/-. Then the AO presumed that the assessee would have earned professional collections in the same pattern in the earlier years also. Accordingly, he estimated the average daily collection at ₹ 1,00,000/-, ₹ 90,000/-, ₹ 80,000/-, ₹ 70,000/-, ₹ 60,000/- and ₹ 50,000/- respectively for assessment years 2007-08, 2006-07, 2005-06, 2004-05, 2003-04 and 2002-03. Accordingly the assessing officer worked out the gross receipts. Then the AO worked out the difference between the gross receipts declared by the assessee and that was worked out by him. Thereafter he applied the net profit rate declared by the assessee on the difference and accordingly worked out the additions. On appeal by the assessee the CIT(A) deleted the addition. On appeal by the department to the Tribunal HELD dismissing the appeal:

There is no dispute with regard to the fact that the revenue did not unearth any incriminating material, which could suggest that there was under billing or evasion of professional receipts. The revenue only stumbled with excess cash balance and the same

was surrendered as income of the year in which the search took place. The assessee offered the same as his professional income. As observed by CIT(A), the unexplained cash is required to be assessed in the year in which it was found as per the deeming fiction of provisions of sec. 69A of the Act, which does not mean that the assessee would have earned the entire excess cash balance in one year. Hence, in our view also, the Assessing Officer misguided himself by presuming that the entire undisclosed cash balance represents his professional fee collected during the financial year relevant to the assessment year 2008-09. Hence, in our view, the CIT(A) has rightly concluded that the Assessing Officer did not bring any material on record to support his case of estimation of professional receipts of earlier years. We also notice that the Assessing Officer has assessed the net profit on the alleged suppressed professional receipts, meaning thereby, the Assessing Officer has presumed that the assessee would have suppressed corresponding expenses also. Again it is only a guess work only, unsupported by any material. Similarly, the average daily collection estimated by the AO was also mere guess work. In effect, there is no material available with the AO to show that the assessee has suppressed professional receipts as well as expenses in order to substantiate the estimation made by him. During the course of hearing, the learned D. R placed reliance on the decision rendered by Hon'ble Punjab & Haryana High Court in the case of *Ved Prakash v. CIT (265 ITR 642)* to support the estimation made by the Assessing Officer. However, we notice that the Hon'ble Punjab & Haryana High Court has considered a case, wherein materials were found during the course of search. However, in the instant case, no material relating to suppression of professional fee receipts was found.(AY. 2004-05 to 2008-09)

Uday C. Tamhankar v. DCIT (2015) 127 DTR 41 / 174 TJ 151 (Mum.)(Trib.)

1746 **S.143(3) : Assessment – Bogus sales and purchases – Natural justice – Reliance on statement of supplier who confesses to providing accommodation entries without giving assessee right of cross-examination violates principles of natural justice and the addition has to be deleted in toto – Sales made was not questioned – Addition was deleted. [S. 69,131]**

(i) The assessment was reopened on the basis of the statement of Shri Hiten L. Rawal, the proprietor of M/s. Zalak Impex. In this statement recorded u/s. 131 of the Act, Shri Rawal confessed to have provided accommodation entries in the form of sales and purchases, to various parties. The assessee was stated to have obtained bills for non-existing parties, amounting to Rs. 4,09,12,718, during the year under consideration. It remains undisputed that the assessee was never provided any opportunity to cross examine Shri Hiten L. Rawal, though he specifically asked for such cross examination. On the other hand, the burden was sought to be shifted on the assessee by the A.O., by asking him to produce Shri Rawal, even though it was the A.O. who had relied on the statement of Shri Rawal, without either confronting this statement to the assessee, or providing opportunity to the assessee to cross examine Shri Rawal. Therefore, the reassessment order is as a result of violation of the natural principle of *audi alteram partem*. A statement recorded at the back of a party cannot be used against such party without confronting such statement to the party. Hence, on this score alone, the reassessment order is unsustainable

in the eye of law and we hereby cancel the same. As a consequence, the order of the learned CIT(A) is also cancelled in toto.

(ii) Further, even otherwise, before the A.O., the assessee had contended that the assessee being in an export promotion zone, the movement of its goods is controlled and customs approved; that the purchases being approved purchases, there was no question of their being bogus purchases. The assessee enclosed the custom approved invoices in respect of purchases from Zalak Impex. As per these invoices, the goods purchased had been verified and approved by the Customs Authority. This clearly shows that the goods had actually been purchased and received by the assessee. As such, these purchases could not have, by any stretch of imagination, been treated as bogus purchases. It is also noteworthy that the payments made by the assessee to Zalak Impex were through account payee cheques only. Neither of the Taxing Authorities, however, took these invoices into consideration and wrongly held the assessee's purchases from Zalak Impex to be bogus purchases. Nothing has been brought on record to show that these invoices were self made or fabricated. Moreover, the comparative chart of purchases made during the year and the selling price has not been refuted and this also goes to prove the theory of bogus bills and accommodation entries to be wrong. Therefore, the order under appeal is a result of complete misreading and non-reading of cogent documentary evidence brought on record by the assessee. For this reason also, along with the reason that the sales made by the assessee were never questioned, the addition is deleted in toto. (AY. 2006-07)

ACIT v. Tristar Jewellery Exports Pvt. Ltd. (Mum.)(Trib.); www.itatonline.org

S.143(3) : Assessment – Disallowances made by Assessing Officer resulting in positive income – Denial of opportunity to claim exemption under section 10A – Claim made for first time before Commissioner (Appeals) – Duty of Assessing Officer to grant exemption statutorily allowable to assessee – Matter remanded to Assessing Officer. [S.10A, 139(5)] 1747

In an additional ground of appeal, the assessee claimed deduction under section 10A of the Act for the unit located in Special Economic Zone. The Commissioner (Appeals) rejected the claim on the ground that no deduction under section 10A was claimed by the assessee either in the return of income or during the assessment proceedings before the Assessing Officer and the time limit for filing the revised return under section 139(5) had already expired. On appeal, the assessee contended that there was net loss in the unit before the additions were made and the claim for deduction arose only when the Assessing Officer made various disallowances and additions in the assessment completed under section 143(3), and the business income had resulted in positive income and became eligible for deduction under section 10A of the Act :

Held, that the Assessing Officer had not allowed any opportunity to the assessee to claim exemption under section 10A of the Act, after computing the business income of the eligible undertaking at a positive figure for the first time. It was the duty of the Assessing Officer to compute the total income in terms of the provisions of the Act and the deductions/ exemptions were statutorily allowable to the assessee. Matter remanded to the Assessing Officer to verify the claim of deduction under section 10A of the Act. (AY. 2004-05)

Himson International P. Ltd. v. Dy. CIT (2015) 38 ITR 218 (Ahd.)(Trib.)

1748 **S.143(3) : Assessment – Additions made solely on the basis of AIR information are not sustainable in the eyes of law if the Revenue has not made any enquiries to find out whether the AIR information was correct or not.**
Tribunal observed that addition has been made solely on the basis of AIR information and without any corroborative evidence regarding the receipt of any interest by the assessee from the said M/s. Essar Oil Ltd. The assessee has specifically denied the receipt of such an interest income. The Revenue has not made any enquiries to find out whether the AIR information was correct or not. It has been held time and again by this Tribunal that the additions made solely on the basis of AIR information are not sustainable in the eyes of law. If the assessee denies that it is in receipt of income from a particular source, it is for the AO to prove that the assessee has received income as the assessee cannot prove the negative. In this respect the decision of the Tribunal in the case of "*DCIT v. Shree G. Selva Kumar*" in ITA No.868/Bang/2009 and another case in the case of "*Aarti Raman vs. DCIT*" in ITA No.245/Bang/2012 decided on 5-10-2012. (ITA No. 5125/M/2013, dt. 10-4-2015) (AY. 2009-10)
Kroner Investment limited v. DCIT (Mum.)(Trib.); www.itatonline.org

Section 144 : Best judgment assessment.

1749 **S.144 : Best judgment assessment – Return could not be submitted to comply with the Notice u/s. 148 since the same were seized by the CBI – Best judgment assessment in such case is not be valid and the assessee given another opportunity to comply with the notice once the documents received from the CBI. [S. 69, 148]**
The CBI had conducted a raid and seized several property documents. Based on the information shared by the CBI, the ITO issued notice u/s. 148 calling upon to file the returns for him and his wife for the period from 1996-97 to 2001-02. The petitioner sought many adjournments to produce the necessary details since the property documents were seized by the CBI. Due to limitation of time, best judgment assessment was passed. The petitioner filed a revision before Commissioner instead of an appeal, however the same dismissed. The plea of the petitioner was partly allowed and was asked to file the return within one month since the documents were secured by the petitioner from the CBI.(AY. 1996-97 to 2001-02)
Mridul Kumar Laskar v. UOI (2015) 370 ITR 593 / 124 DTR 229 / 57 taxmann.com 140 (Gauhati)(HC)

1750 **S.144 : Best judgment assessment – Estimation – Application of net profit rate of 6 per cent is held to be justified.**
Held that in the preceding and following years a net profit rate of 6.75 per cent. and 5 per cent, respectively, was applied by the Assessing Officer and for the assessment year 2009-10 a net profit rate of 5 per cent had been applied to the assessee. Therefore, the net profit rate of 6 per cent was in consonance with the past history of the assessee. There was no error in the discretion exercised by the Tribunal in applying a net profit rate of 6 per cent. (AY. 2008-09)
CIT v. Rajinder Parshad Jain (2015) 374 ITR 545 (P&H)(HC)

S.144 : Best judgment assessment – Assessing Officer bringing cash deposits to tax as income from undisclosed sources – Commissioner (Appeals) quantifying net profit rate at 5% – Tribunal holding in favour of assessee but observing that its order would not be quoted as precedent – Tribunal not justified in holding addition unwarranted. [S. 44AF] 1751

The assessee claimed the benefit of section 44AF and disclosed income of ₹ 2,15,292. The Assessing Officer framed an assessment under section 144 since no response was forthcoming on the part of the assessee. He considered the source of a separate cash deposit of ₹ 31,29,880 and further amount of ₹ 16,07,240. After adding these amounts, he reassessed the income on regular basis bringing the amounts to tax under section 68 as the assessee's income from undisclosed sources. The Commissioner (Appeals) on the basis of the facts of the assessment year 2008-09 quantified the net profit rate at 5% holding that the amount of ₹ 2,87,403 alone was assessable as income from undisclosed business. The Tribunal accepted the assessee's contention and rejected the Revenue's appeal. On appeal: Held, allowing the appeal, that the Tribunal's decision had merely stated the Commissioner (Appeals)'s finding and did not contain any reasoning and was guided by the decision on the assessment of other years. Furthermore, the Tribunal was conscious of the fact that this decision favouring the assessee was perhaps unsupportable in law, which was evident from its observation that the order would not be quoted as a precedent. Therefore, the Tribunal was not correct in holding that the addition of ₹ 47,37,120 brought to tax by the Assessing Officer was unwarranted. (AY. 2005-06)

CIT v. Chander Prakash Pabreja (2015) 372 ITR 472 (Delhi)(HC)

S.144 : Best judgment assessment – Taxable income from business would be computed on net profit rate and not on the basis of gross profit rate. 1752

While making best judgment assessment under section 144, assessee's taxable income from business would be computed on basis of net profit rate shown by assessee in immediate preceding year and not based on gross profit rate of said year.

ITO v. Om Silk Mills (2015) 230 Taxman 189 / 281 CTR 532 (Guj.)(HC)

S.144 : Best judgment assessment – If books are rejected and Gross Profit rate is estimated, separate disallowance of expenses cannot be made. [S.29 to 43D, 40(a)(ia), 145(3), 194C] 1753

The pattern of assessment under the IT Act is given by S.29/144 which states that the income from profits and gains of business shall be computed in accordance with the provisions contained in Ss.30 to 43D. Sec. 40 provides for certain disallowance in certain cases notwithstanding that those amounts are allowed generally under other sections. The computation under S.29 is to be made under s. 145 on the basis of the books regularly maintained by the assessee. If those books are not correct or complete, the ITO may reject those books and estimate the income to the best of his judgment. When such an estimate is made it is in substitution of the income that is to be computed under S. 29. In other words, all the deductions which are referred to under s. 29 are deemed to have been taken into account while making such an estimate. This will also that the embargo placed in S. 40 also taken into account *(Indwell Constructions*

v. Commissioner of Income Tax (1998) 232 ITR 776 (AP) followed). (ITA No. 418/Chd/2015, dt. 12.08.2015) (AY. 2010-11)
CIT v. Hind Agro Industries (Chd.)(Trib.); www.itatonline.org

1754 **S.144 : Best judgment assessment – Rejection of accounts – Estimation of profit – Transport business – Estimation of income at 5 per cent. Reasonable – Cash credits – Estimation of income at figure higher than cash credit – No separate addition for sundry creditors warranted. [S.68]**
The assessee derived income from transportation. The AO passed an order of assessment under section 144 of the Act making an addition of total income of ₹ 23,69,720. The CIT(A) partly allowing the appeal, directed the AO to take the assessee's business income at 6 per cent of the turnover as against 8 per cent and confirmed the addition regarding sundry creditors. On appeal by the assessee :
Held, (i) that keeping in view the assessee's turnover and the nature of business being transport business, the business income was estimated at 5 per cent of the turnover of ₹ 1,87,25,469 as against 6 per cent determined by the CIT(A).
(ii) That the gross receipts of the assessee were at ₹ 1,87,25,469, 5 per cent of which would come to ₹ 9,36,273, which was more than the sundry creditors shown at ₹8,71,683. Further, since books of account were rejected, the detailed scrutiny of sundry creditors was not done. There was no other source of income earned by the assessee. Therefore, no separate addition regarding sundry creditors was warranted. (AY. 2008-09)
Sahani Transport Corporation v. Dy. CIT (2015) 37 ITR 564 (Cuttack)(Trib.)

Section 144C : Reference to Dispute Resolution Panel.

1755 **S.144C : Reference to dispute resolution panel – Empowered to examine issues arising out of assessment proceedings even though such issues are not part of subject matter of variations suggested by Assessing Officer.[S.147]**
In terms of Explanation to section 144C(8), Dispute Resolution Panel is empowered to examine issues arising out of assessment proceedings even though such issues are not part of subject matter of variations suggested by Assessing Officer. Reassessment was also quashed. AY. 2008-09)
Lahmeyer Holding GMBH v. Dy. DIT (2015) 376 ITR 70 / 232 Taxman 829 (Delhi)(HC)

1756 **S.144C : Reference to Dispute Resolution Panel – order passed after expiry of one month is barred by limitation.**
It was held that where Assessing Officer passed assessment order in assessee's case after expiry of one month from end of month in which direction of DRP was received, in terms of section 144C (13), said order was to be set aside being barred by limitation. (AY.2009-10)
Envestnet Asset Management (India) (P.) Ltd. v. ACIT (2015) 67 SOT 217 (URO) (Cochin) (Trib.)

Section 145 : Method of accounting.

S.145 : Method of accounting – Hybrid accounts – Prior to 1997 assessee could follow two systems of accounting – Principle of consistency – Methods of accounting accepted for several years methods could not be rejected in a particular year. 1757

The assessee was a company publishing a newspaper. It followed the mercantile system of accounting. However, as far as sales of newspaper and advertisement revenue were concerned, the assessee followed the cash system of accounting. Returns were filed for the assessment years 1990-91, 1991-92, 1992-93 and 1993-94. Taking the view that the assessee, having adopted the mercantile system of accounting, could not adopt the cash basis of accounting as regards sales of newspaper and advertisement charges, the Assessing Officer made additions and completed the assessment. The Tribunal, however, directed the Assessing Officer to revise the assessment. On appeals to the High Court : Held, dismissing the appeals, that the method of accounting on cash basis which was now objected by the Revenue had been upheld by the Tribunal in its orders and these orders of the Tribunal had become final and were accepted and acted upon by the Revenue. This, therefore, showed that the fundamental aspect permeating though the assessment orders was the system of accounting on cash basis adopted by the assessee and which had been found by the Tribunal in favour of the assessee. The parties had also allowed that position to be sustained by not challenging the order. The Tribunal had no case that the method of accounting disabled it from quantifying the taxable income or that the Tribunal`s orders in the previous years were vitiated by any illegality. The rejection of accounts was not justified. (AY 1990-91 to 1993-94)

CIT v. Kerala Kaumudi P. Ltd. (2015) 379 ITR 132 (Ker.)(HC)

S.145 : Method of accounting – Mercantile system of accounting – Addition of estimated income from sale of development rights – Not justified. [S.4] 1758

Dismissing the appeal of Revenue the Court held that the concurrent findings of fact of the Commissioner (Appeals) and the Tribunal were that the land owning companies had not acquired any development rights during the assessment years 2007-08 and 2008-09. In such a situation, the assessee could not have acquired such rights from the land owning companies, let alone transferred them to DLF and CBDL. Since no rights were in fact sold in the two assessment years by the assessee to either DLF or CBDL, no income from such sale could be brought to tax by the Revenue. The assessee followed the accrual system of accounting. The accrual system of accounting takes into consideration all gains and losses pertaining to the accounting period for which income is being ascertained, irrespective of whether income has been actually received or whether expenses were paid out. Similarly, every receipt is not treated as an income of the assessee. The assessee's accounting policy was provided for in Accounting Standard 4. Since no sale occurred, no income could be said to have accrued to the assessee. Therefore, the amount received by the assessee as advance could not be treated as sale consideration. (AY. 2007-08, 2008-09)

CIT v. DLF Commercial Project Corporation (2015) 379 ITR 538 / 123 DTR 1 (Delhi)(HC)

1759 **S.145 : Method of accounting – Change of method – Shares shown as stock-in-trade was regrouped as investment – Closing stock shown cannot be simply altered – Appeal of revenue was allowed.**

Assessee-company was engaged in business of trading and finance - During assessment year it had changed method of accounting and shares shown as stock-in-trade in assessment year 2004-05 had been regrouped under head investment in accounts for assessment year 2005-06. The Assessing Officer held that there was no justification for the change in the method of accounting by treating the stock of shares as investment instead of stock-in-trade. He treated the entire shares held by the assessee as stock-in-trade and brought the resultant profit from the sale of shares to tax as business profit. The Commissioner (Appeals) concluded that the transactions under consideration were on investment account and not stock-in-trade. The Tribunal upheld the order of the Commissioner (Appeals). On appeal by Revenue, allowing the appeal the Court held that it is inconceivable that after an audited balance sheet of a company for a financial year is signed by its directors and statutory auditors and submitted to the statutory authorities, including the Registrar of Companies and the income tax authorities, the figures in such balance sheet for the closing stock of shares can simply be altered subsequently by the assessee. In view of the aforesaid, the order of the Tribunal was liable to be set aside. The matter required to be remanded back to it for a fresh consideration keeping in view the above aspects. (AY. 2005-06, 2006-07)

CIT v. Morgan Securities & Credits (P.) Ltd. (2015) 235 Taxman 404 (Delhi)(HC)

1760 **S.145 : Method of accounting – Additional finance charges (AFC) or overdue charges in prescribed rate – Offering the income on receipt basis was held to be justified.**

Assessee was a non-banking company entered into a lease agreement with its customers. One of clauses in agreement provided for if monthly installments (EMI) were not paid, it would carry additional finance charges (AFC) or overdue charges in prescribed rate. Assessee maintained its accounts with respect to AFC charges under cash/receipt system for purpose of Income-tax and had not recognized AFC as income however for Companies Act, assessee had accounted it. Revenue contended that assessee should have accounted said AFC in mercantile system of accounting. On appeal, the Commissioner (Appeals) deleted said addition on the ground that the assessee was entitled to show the income arising out of AFC as and when said income was received. On appeal, the Tribunal held that the amendment to section 145 did not have any effect on the issue under consideration, therefore, the Tribunal came to the holding that the AFC was an income arose only at the time of actual receipt. On appeal by Revenue dismissing the appeal the Court held that the change in method of accounting had not caused any loss to Revenue, because AFC on receipt by assessee had been offered to tax, in terms of agreements, which enabled assessee to demand AFC was only an enabling provision and recovery of overdue charges was not certain, same was taxable on cash receipts basis and not on accrual basis, therefore, addition made towards AFC by Assessing Officer was unjustified. (AY. 1997-98 to 2000-01)

CIT v. Shriram Investments Ltd. (2015) 378 ITR 533 / 234 Taxman 868 (Mad.)(HC)

S.145 : Method of accounting – Running trucks on hire – Rejection of books of account was held to be justified. [S. 44AE] 1761

Assessee was a Civil Contractor and declared income from Government contracts as well as from running trucks on hire. Assessee owned 15 trucks out of which 9 trucks were run on hire and remaining 6 trucks were used in contract business. Assessing Officer held that huge freight and carriage expenses were debited against contract income and assessee was unable to provide truck-wise details of said expenses in respect of 6 trucks. Assessing Officer held that accounts were incorrect and incomplete and that net income from contracts had been suppressed by inflating expenses on freight. Accordingly, Assessing Officer rejected books of account. Commissioner (Appeals) confirmed the addition however the Tribunal deleted the addition. On appeal by Revenue allowing the appeal the Court held that where freight and carriage expenses debited in P/L account were far too excessive, particularly when only six trucks were used for contract business and further assessee failed to segregate expenses of contract business from other nine trucks, books of account were to be rejected. The Assessing Officer had given cogent reasons for not accepting the accounts. Though, these findings were set aside by the Tribunal, but then even the Tribunal did not conclude that the method of accountancy as employed by the assessee was in any manner correct. In absence of such findings, the order passed by the Tribunal cannot be sustained. (AY. 2005-06, 2006-07)

CIT v. Rakesh Mahajan (2015) 234 Taxman 559 / (2016) 136 DTR 247 (HP)(HC)

S.145 : Method of accounting – Lease equalisation amount – Book entry to comply with Guidance Note issued by ICAI to meet accounting standards – Cannot be assessed as income. 1762

Assessee-company in its computation reduced lease equalisation amount after having credited same to its profit and loss account. Credit of said lease equalisation fund according to Assessing Officer could not be allowed to be deducted while computing taxable income. Commissioner (Appeals) allowed the claim of assessee. Tribunal upheld the order of Commissioner (Appeals). On appeal by Revenue dismissing the appeal of revenue the Court held that Lease rent which was received by assessee was offered to tax and said equilisation fund was a mere book entry made to comply with Guidance Note issued by ICAI so as to meet Accounting Standards, therefore the assessee was completely justified in reducing amount credited to profit & loss account as lease equalisation fund for purposes of determining income chargeable to tax. (AY. 1999-2000)

CIT v. Reliance Industrial Infrastructure Ltd. (2015) 379 ITR 340 / 234 Taxman 256 (Bom.) (HC)

S.145 : Method of accounting – Bogus purchases – Cash credit – Matter was set aside [S.68. 145(3)] 1763

Assessing Officer rejected the book results and disallowed the expenses and also made addition under section 68. Commissioner (Appeals) upheld the order of the Assessing Officer rejecting the books of account and sustained the addition of ₹ 10 lakh on account of the rejection of books but held that the provisions of section 68 were not applicable to sundry creditors and that the purchases from the three parties were genuine. The assessee and the Revenue filed appeals before the Tribunal. The

Tribunal dismissed the assessee's appeal and allowed the appeal filed by the Revenue. On appeal the High Court set aside the order of Tribunal, on the ground that merely because another entity had withdrawn the amount which was paid by the assessee to its vendors would not lead to the conclusion that the transactions between the assessee and the vendors were fictitious. Similarly, there was nothing unusual in different persons operating the bank accounts of a company and signing the confirmation receipts of the supply of goods and the finding against the assessee in this regard was perverse. Therefore, the matter was remanded to the Tribunal for decision afresh. It would be open to the Tribunal to either decide the matter itself or remand the matter to the Assessing Officer or to the Commissioner (Appeals). (AY.2008-09)
Joneja Bright Steel P. Ltd. v. CIT (2015) 378 ITR 609 / 234 Taxman 382 (P&H)(HC)

1764 **S.145 : Method of accounting – Building contractor – Net profit rate – Assessing Officer being quasi judicial authority has to apply the net profit applying relevant factors – Matter remanded.[S.145 (3)]**
The assessees were building contractors, whose books of account were rejected. The Assessing Officer applied a net profit rate while assessing their income. The Assessing Officer, the Commissioner (Appeals) and the Tribunal applied different percentages of net profit. The Tribunal and the Commissioner (Appeals) had either reduced the rate or restored the rate applied by the Assessing Officer. On appeals :
Held, that the orders setting out different rates of net profit were devoid of any rational reasons much less a perceptible process of reasoning by referring to the relevant facts. Consequently, the orders passed by the Assessing Officer, the Commissioner (Appeals) and the Tribunal were set aside and the matters were restored to the Assessing Officer to redetermine the net profit rate by reference to and after due consideration of the relevant factors and such other factors as may be deemed relevant. Any objection as to limitation in finalising the assessment shall not prohibit the Assessing Officer from proceeding to finalise assessment proceedings. (AY. 2009-10)
CIT v. Mattewal Co-op. L/C Society (2015) 377 ITR 158 / 228 Taxman 373 (Mag.) (P&H) (HC)
Telelinks v. CIT (2015) 377 ITR 158 / 228 Taxman 373 (Mag.)(P&H)(HC)
CIT v. Satish Aggarwal & Co. (2015) 377 ITR 204 (P&H)(HC)

1765 **S.145 : Method of accounting – Income chargeable to tax – Professional advances – Cash system of accounting – Firm of solicitors – Principle of consistency – On account money from clients – Apportionment of fees on completion of case – Held to be proper. [S. 4]**
On appeal by revenue, dismissing the appeal, the Court held that the assessee was consistently following a certain system of accounting which had been accepted by the Department. There was no change of system of accounting followed by the assessee. Allowing the Department to adopt a different stand in the assessment year 2009-10 would create an anomalous situation as far as the assessee was concerned. The issue of lawyers accepting monies from clients on account to defray the expenses and appropriating fees as income only upon completion of a case has been examined in the past and a consistent view has been taken by the Tribunal. This had been adverted to in the order

of the Tribunal. The principles on the basis of which those decisions were taken were unexceptionable. Given the manner and functioning of lawyers and law firms, it was correct that the categorisation of a receipt can take place only at the time of appropriation, i.e., in case of fees only when the matter is over or as and when the assessee decides on the quantum of fees. The entire advance received at the time it was received did not bear any particular characterisation for the purposes of treating it as income. (AY. 2009-10)
CIT v. Om Prakash Khaitan (2015) 376 ITR 390 / 234 Taxman 813 (Delhi)(HC)

S.145 : Method of accounting – Consistent method of accounting followed – Stock register maintained – Rejection of accounts was held to be not justified. 1766
Dismissing the appeals of Revenue the Court held that the findings of the Tribunal were all findings of fact. They were reasonable and supported by materials on record. The rejection of accounts was not justified. The deletion of the additions was justified. (AY. 2002-03 to 2005-06)
CIT v. Navbharat Export (2015) 378 ITR 89 (Delhi)(HC)

S.145 : Method of accounting – Valuation was done without any co-relation with production or turnover – Rejection of method of valuation was held to be justified. 1767
Allowing the appeal of revenue the Court held that rule of thumb applied by assessee to disclose opening and closing stock of petty items as same without any corelation with production or turnover of same could not be said to be an accepted method of accounting. (AY. 1989-90)
CIT v. Highway Cycle Industries Ltd. (2015) 232 Taxman 302 (P&H)(HC)

S.145 : Method of accounting – Work in progress – Income was offered in the year of completion of project – Deletion of addition was held to be justified. 1768
During assessment proceedings, Assessing Officer made addition to assessee's income by rejecting certificate issued by Structural Engineer certifying value of work-in-progress of a particular project Tribunal finding that said project was completed subsequently and profit earned in respect of same had already been assessed, deleted addition made by Assessing Officer. On facts, impugned order passed by Tribunal did not require any interference. (AY. 2009-10)
Principal CIT v. Ashwin Kantilal Raval (2015) 231 Taxman 615 (Guj.)(HC)

S.145 : Method of accounting – Accrual of income – Pending litigation – Interest income could not be treated as income accrued or received to assessee even though assessee was following mercantile system of accounting. [S. 4, 5 Code of Civil Procedure S.34] 1769
The assessee-company had taken legal action for recovery of residential housing loans given to seven co-operative housing societies. Pending the litigation, the same were considered good and no interest had been charged. However, the Assessing Officer held that the assessee was liable to tax for the interest income, which would accrue in future, as it was following the mercantile system of accounting.
On second appeal, the Tribunal held that in case of uncertainty of interest income from housing loans given to societies, which was sub-judice, it could not be treated as income accrued or received to the assessee with year under appeal. The Tribunal

placed reliance on the provisions of section 34 of the Code of Civil Procedure and held that merely, because the assessee was following mercantile system of accounting, it cannot be said that the Tribunal was not justified in law and in facts in holding that the interest income, commission, loans to the seven societies could not be treated as income accrued or received by the assessee. On appeal by Revenue, dismissing the appeal, the High Court held that the Tribunal was justified in holding that the interest income from housing loans given by the assessee to the seven societies could not be treated as income accrued or received to the assessee. As regards the question of placing reliance on the provisions of section 34 of the Code of Civil Procedure, the assessee in the instant case was and had never decided to waive off any loan or interest, but, has filed suits and bad debts can be written-off in terms of section 37. Thus, in the case of *H. P. Mineral & Ind. Development Corp. v. CIT [2008] 302 ITR 120 (HP)*, the decision to waive interest was taken at a much later stage, and therefore, the Court held against the assessee, therein. The facts of instant case, permitted the Tribunal to interpret provisions of section 34 in its true spirit. The Assessing Officer as well as the Commissioner (Appeals) has misread the provisions of section 34 of the Code of Civil Procedure, which is made applicable to the interest. Therefore, no fault can be found with the Tribunal. (AY. 1991-92 to 1997-98)
JCIT v. Parshwanath Housing Financing Corpn. Ltd. (2015) 231 Taxman 431 (Guj.)(HC)

1770 **S.145 : Method of accounting – Business loss – Rejection of accounts – Accounts could not be rejected merely because trial production could not be proved – Allowance of loss was held to be justified – Question of fact. [S.28(1)]**
Dismissing the appeal of Revenue the Court held that the revenue had not pointed out either perversity or unreasonableness or that any of these findings were not based upon the inference that could not have been drawn in the circumstances of the case. Consequently, no substantial question of law arose. (AY. 1994-95, 1995-96)
CIT v. Tony Electronics Ltd. (2015) 375 ITR 431 / 128 DTR 281 (Delhi)(HC)

1771 **S.145 : Method of accounting – Gross profit rate – Estimation merely on basis of figure for preceding year – Quantitative tally of all raw materials consumed in making of final marketable product available on record – Matter remanded to Commissioner (Appeals) for fresh examination. [S.145(2)]**
On appeal by assessee allowing the appeal partly the Court held that;
Held, allowing the appeal partly, that the assessee categorically submitted that a quantitative tally of all the raw materials consumed in the preparation of the final marketable product was being maintained. Even though the Commissioner (Appeals) noticed the contention as a matter of fact, he did not render any finding. The Tribunal instead went by the findings of the lower authority and merely based its conclusion on the interpretation of section 145(2) of the Act. In fact, there was an assumption that the assessee did not maintain quantitative details of ingredients such as mixing gum, starch and oil. Having regard to the assessee's stand that such details were forthcoming both by way of books as well as through a quantitative tally, the Commissioner (Appeals) should have addressed himself to the issue and rendered clear findings. Failure to do so had prejudiced the assessee. Consequently, the order was set aside. The matter was

remitted to the Commissioner (Appeals) for fresh examination of the books of account, specifically with regard to whether the quantitative tally was undertaken of the raw material used by the assessee in its business activities and if so, the inference is to be drawn from it and the other available material on the record. (AY. 2010-11)
R. L. Traders v. ITO (2015) 374 ITR 22 (Delhi)(HC)

S.145 : Method of accounting – Work-in-progress – Concurrent finding that amount already taken into account in total cost of works and no addition is warranted. [S. 37] 1772
Held that the Appellate Authorities recorded a finding of fact that ₹ 8,04,948 was added on account of work-in-progress, had already been taken into account in the total costs of the works and, therefore, the addition made by the Assessing Officer was not warranted. The Tribunal had recorded that the Revenue was unable to controvert the findings recorded by the Commissioner (Appeals) in respect thereof. (AY. 2008-09)
CIT v. Rajinder Parshad Jain (2015) 374 ITR 545 (P&H)(HC)

S.145 : Method of accounting – Valuation of stock – Scientific and no evasion of tax – Deletion of addition made on account of closing stock was held to be justified. 1773
Held on an identical issue in the assessee's case the Court held that the changed method of accounting was more scientific and did not result in any evasion of tax. Thus, deletion of the addition made on account of closing stock amounting was justified. (AY. 1991-92)
CIT v. Dhampur Sugar Mills P. Ltd. (2015) 375 ITR 296 (All.)(HC)

S.145 : Method of accounting – Contract of construction of roads awarded by Government – Estimation at 5% of gross receipts – Held to be proper. 1774
Assessee-company was carrying out contract of construction of roads awarded by Government. Due to various discrepancies in books of account, Assessing Officer rejected same and estimated profit at 10 per cent of gross receipts. Tribunal relying upon profit rates of preceding three years, reduced profit earned during relevant year to 5 per cent of gross receipts. On appeal by Revenue dismissing the appeal the Court held that since assessee had not done any private construction work during assessment years in question, impugned order passed by Tribunal did not require any interference. (AY. 2004-05, 2005-06)
CIT v. Target Construction Co. Ltd. (2015) 231 Taxman 55 (All.)(HC)

S.145 : Method of accounting – Rejection of accounts – Normal deductions allowable – Denial of deduction of salaries to partners and interest on financial charges – Not justified. [S.44AD, 144] 1775
Once a provision of the nature of sub-section (2) of section 44AD was not incorporated under sections 144 and 145 the contention of the Department that once the assessment was shown under section 145, it was deemed to be comprehensive and no other deductions were permissible could not be accepted. Once it was held that even where the assessment is done under section 145 normal deductions are to be allowed, the Assessing Officer could not have denied deduction of the salaries to the partners and interest on financial charges. It was not even mentioned that the claims are not factually correct. (AY. 1994-95)
CIT v. Inter Continental Constructions (2015) 372 ITR 141 (T&AP)(HC)

1776 **S.145 : Method of accounting – Rejection of books of account – Income from undisclosed sources – Additions on unaccounted purchases, unrecorded sales and embroidery charges – Deletion of addition by Tribunal was held to be justified. [S. 145(2)]**

The assessee declared its total income at ₹ 1,19,370. The Assessing Officer rejected the assessee's books of account invoking section 145(2), and brought to tax a sum of ₹ 1,13,24,060. In doing so, he added (i) ₹ 83,25,768 due to unaccounted purchases, (ii) ₹ 20,93,098 due to unrecorded sales, and (iii) ₹ 87,429 due to embroidery charges. A similar exercise had been conducted for the assessment year 1994-95 and he referred the assessee's accounts to the special auditor under section 142(2A). The Tribunal quashed the reference to the special auditor on technical grounds. The Commissioner (Appeals) granted substantial relief denying relief to the extent of ₹ 4,07,355 on unrecorded sales. The Tribunal granted the relief to the assessee as sought. On appeal:

Held, dismissing the appeal, (i) that the Commissioner (Appeals) and the Tribunal took note of the reasoning and the materials. Both the authorities were guided by the peculiar nature of the transactions involved where the assessee purchased raw and semi-finished products and thereafter sent them for embroidery and other work before the finished products were made available to it for sale. No fresh ground has been made out to show why the Tribunal's reasoning was unsustainable in law. The Tribunal confirmed the view of the Commissioner (Appeals) after an elaborate discussion, based on its own appreciation. No substantial question of law arose.

(ii) That the Tribunal recorded a finding that the undisclosed purchases and sales could not be attributed to the assessee without reliance on proper corroborative evidence. The gross profit disclosed by the assessee having been accepted, no specific instances of deficiency of sale or purchase having been pointed out in the account books and no proof of unrecorded purchases or sales having been brought on record there was no justification for the rejection of the books of the assessee. The Tribunal upheld the book results and the gross profit disclosed by the assessee as being satisfactory and held that no addition was called for. Consequently, the Tribunal deleted the additions in respect of the rejection of the books, estimation of sales and purchases and consequent estimation of the gross profit. (AY. 1996-97)

CIT v. Zohra Emporium (2015) 372 ITR 381 / 232 Taxman 629 (Delhi)(HC)

1777 **S.145 : Method of accounting – Accounts not rejected – Deletion of addition by Tribunal was held to be justified.**

Assessee, engaged in business of displaying of hoarding and wall paintings, filed its return declaring net profit rate at 5.23 per cent. Assessing Officer having disallowed a part of expenses claimed, determined a gross profit rate of 60.49 per cent. Tribunal, however, allowed assessee's claim. On appeal by Revenue, dismissing the appeal the Court held that it was noted that net profit rate shown by assessee during relevant year was better than rate accepted in last year,moreover, account books submitted by assessee were not rejected by Assessing Officer.(AY. 2007-08)

CIT v. Kailash Grover (Smt.) (2015) 230 Taxman 303 (P&H)(HC)

S.145 : Method of accounting – Rejection of accounts – Ad hoc addition of one per cent of sales legally untenable. [S. 142(2A), 153A] 1778

The assessee was engaged in processing of and trading in rice, pulses and food products. A search was carried out in its premises, after which a notice was issued to the assessee under section 153A of the Act. The Assessing Officer made a reference to the special auditor under section 142(2A) which lead to a report. After considering the materials on record he made an addition to the income for the assessment years 2002-03 to 2007-08 to the tune of ₹ 19,28,42,391. This included 1 per cent of the sale of rice shown in books of account for each of the assessment years. The relative amounts, to the extent of 1 per cent for various years were added on the ground that the quality-wise day-to-day stock of the rice traded by the assessee was not reflected. Since the assessments also concerned an element of transfer pricing and determination of the arm's length price the assessee's grievances were referred to the Dispute Resolution Panel which upheld these additions. The Tribunal deleted the additions. On appeals :

Held, dismissing the appeals, that the Tribunal found that the assessee's books of account were regularly maintained, audited and no discrepancies whatsoever had been indicated by the Assessing Officer in any material terms. All the books of account were found and seized and there was no quantitative tally in the account books. Therefore, the conclusion of the Assessing Officer in this behalf to reject the books was purely based on surmises and conjectures. Based on the surmises and conjectures, the *ad hoc* addition of 1 per cent of sales had been made which was again guesswork based again on conjectures. Thus, the whole addition was nothing but an interplay of surmises and conjectures arrived at by the Assessing Officer to somehow make the addition. Having regard to the facts, the Assessing Officer's narrow basis for rejecting the books of account and addition of one per cent of sales and bringing it to tax was legally untenable. (AY. 2002-03 to 2007-08)

CIT v. Kohinoor Foods Ltd. (2015) 373 ITR 682 (Delhi) (HC)

S.145 : Method of accounting – Hire purchase finance charges – Method adopted was accepted for earlier years and latter years – Method to be accepted for the relevant year. 1779

Assessee maintaining equated monthly instalment method for income-tax purposes and sum of digits method for books of account. Equated monthly instalment method not showing suppression of income. Method followed by assessee for tax purposes accepted in earlier years and subsequent years. Allowing the appeal the Court held that the method of accounting to be accepted for relevant assessment year.(AY 1997-98)

Integrated Finance Co. Ltd. v. JCIT (2015) 373 ITR 517 (Mad.)(HC)

S.145 : Method of accounting – Valuation of stock – Actual cost paid method – Accepted for sixteen years – Method could not be changed. 1780

The assessee had been following the actual cost method paid method of valuation of stock for last sixteen years. The method of valuation of stock followed by the assesse was an accepted method and in consonance with law as well as the Accounting Standards. The Assessing Officer could not change the method.(AY.2005-06)

CIT v. Agarwal Enterprises (2015) 374 ITR 240 / 229 Taxman 525 (Bom.)(HC)

1781 **S.145 : Method of accounting – Bank – Hybrid system of accounting – Prior to amendment with effect from 1-4-1997 – Hybrid system was held to be valid.**
Prior to amendment to section 145 with effect from 1-4-1997, assessee-bank was entitled to follow hybrid system of accounting and there was nothing wrong in accounting for sticky loans on cash basis while following mercantile system of accounting generally since recovery of even principal amount of these sticky loans was doubtful. (AY. 1989-90)
CIT v. United Bank of India (2015) 229 Taxman 442 (Cal.)(HC)

1782 **S.145 : Method of accounting – Sales to sister concern – Rate of sister concern was 30 percent – Application of gross rate at 20% was held to be not justified.**
Assessing Officer made certain additions on account of sales to sister concern at lower rates as compared to non-related parties. On sales to sister concern AO applied gross profit at rate of 20 per cent. CIT(A) as well as Tribunal deleted same in respect of sales made to sister concern. CIT(A) as well as Tribunal had recorded that assessee-concern was entitled for deduction under section 80IB at rate of 25 per cent and, therefore, effective rate of taxation was 22.5 per cent. It was further noticed that in case of sister concern, rate of taxation was 30 per cent. It was also observed that in such circumstances, there was no incentive for assessee to make sales to sister concern at lower rate. On appeal by revenue the Court held that since said finding had not been shown to be perverse or erroneous in any manner being finding of fact, it did not call for any interference. (AY. 2007-08)
CIT v. Saimbhi Cycles & Auto Industries (2015) 229 Taxman 552 (P&H)(HC)

1783 **S.145 : Method of accounting – Errors in vouchers – No plausible reason – Rejection of books of account was held to be justified.**
Whether where no plausible reason was extended by assessee for errors in vouchers and in other account books, rejection of books of account by Assessing Officer and additions made thereon was justified. (AY. 2006-07)
CIT v. Mangilal Choudhary (2015) 229 Taxman 378 (Raj.)(HC)

1784 **S.145 : Method of accounting – Provision made on obsolete stock has to be based upon cost price or market price, whichever is lower – Held to be allowable.**
Provision made on obsolete stock has to be based upon cost price or market price, whichever is lower is held to be allowable. (AY. 2006-07, 2007-08, 2008-09)
CIT v. Tupperware India (P.) Ltd. (2015) 229 Taxman 318 (Delhi)(HC)

1785 **S.145 : Method of accounting – Rejection of accounts – Finding that there was no evidence that accounts were not reliable – Rejection of accounts was held to be not justified.**
The Assessing Officer made an addition of ₹ 30,26,723 on account of trading addition by applying the gross profit rate of 52 per cent instead of 51.7 per cent shown by the assessee after rejecting the book results declared in the MDF division. The Commissioner (Appeals) deleted the addition and this was confirmed by the Tribunal. On appeals to the High Court, held that in deleting the addition by rejecting the accounts, the Commissioner (Appeals) and the Tribunal had followed the earlier decision in the case of the assessee

for the assessment year 1993-94 which was not shown to have been upset by any higher Court. The deletion of the addition was justified. (AY.1994-95 to 1999-2000)
CIT v. Nuchem Ltd. (2015) 371 ITR 164 (P&H)(HC)

S.145 : Method of accounting – Rejection of accounts – Civil contractor – Estimate of income – Estimate should be based on past history and comparative cases – No evidence to justify additions – Addition was held to be not justified. 1786
The assessee carried on business as a civil contractor. It declared a net profit at the rate of 5.38 per cent. The Assessing Officer invoked the provisions of section 145. He disallowed expenses amounting to ₹ 1,17,75,202 and determined the net profit at 13.7 per cent. The Commissioner (Appeals) sustained an *ad hoc* addition of ₹ 10 lakhs. The Tribunal reduced the addition to ₹ 5 lakhs and deleted the addition of ₹ 1.12 crores. On appeal to the High Court :
Held, that in three out of the past five assessment years, i.e., 2004-05, 2005-06, 2006-07, the Tribunal had applied the rate of 5 per cent. For the assessment year in question though the contract receipts had sharply increased from ₹ 10.60 crores to ₹ 12.32 crores the net profit had increased from 5.02 per cent to 5.38 per cent or 5.78 per cent with the addition of ₹ 5 lakhs. The Assessing Officer had merely disallowed 20 per cent or 10 per cent, as the case may be, out of the various expenses, which was not proper and he had to bring on record justifiable basis or evidence for making an addition. As the Assessing Officer had failed to bring on record any comparable case so as to justify any estimation/addition, the addition had been rightly deleted by the Commissioner (Appeals) as well as the Tribunal. (AY. 2009-10)
CIT v. Gupta, K. N. Construction Co. (2015) 371 ITR 325 / 116 DTR 377 (Raj.)(HC)

S.145 : Method of accounting – Bogus purchase – Where assessee recorded bogus purchases and, moreover, values of opening stock/closing stock were not open for verification, authorities below were justified in rejecting books of account and making addition to assessee's income by adopting higher GP rate. [S.143(3)] 1787
The assessee was engaged in business of precious and semi-precious stones. The assessee purchased some goods from a party 'L' which was found to be non-genuine. It was also found that the assessee was not maintaining stock register at all and the entire valuation of the opening as well as closing of the stock was on mere estimation. The AO thus, *prima facie*, came to the conclusion that the books of account were to be rejected and a higher GP rate was to be applied. The CIT(A) and Tribunal confirmed the order of AO.
The High Court held that in so far as the issue on trading addition is concerned, all the three authorities i.e., the Tribunal, Commissioner (Appeal) as well as AO, have categorically arrived to a conclusion that provisions of section 145(3) are applicable and what should be a reasonable profit on account of the trading transactions, is a finding of fact. The assessee has introduced and recorded bogus purchases and values of opening stock/closing stock were not open for verification in the books of account, thus the motive was to reduce its profits. The assessee has not been able to dispel this finding of fact recorded by all the three authorities who in consonance, have come to the aforesaid conclusion. Consequently, the instant appeal, being devoid of merit, stands dismissed in *limine* (AY. 2008-09)
Vimal Singhvi v. ACIT (2015) 370 ITR 275 / 230 Taxman 73 / 113 DTR 157 / 273 CTR 322 (Raj.)(HC)

1788 **S.145 : Method of accounting – Net profit rate must necessarily be exercised on the basis of relevant factors – Matter remanded.**

The assessees were building contractors, whose account books were rejected for one reason or the other.

The Assessing Officer, the Commissioner and the Tribunal had applied different percentages of net profit.

On appeal: the Court held that discretion to determine a net profit rate must necessarily be exercised on basis of relevant factors, which are not exhaustive, past tax history of assessee, an appraisal of value of contract, prevailing economic conditions *vis-a-vis* assessees business, price of raw material, labour etc., rise in price index as notified by Central Government from time to time and if Assessing Officer proceeds to rely upon assessments of other assessees engaged in similar business to do so only after determining points of similarity etc. Matter remanded.

Telelinks v. CIT (2015) 377 ITR 158 / 228 Taxman 373 (Mag.)(P&H)(HC)

1789 **S.145 : Method of accounting – Percentage completion method – Reversal of entry of amount received was held to be justified.**

The assessee during the year, reversed in an amount of ₹ 36,70,287 from the turnover of the year which represented the amount credited, but not received. The AO held that the reversal of income was not in accordance with the Principles of Accountancy. The earlier year income could not be reversed except for claiming under the head 'bad debts'. The reversal of income during the current year would result in the excess claim of deduction under section 80HHB to the earlier year to the tune of ₹ 18,35,144. Therefore, the AO disallowed the reversal of income and added said amount to assessee's income. On appeal, the Tribunal held that if the amount was not realizable and had already been considered while estimating the income, then the same was to be allowed as deduction. On appeal by revenue, dismissing the appeal the Court held that when once according to percentage completion method of accounting adopted by assessee, he is expected to declare Revenue as well as profit even in respect of amounts which he has not received, merely because he claimed deduction under section 80HHB, he cannot be denied reversal of entry and deduction of amount which he did not receive, which was subject matter of earlier years return of income by claiming such deduction. Order of Tribunal was affirmed. (AY. 2000-01)

CIT v. John Brown Technologies (India) (P.) Ltd. (2015) 228 Taxman 52 (Mag.)(Karn.)(HC)

1790 **S.145 : Method of accounting – Undisclosed receipts – Estimate of 2 per cent of undisclosed receipts was held to be justified. [S.143(3)]**

The assessee was engaged in business of sale of copra and coconuts. A search was carried out in the assessee's premises in the course of which assessee declared certain undisclosed trade receipts credited in his bank account. The AO treated the entire amount so credited as assessee's taxable income. The Tribunal relying upon the orders passed in subsequent assessment years, estimated gross profit rate of 2 per cent on trade receipts. On appeal by Revenue, the Court also upheld the order of Tribunal. (AY. 1-4-1996 to 30-03-1999)

CIT v. Jayesh S. Mehta (2015) 228 Taxman 102 (Mag.)(Karn.)(HC)

S.145 : Method of accounting – Just because stock register and production register was not maintained books of account cannot be rejected. 1791

Tribunal held that where all details of wastage involved in manufacturing activity were available before the Assessing Officer the rejection of books of account was held to be not justified only on the ground that stock register and production register was not maintained. (AY. 2010-11)

DCIT v. Mohindra Precision Tools (P) Ltd. (2015) 168 TTJ 26 (UO) (Chd.)(Trib.)

S.145 : Method of accounting – Rejection of books of account – Medical Professional not mentioned nature of service, stock of medicines, address of patient etc. in register under Rule 6F hence AO rejected the books of account and assessed income on estimated basis – Addition was deleted. 1792

The assessee is a medical professional and maintained desired books of account and prescribed register Form 3C mentioning name of patient and amount received as also his account duly audited but AO rejected books on the ground that nature of service, address of patient, stock of medicines not mentioned in the Register maintained under Rule 6F as also estimated unaccounted income based on of various medical test prescribed by the assessee to his patients on the assumption that 80% of all lab test cases have undergone surgery. The CIT(A) decided against AO. The ITAT also concluded that the AO has not brought any material on record to show whether actually any patient had undergone surgery without recording the same in the records of the assessee and addition has been made by the AO merely on assumption of certain facts without any basis as also no specific defects have been pointed out in the maintenance of books of account. Therefore, rejection of the audited books of account and assuming income on estimated basis was not justified.(AY. 2009-10)

ACIT v. Maheshinder Singh (Dr.) (2015) 169 TTJ 36 (UO)(Chd.)(Trib.)

S.145 : Method of accounting – Not receiving any interest on loan advanced and it had to write-off said loan in subsequent year, no addition could be made on account of accrued interest just because assessee was following mercantile system of accounting. [S.4, 5] 1793

Assessee had advanced certain amount to a party on interest but it had not shown income from interest accrued in return. Assessee was following mercantile system of accounting. The AO invoking provisions of section 145 and made addition on account of accrued interest. Principle of accountancy cannot take place of theory of real income and, therefore, when assessee was not actually receiving any interest and had to write off loan finally in subsequent year, no addition could be made just because interest had accrued to assessee as per mercantile system of accounting. (AY. 2004-05, 2006-07)

Cachar Drug Distributors v. ITO (2015) 155 ITD 745 (Guwahati)(Trib.)

S.145 : Method of accounting – Construction business – Recognition of income – Completion of development – Received 70-80 of sale proceeds – Recognizing the Revenue only when the registration of the sale deed has been done in favour of the buyer is not a recognized method, hence order of AO was affirmed. [AS.7,9] 1794

Assessee was engaged in construction business. During relevant year assessee having completed construction of plot, sold same and received 80 per cent of sale proceeds.

Assessee did not credit sale proceeds to profit and loss account contending that it was showing sales when registration of sale deed was carried out. Assessing Officer having rejected assessee's explanation, recomputed profit by crediting sale proceeds to profit and loss account in the ground that recognising Revenue when sale deed had been registered by assessee in favour of buyer could not be regarded as either cash or mercantile system of accounting as mandated in provisions of section 145. In appeal CIT(A) held that AO has changed the method of accounting from completion method to percentage completion method, accordingly deleted the addition. On appeal by Revenue allowing the appeal the Tribunal held that percentage completion method is not linked with the consideration received by assessee from the intended buyer. The assessee has recognized the Revenue only when the registration of the sale deed has been done in favour of the buyer. Under AS-7 this is not a recognized method of recognizing the revenue. This method is neither project completion method nor percentage of completion method. The method adopted by the assessee therefore cannot be regarded to comply with the ingredients as laid down under section 145. Section 145 makes it mandatory on the part of the assessee to follow either cash or mercantile system of accounting regularly. Recognizing the revenue when the sale deed had been registered by the assessee in favour of the buyer could not be regarded to be either cash or mercantile system of accounting, therefore the order of CIT(A) is set aside and the order of AO is restored. (AY. 2009-10)

ACIT v. Alcon Developers (2015) 68 SOT 299 (Panaji)(Trib.)

1795 **S.145 : Method of accounting – Valuation of closing stock – MODVAT credit – No addition of MODVAT credit would be made in closing stock.**

No addition of MODVAT credit would be made in closing stock.(AY. 2003-04, 2005-06)

Aditya Birla Nuvo Ltd. v. ACIT (2015) 68 SOT 403 (Mum.)(Trib.)

1796 **S.145 : Method of accounting – Rejection of accounts – *Ad hoc* estimation – Discrepancies – Once books of account produced before lower authorities – Certain discrepancy – Authorities free to make addition to said extent of discrepancies – Rejection of books of account is not justified.**

During the course of remand proceedings before AO the assessee produced the books of account. The AO also confirmed the examination of books of account and observed that the has not produced the bills in respect of conveyance expenses, general expense, motor car expenses, telephone expenses etc. Once the books of account of the assessee was produced before the lower authorities and if there is certain discrepancy the authorities were free to make addition to that extent of discrepancies noticed by the authorities and, authorities were precluded in rejecting the books of account of the assessee. The Hon'ble ITAT has taken view that rejection of books of account of the assessee is not justified. However, there is certain discrepancy noticed by the authorities in the course of first appellate proceedings, instead of *ad hoc* estimation, it is inclined to sustain the disallowance in respect of expenses incurred in cash and no bills or vouchers were produced by the assessee for verification namely conveyance expenses, general expenses, motor car expenses, telephone expenses. (AY.2007-08)

Bharat Dana Bera v. ITO (2015) 39 ITR 632 / 153 ITD 421 / 169 TTJ 721 (Mum.)(Trib.)

S.145 : Method of accounting – Valuation of stock – Survey – Stock found less than the stock shown in trading account – Addition as unaccounted sale was not justified. [S.133A] 1797

Closing stock found during survey was found less than closing stock shown in trading account. This, according to Assessing Officer, proved shortage of stock and unaccounted sales. On facts addition made by Assessing Officer was totally uncalled for.

Safari Bikes Ltd. v. JCIT (2014) 33 ITR 665 / 166 TTJ 216 / (2015) 67 SOT 257 (Chd.) (Trib.)

S.145 : Method of accounting – Assessee changing method of accounting – Change *bona fide* – Loss is allowable.[S.28(i)] 1798

Deduction on account of loss on acquiring loans claimed in single year pursuant to change. Failure by Department to show change in method of accounting results in distortion of profits. Change in method *bona fide*. Deduction is allowable. (AY. 2005-06)

ING Vysya Bank Ltd. v. ACIT (2015) 39 ITR 250 (Bang.)(Trib.)

S.145 : Method of accounting – Rejection of accounts – Labour payable – Estimate of net profit at 8% was held to be reasonable. [S.145(3)] 1799

The assessee was a contractor. Failure by assessee to verify genuineness of opening and closing balance of labour payable, failure to justify quantitative and qualitative details of closing stock and also failure to address queries raised and details called for by Assessing Officer. Rejection of books of account proper and estimate of net profit rate of 8 per cent was held to be reasonable. (AY. 2010-11)

Ashok Kumar v. ITO (2015) 39 ITR 617 (Chd.)(Trib.)

S.145 : Method of accounting – Estimation of income – Sales return – Returned goods to extent of not resold were included in closing stock and to extent goods were resold were included in turnover – AO was not justified in making addition on account of sales return. 1800

The sales returns were reflected either in the turnover or in the closing stock as on 31-3-2007 and therefore the observation of the AO that the returns goods were not included either in the turnover or in the closing stock of finished goods is contrary to the facts placed on record also could not be controverted by the Revenue. Therefore the detailed reasoning given by the CIT(A) is no infirmity accordingly, the ground raised by the revenue was dismissed. (AY. 2007-08 to 2009-10)

Balaji Amines Ltd. v. Addl. CIT (2015) 153 ITD 20 (Pune)(Trib.)

S.145 : Method of accounting – Assessment – Rejection of books of account – Survey – Stock found – Estimation of GP – Notice – Rejection of books of account was held to be valid. [S. 133A, 143(2)] 1801

Tribunal after appreciating the evidence found that the notice was served by speed post and excess stock was found in the course of survey hence addition affirmed by the CIT(A) was affirmed. Appeal of assesse was dismissed. (AY. 2008-09)

Mundra woolen Mills (P) Ltd. v. ACIT (2015) 69 SOT 280 / 171 TTJ 245 (Jaipur)(Trib.)

1802 **S.145 : Method of Accounting – Rejection of accounts – Low gross profit rate as compared to previous year – Change in market causing change in gross profit rate – Deletion of disallowance was held to be proper.**

The assessee was engaged in the business of manufacture and trading of textile machinery and spare parts. For the assessment year 2004-05, the assessee showed a gross profit at the rate of 9.05 per cent. The Assessing Officer estimated the gross profit taking the average of the last two years' profit and made an addition on the ground that the net profit rate was low as compared to the previous year. The Commissioner (Appeals) deleted the disallowance. On appeal by the Department, Held, dismissing the appeal, that the gross profit rate disclosed for the assessment year was 17.26 per cent and not 9.05 per cent. The Assessing Officer had proceeded on a wrong assumption that the gross profit rate disclosed by the assessee during the year was low as compared to previous years. The market in which the assessee sold its goods in earlier years was different from the market in which the assessee sold its goods during the assessment year and the change in the market caused change in the gross profit rate. There was no infirmity in the order of the Commissioner (Appeals). (AY. 2004-05)

Himson International P. Ltd. v. Dy. CIT (2015) 38 ITR 218 (Ahd.)(Trib.)

1803 **S.145 : Method of accounting – Rejection of accounts – Rejection of books of account was held to be not justified – *Ad hoc* disallowance of 10 per cent of expenditure not sustainable.**

The assessee was incorporated under the laws of People's Republic of China and set up its branch office in India in the year 2000. The principal business of the assessee was that of wholesale of food supplements and health care equipment, which it imported into India from its head office in China. The "food supplements" were imported into India in retail packaging and were primarily sold in bulk to its associated enterprises in India. Based on an information received by him, the AO made an addition on account of suppressed sales on the ground that it had misdeclared the retail sale price by suppressing the actual maximum retail price. The AO also rejected the books of account of the assessee on the ground that the assessee had failed to produce them when called upon to do so for examination and also disallowed 10 per cent of the total expenses claimed. The Dispute Resolution Panel held that the book results of the assessee regarding sales were unreliable and to be rejected and computed the amount of suppressed sale of ₹ 42.67 crore by multiplying the differential maximum retail price by the quantity of goods sold in accordance with the financial statement of the assessee and deleted the *ad hoc* disallowance of 10 per cent of expenses claimed by the assessee. On appeal the Tribunal held that the rejection of books of account was held to be not justified. *Ad hoc* disallowance of 10 per cent of expenditure not sustainable. (AY. 2009-10)

Tianjin Tianshi Biological Development Co. Ltd. v. Dy. CIT (2015) 37 ITR 260 / 120 DTR 46 / 168 TTJ 454 (Delhi)(Trib.)

1804 **S.145 : Method of accounting – Builder – Project competition method – Method for allocation of common expenses to different WIP projects of a builder explained**

The assessee being a builder and developer, Accounting Standard 7 (AS-7), issued by the ICAI, titled, 'Construction Contracts', would not apply, so that the prescription of

AS-9 and AS-2, based on general principles that govern any business, would apply for the revenue recognition and inventory valuation respectively. Only costs incurred toward a particular project, or otherwise related to construction activity, would stand to be allocated and, thus, capitalized as a part of the project cost. 'Capitalized' here is not to be construed in the regular, classical sense of the relevant expenditure being not of revenue nature, but only in the sense of it being accumulated under a particular head of account (i.e., WIP), for being set off, under the matching principle, at the time the corresponding revenue is recognized. Indirect costs could therefore include only production/project overheads, and not general office and administrative expenses. The assessee has not specified the duties allotted to different employees or the functional responsibility of the directors. Identification of individual sites, besides work in relation to site preparation, clearances, project supervision or overseeing project execution, etc., would understandably form part of the director's duties. Further, we do not observe any employee costs in the expenses allocated to the various projects. Managerial and supervisory costs are necessary inputs to project execution. We, accordingly, consider 50% of the personnel costs, claimed at ₹ 40.22 lakhs, i.e., including director's remuneration, as liable for inclusion in the project cost, to be allocated on some systematic or rational basis which would capture project execution, which is a composite activity commencing with site identification to the construction in a deliverable state. No such proportion could be applied to rent, rates and taxes which constitutes the second major component of the impugned expenditure. The same would need to be examined with reference to the purpose for which each item comprising the same is incurred, to be decided accordingly. If not for any specific project, no part of the said cost could be capitalized. Rent for office premises, however, if forming part thereof, would stand to be allocated on the basis of the balance expenditure. Again, as no particulars in respect of these expenses stand specified; the account head describing only the nature of the expense and not its purpose or the activity in relation to which it is incurred, we consider 20% of such expenditure to be allocable to WIP toward project overhead cost, again on the same parameter as applied to the personnel costs.

Expenditure on architect & engineering fees, tender & survey expenses and other miscellaneous expenses incurred for a project that was not awarded to it cannot be allocated to any of the projects, work in respect of which is under execution as at the year-end. Similarly, advertisement, sponsorship and brand-building expenses are only in the nature of selling costs, i.e., of the construction business, and which would not therefore stand to be capitalized, in-as-much as the same could only be in respect of a direct cost which adds value to or otherwise adds to its cost of production to the assessee. As regards the argument of there being no corresponding income, or it being not relatable to any revenue stream, the same is to our mind of little consequence. As long as the assessee is carrying a particular business during the year, income there-from has to be computed u/s. 28 of the Act, allowing it all permissible deductions, i.e., in accordance with the provisions of sections 30 to 43D (refer section 29). Whether the method of accounting followed by the assessee, i.e., the project completion method, is a correct method in accordance with the law, i.e., given that it follows mercantile method of accounting, is another matter altogether, which has not been impugned by the Revenue in any manner. (AY. 2009-10)

Vardhman Developers Ltd. v. ITO (2015) 38 ITR 512 / 68 SOT 107 (URO)(Mum.)(Trib.)

1805 **S.145 : Assessment – Accounts – Estimation of gross profit in line with the industry average is held to be justified.**
The Tribunal held that income for the relevant year is to be estimated by ascribing the incremental sales to the newly added trading business in printing paper while retaining the sales and net profit rate of the existing printing business to the level as disclosed for the immediately preceding year, for the remaining sales the net profit is estimated at 1 per cent i.e., 1/5 of the profit on the manufacturing activity which is in line with the industry average. (AY. 2009-10)
Color Craft v. ITO (2015) 172 TTJ 273 (Mum.)(Trib.)

Section 145A : Method of accounting in certain cases.

1806 **S.145A : Method of accounting – Valuation – Excise duty could not be included in opening and closing stock**
While computing income of assessee-manufacturer, excise duty could not be included in opening and closing stock.
CIT v. Avery Cycle Inds Ltd. (2015) 231 Taxman 814 (P&H)(HC)

1807 **S.145A : Method of accounting – Change – Valuation of stock – Government company – Non-moving stores and spares – Write off on basis of deterioration of slow moving items of machinery – Justified.[S.145]**
Held, the method of accounting had been altered with effect from the assessment year 2001-02. However, the facts revealed that the write off was on account of deterioration in the condition of the non-moving stores since the assessee's plants were located in remote places and near the sea. The non-moving stores and spares got corroded over a period of time due to wear and tear. The same method of accounting having been adopted in the earlier years, there was no reason for the Assessing Officer to disallow the claim on the ground that the accounting method had changed. The write off claimed was essentially on the basis of deterioration of various materials, including the raw materials and in particular slow moving items of machinery. (AY. 2002-03 to 2004-05)
CIT v. Indian Rare Earths Ltd. (2015) 375 ITR 276 / 231 Taxman 853 (Bom.)(HC)

1808 **S.145A : Method of accounting – Valuation – Excise duty – Not includible in valuation of closing stock.[S.145]**
The assessee-company was engaged in the business of manufacture and sale of alcohol and vanaspati. AO held that excise duly had not been included in the value of closing stock in compliance to the verdict of the Supreme Court in the case of *CIT v. British Paints Ltd. [1991] 188 ITR 44 (SC)* Accordingly, an addition was made to income of the assessee-company on account of non-inclusion of excise duty in closing stock of finished products. The CIT(A) held that neither excise duty was paid nor the duty was incurred. Further, the duty had not been included and did not form part of the cost as it was not claimed in the profit and loss account. The CIT(A) therefore deleted the addition. The Tribunal confirmed said order. On appeal by Revenue dismissing the appeal the Court held that, on last date of accounting year, goods were lying in bonded warehouse. Neither excise duty was paid nor duty was incurred. Further, duty had not been included and did not form part of cost as it was not claimed in Profit and Loss

account. As the excise duty being payable at time of removal of goods and not at time of manufacture, duty would be payable only at time of unbonding and, thus, addition was to be deleted. Order of Tribunal was affirmed. (AY. 2004-05)
CIT v. SVP Industries Ltd. (2015) 228 Taxman 104 (Mag.)(Delhi)(HC)

S.145A : Method of accounting – Valuation of closing stock – Inclusive method cannot be applied selectively to closing stock without applying it to opening stock, purchases and sales. 1809
Allowing the appeal of assessee the Tribunal held that the inclusive method cannot be applied selectively to closing stock without applying it to opening stock, purchases and sales. Matter was remanded. (AY. 2007-08)
Sunshield Chemicals Pvt. Ltd. v. ITO (2015) 129 DTR 113 (2016) 156 ITD 452 / 175 TTJ 129 (Mum.)(Trib.)

S.145A : Method of Accounting – Valuation of stock – Matter remanded. 1810
Tribunal held that there was failure by assessee to show "net profit" the same under both "inclusive method" and "exclusive method". Assessee to be given opportunity to demonstrate working and the Assessing Officer to adjust opening stock with correct amount that actually adjusted in closing stock of immediately preceding year if assessee fails to furnish workings, amount adjusted in closing stock cannot be allowed as deduction. Matter remanded. (AY. 2006-07)
Ciba India Ltd. v. Dy. CIT (2015) 38 ITR 474 (Mum.)(Trib.)

Section 147 : Income escaping assessment.

S.147 : Reassessment – Change of opinion – Original assessment completed under section 143(1) – Intimation is not an assessment – No question of change of opinion – Main issue not addressed by High Court – Order set aside and matter remanded to Tribunal. [S. 143(1), 148] 1811
Notice was issued to the assessee for reassessment for the assessment year 1991-92 on the ground that capital gains chargeable to tax had escaped assessment in that year. Challenging the validity of this notice, the assessee preferred a writ petition which the High Court allowed, quashing the reassessment proceedings. Meanwhile pursuant to the notice, the Assessing Officer had passed an assessment order on the merits rejecting the contention of the assessee that the transaction in question did not amount to a sale in the assessment year in question and the assessee's appeal before the Commissioner (Appeals) was dismissed. On further appeal, the Appellate Tribunal simply following the judgment of the High Court in the writ petition, allowed it. On appeal :
Held, allowing the appeal, that the main issue involved in the case had not been addressed by the High Court. The Department had taken a contention that since the assessee's return was accepted under section 143(1) of the Act, there was no question of "change of opinion" inasmuch as while accepting the return no opinion was formed and, therefore, on this basis, the notice issued was valid. The judgment of the High Court had to be set aside. Since the judgment of the High Court had been set aside, as a result, the order passed by the Appellate Tribunal also would stand set aside.

Accordingly the matter is remanded to Tribunal for decision of appeal on the merits. (AY.1991-92)

CIT v. Zuari Estate Development and Investment Co. Ltd. (2015) 373 ITR 661 / 279 CTR 527 / 124 DTR 222 / (2016) 236 Taxman 1 (SC)

Editorial: Decision in Zuari Estate Development and Investment Co. Pvt. Ltd. v. J. R. Kanekar, Dy. CIT [2004] 271 ITR 269 (Bom) is reversed.

1812 **S.147 : Reassessment – After the expiry of six years – Time limit – Where assessee did not have any asset outside India and, therefore, there was no question of having any income in relation to such an asset, notice issued u/s. 148 after expiry of six years was not sustainable. [S.14, 148, 149]**

For the assessment year 2006-07, a notice under section 148 was issued to assessee on 13-6-2013.

On a Writ Petition by the assessee, the High Court observed that it is evident from record that the assessee had taken the specific stand that it was an Indian company and that it has no foreign asset and no foreign income and that section 149(1)(c) had no application in the facts of the case. The High Court further observed that the very condition precedent for issuing a notice under section 148 read with section 149(1)(c) by invoking the extended period of limitation of sixteen years is that the income which has escaped assessment must have relation to any asset located outside India. This precondition is not satisfied. The High Court held that there is a complete bar to the issuance of such a notice beyond the period of four years and in view of the foregoing discussion, the impugned notice dated 13-6-2013, the impugned order dated 19-12-2013 and all proceedings pursuant to said notice are set aside (AY. 2006-07)

Deccan Digital Networks (P.) Ltd. v. ITO (2014) 50 taxmann.com 277 (2015) 113 DTR 147 / 274 CTR 202 (Delhi)(HC)

Editorial: SLP of department was dismissed, ITO v. Deccan Digital Networks (P.) Ltd. (2015) 234 Taxman 768 (SC)

1813 **S.147 : Reassessment – After expiry of six years – Reassessment proceedings initiated solely on direction issued by Commissioner (Appeals) in the case of another assessee – Direction issued by Commissioner (Appeals) set aside by Tribunal and order confirmed by High Court – Reassessment proceedings and notice not valid. [S. 148]**

On appeal allowing the petition the Court held that when the direction for the assessment year 2005-06 itself had been set aside by the Tribunal there was no question of giving any effect to the direction. Under the circumstances, on this ground alone, the reassessment proceedings and notice under section 148 to reopen the assessment proceedings for the assessment year 2005-06 should be quashed and set aside.(AY. 2005-06)

Devendra Somabhai Naik v. ACIT (2015) 377 ITR 402 / 63 taxmann.com 369 (Guj.)(HC)

1814 **S.147 : Reassessment – After the expiry of four years – Cash credits – Merely on the basis of report of investigation wing – Reassessment was held to be bad in law.[S. 68, 148]**

Dismissing the appeal of Revenue the Court held that assessee had disclosed all material facts in support of loan transactions at time of making assessment, initiation of reassessment proceedings after expiry of four years from end of relevant assessment

yearly on report of investigation wing that loan received from one from Richie Rich Overseas Pvt. Ltd. was bogus, was not sustainable. (AY. 2001-02)
CIT v. Multiplex Trading & Industrial Co. Ltd. (2015) 128 DTR 217 / 63 taxmann.com 170 (Delhi)(HC)

S.147 : Reassessment – After the expiry of four years – Book profit – Additional depreciation – Reassessment was held to be bad in law. [S. 32, 115JB, 148] 1815
On basis of technical evaluation, re-estimated useful life of certain plant and machinery and on that basis claimed certain enhanced depreciation. Enhanced depreciation was taken into account for arriving at its book profits in accordance with provisions of Companies Act and, accordingly, returns of income under section 115JB, were filed for both relevant assessment years. Assessing Officer passed assessment order. Thereafter on 22-3-2011, Assessing Officer issued notice under section 148 on ground that additional depreciation claimed by assessee had reduced its book profits leading to escapement of income chargeable to tax on application of MAT under section 115JB. On writ allowing the petition the Court held that since information regarding enhanced depreciation was available with Assessing Officer at time when he passed assessment order under section 143(3), reopening notices issued beyond period of 4 years from end of relevant assessment year were without jurisdiction. (AY. 2004-05, 2005-06)
Betts India (P.) Ltd. v. Dy. CIT (2015) 235 Taxman 77 (Bom.)(HC)

S.147 : Reassessment – After the expiry of four years – Objection against reassessment was not disposed of – Unsecured loans – Bogus entries – Reassessment was held to be bad in law. [S.68, 148] 1816
Dismissing the appeal of revenue the Court held that; in the original assessment proceedings the assessee has discharged the burden by producing the necessary evidence. In the circumstances, it would be impermissible for the Assessing Officer to reopen the assessment unless, on the basis of credible and tangible material, which was not in his possession during the initial assessment, he believed that income of the assessee had escaped assessment. The Court also held that the assessee filed its objections and requested the Assessing Officer to drop the proceedings. However, the objections were not disposed of and the Assessing Officer proceeded to frame the assessment. Although the Assessing Officer is required to provide reasons, receive objections and pass a speaking order thereon, only after the notice under section 148 had been issued, these requirements are an integral part of the safeguards which have been in-built for ensuring that the assessments are reopened only for lawful reasons and in a transparent manner. If the safeguards are flouted, it would invalidate the exercise of jurisdiction under section 147 and section 148. (AY 2001-02)
CIT v. Multiplex Trading and Industrial Co. Ltd. (2015) 378 ITR 351 / 128 DTR 217 / 63 taxmann.com 170 (Delhi)(HC)

S.147 : Reassessment – After the expiry of four years – Notice on the ground that different part of same provision applicable – No evidence of failure to disclose material facts – Notice not valid – DTAA-India-USA. [148, Art.12(2)a)(ii)] 1817
When a regular assessment is completed in terms of section 143(3) of a presumption can be raised that such an order has been passed upon a proper application of mind.

The escapement of income by itself is not sufficient for reopening the assessment in a case covered by the proviso to section 147, unless and until there was failure on the part of the assessee to disclose fully and truly all the material facts necessary for assessment. Unless and until the recorded reasons specifically indicate as to which material fact or facts was or were not disclosed by the assessee in the course of the original assessment, there could not be any reopening of assessment.
Held, that when the Assessing Officer accepted the assessee's contentions that the royalty was to be taxed under Article 12(2)(a)(ii) at the rate of 15% it had to be presumed that the Assessing Officer's attention was attracted to the entire Article 12 of the Double Taxation Avoidance Agreement. Moreover, the Revenue had been unable to point out which material fact had not been disclosed fully or truly. Even the reasons did not specify or indicate which material fact had not been disclosed fully or truly by the assessee. The notice was not valid. (AY. 2002-03, 2003-04)
Oracle Systems Corporation v. ACIT (2015) 235 Taxman 337 / (2016) 380 ITR 232 (Delhi) (HC)

1818 **S.147 : Reassessment – After the expiry of four years – Notice would be tested only on basis of reasons recorded at the time of issuing notice – Reasons cannot be later added to, deleted from or supplemented – Provisions for bad and doubtful debts and diminution of value of long-term investment reduced from net profit while arriving at book profit – Supreme Court decision that provision made for diminution in value of assets and is not a liability – Subsequent amendment with retrospective effect – Not a ground to reopen assessment. [S. 115JB, 148]**
Allowing the petition the Court held that the reasons as recorded by the Assessing Officer for issuing the notice were that the provisions for bad and doubtful debts and for diminution of value of long-term investment were unascertained liabilities. Thus, the subsequent introduction of clause (g) in the Explanation to section 115JA could not be relied upon by the Revenue. It would have been a different matter if the reasons for the notice had indicated the reasonable belief that income chargeable to tax has escaped assessment on the ground that the provision for doubtful debts and diminution of value of assets had to be added to arrive at the book profit in terms of the Explanation under section 115JA. It is only in such cases, that the retrospective amendment by the introduction of clause (g) of the Explanation to section 115JA with retrospective effect come to the aid of the Revenue. It was clear that the reasons for reopening of assessment by the notice was that the provision for doubtful debts and for depletion in the value of investment are unascertained liabilities. This could not be the reason which could lead to a belief that income chargeable to tax had escaped assessment. The validity of a reopening notice had to be tested on the basis of the reasons recorded at the time of issuing of the notice. It is the Assessing Officer's belief at the time of issue of the notice that determines the validity of the notice. No subsequent event could put life into the Assessing Officer's reason to believe that income chargeable to tax has escaped assessment when the reasons as originally recorded are stillborn. *Rallis India Ltd. v. ACIT [2010] 323 ITR 54 (Bom)* followed. (AY. 2000-01)
Godrej Industries Ltd. v. B. S. Singh, Dy. CIT (2015) 377 ITR 1 / 235 Taxman 25 (Bom.) (HC)

S.147 : Reassessment – After the expiry of four years – No failure to disclose material facts – Reassessment was held to be bad in law. [S.2(15), 11, 12, 13] 1819

Allowing the petition the Court held that reasons for reopening does not state that escapement of income was based on new facts, there was no reference to particular facts which have not been disclosed. All the information were on record. Precondition of reopening beyond period of four years, have not been met hence order withdrawing exemption which formed basis for reopening was set aside. (AY. 2004-05 to 2009-10)

Hamdard Laboratories (India) & Anr. v. ADIT(E) (2015) 379 ITR 393 / 280 CTR 428 / 126 DTR 1 (2016) 236 Taxman 78 (Delhi)(HC)

S.147 : Reassessment – After the expiry of four years – Reopening assessment on basis of judicial precedent delivered more than eight years earlier not noticed at time of original assessment – Change of opinion – Reassessment was held to be not valid. [S. 37(1), 148] 1820

Allowing the appeal the Court held that there was no failure on the part of the assessee to disclose the material particulars in the return originally filed. On the contrary, the Assessing Officer himself replied to the audit objection pointing out that royalty was allowed to be claimed as revenue expenditure by the assessee for the years earlier to the assessment year 2002-03. A copy of the agreement under which royalty was being paid was provided to the Revenue. The only reason for reopening the assessment was that the decision in *Southern Switch Gear Ltd. v. CIT [1998] 232 ITR 359 (SC)*, which was rendered by the Supreme Court several years earlier on December 11, 1997, was not noticed by the Assessing Officer at the time of finalisation of assessment at the first instance on January 31, 2005, under section 143(3). Where the assessment was sought to be reopened in 2009, four years after it was originally made, i.e., 2005, the mere fact that there was a judgment of the Supreme Court of 1997 which was not noticed by the Assessing Officer when he framed the original assessment could not *per se* constitute the only material on the basis of which the assessment could have been reopened. When on the same material, four years after the assessment year for which the original assessment was finalised, the Assessing Officer seeks to reopen the assessment on the basis of a judicial precedent delivered more than eight years earlier, it would be a case of mere "change of opinion" which was impermissible. The threshold requirement that the Assessing Officer should, on the basis of some tangible material, conclude that there was escapement of income on account of the assessee failing to disclose material particulars, was not fulfilled in the present case. Consequently, the reopening of the assessment was, in the facts of the present case, not justified. (AY. 2002-03)

Coperion Ideal P. Ltd. v. CIT (2015) 378 ITR 525 (Delhi)(HC)

S.147 : Reassessment – After the expiry of four years – Interest payment allowed – Reassessment on the ground that the interest ought to have been capitalised – Reassessment was held to be bad in law. [S. 36(1), 148] 1821

Allowing the petition the Court held that; the Assessing Officer in the first instance had raised an issue as to whether the interest payments were to be on the Revenue account or Capital account. The assessee had claimed it as a Revenue expense and that had been allowed in the original assessment proceedings. As could be seen from the reasons, the Assessing Officer had done nothing but to re-examine the records which were already

available and had arrived at a different conclusion that the interest expenses ought to have been capitalised. This, by itself, did not amount to any failure on the part of the assessee to disclose fully and truly all material facts necessary for its assessment. It had not been indicated as to what particulars were not disclosed by the assessee. All the relevant accounts and records were available for consideration and the Assessing Officer had considered the entire material and passed a detailed assessment order. It could not be inferred from these facts that the assessee had not made a full and true disclosure of the material particulars necessary for assessment. Therefore, the allegations of the Assessing Officer in the reasons that the assessee had failed to disclose full and true particulars of its income, was without any basis. Consequently, in view of the provisions of the first proviso to section 147, the Revenue could not be permitted to reopen the assessment as the necessary precondition for doing so in a case which was beyond four years from the end of the relevant assessment year had not been fulfilled. (AY. 2007-08)
Consulting Engineering Services (I) P. Ltd. v. Dy. CIT (2015) 378 ITR 318 (Delhi)(HC)

1822 **S.147 : Reassessment – After the expiry of four years – Subsequent decision of Supreme Court – Change of opinion – Export business – Service charges – Reassessment was held to be bad in law. [S. 80HHC, 148]**
Assessing Officer applying his mind earlier on issue of service income and allowed the deduction u/s. 80HHC. Assessing Officer thereafter issued notice for reassessment relying on the ratio of judgment in *CIT v. K. Ravindranathan Nair (2007) 295 ITR 228 (SC)*. The Tribunal decided the issue in favour of assessee. On appeal by Revenue, dismissing the appeal the Court held that the reason for reopening being merely a change of opinion on account of the subsequent judgment of the Supreme Court, it would not give the Assessing Officer jurisdiction to reopen the assessment as he would, thus, be reviewing his earlier decision which was not permissible. In the absence of allegations that the assessee failed to disclose fully and truly all material facts, the assumption of jurisdiction was not justified. (AY. 2002-03, 2003-04, 2004-05)
CIT v. ITW India Ltd. (2015) 377 ITR 195 / 126 DTR 429 (P&H)(HC)

1823 **S.147 : Reassessment – After the expiry four years – Additional depreciation – No new material hence reassessment was held to be not valid. [S.32, 148]**
Allowing the petition the Court held that Claim to depreciation considered and granted in original assessment. Reassessment on ground assessee not entitled to additional depreciation there was no new material hence it was change of opinion. Escapement of income must be occasioned by failure by assessee to disclose fully and truly all material facts, on facts reopening of assessment was held to be not permissible. (AY. 2007-08)
Paladiya Brothers and Co. v. ACIT (2015) 376 ITR 567 / 61 taxmann.26 (Guj.)(HC)

1824 **S.147 : Reassessment – After the expiry four years – Income from other sources – No failure to make full and true disclosure of all necessary facts – Reassessment was held to be not valid. [S.56, 148]**
Allowing the petition the Court held that allowing the petition, (i) that the reasons indicated that the assessee followed the same pattern of filing returns, although successive Assessing Officer held that any receipt in the hands of a co-operative

housing society from an outside agency in view of service or licence to use part of the premises for its own business interest, was liable to be taxed as income and not to be covered by the principle of mutuality. The Assessing Officer, accordingly, recorded that he had reason to believe that income chargeable to tax in excess of ₹ 1 lakh escaped assessment for the accounting year 2001-02. To arrive at this finding, the Assessing Officer considered the statement of computation, income and expenditure account, balance-sheet, auditors' reports, notes forming the auditors' reports. All these documents were furnished by the assessee during the assessment. There was nothing in the reasons for reassessment to the effect that the assessee failed to make full and true disclosure of any relevant facts or that the assessee withheld such necessary facts, thus necessitating reopening of the assessment. Nor did the reasons as a whole indicate that there was a failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment. Thus, firstly, there was no failure to make full and true disclosure of necessary facts which was the jurisdictional requirement for initiating reopening proceedings after a period of four years according to the proviso to section 147. Secondly, the reasons did not show that there was any failure to disclose. Reassessment was held to be invalid. (AY 2001-02)

Panchratna Co-op. Housing Society Ltd. v. AO (2015) 376 ITR 404 / 235 Taxman 91 (Bom.)(HC)

S.147 : Reassessment – After expiry of four years – Business income – Capital gains – Order passed within four weeks from date of rejection of assessee's objections – Reassessment was held to be bad in law. [S. 28(i), 45 143(3), 148] 1825

Assessee, a member of BSE, filed his return declaring income from sale of shares as capital gains. Assessing Officer completed assessment under section 143(3) accepting assessee's treatment in respect of income in question. After expiry of four years from end of relevant year, Assessing Officer sought to reopen assessment on ground that assessee was a trader holding shares as stock-in-trade and, thus, income from sale of shares was to be taxed as business income. On Writ allowing the petition the Court held that at time of making assessment, assessee had given complete details giving names of scrips, purchase quantity, sale quantity, period of holding profit earned etc. therefore in absence of any failure on part of assessee to disclose all material facts necessary for assessment, initiation of reassessment proceedings merely on basis of change of opinion was not sustainable. Court also held that Assessing Officer passed assessment order within period of four weeks from date of rejection of assessee's objections to reopening of assessment, order so passed being invalid, same deserved to be set aside. (AY. 2007-08)

Bharat Jayantilal Patel v. UOI (2015) 378 Taxman 596 / 233 Taxman 98 (Bom.)(HC)

S.147 : Reassessment – After the expiry of four years – Transfer – Capital gain – Change of opinion – Transfer of unexpired value of contracts – Getting additional shares Reassessment was quashed. [S.2(47), 144C, 148] 1826

Assessee was a foreign-company. During relevant year, assessee transferred unexpired value of its contracts in India to its 100 per cent subsidiary 'LICEG' in exchange for getting additional shares of LICEG. Assessing Officer passed an assessment order under

section 143(3) wherein no addition was made in respect of transfer of unexpired value of contracts in exchange of shares. Subsequently, Assessing Officer initiated reassessment proceedings on ground that aforesaid transaction would be exigible to capital gains tax in hands of assessee. On Writ Petition, allowing the petition the Court held that from records the Assessing Officer as well as DRP had examined issue of business restructuring and concluded that transaction in question was not exigible to tax. It was also undisputed that assessee had brought all relevant facts on record relating to transfer of unexpired contracts to its subsidiary at time of assessment. Therefore on facts, initiation of reassessment proceedings after expiry of four years from end of relevant year merely on basis of change of opinion was not sustainable. (AY. 2008-09)
Lahmeyer Holding GMBH v. Dy. DIT (2015) 376 ITR 70 / 232 Taxman 829 (Delhi)(HC)

1827 **S.147 : Reassessment – After the expiry of four years – Change of opinion – Capital or Revenue – Management fees under shared service – Reassessment was held to be not valid.[S. 143(3), 148]**
Assessee-company was engaged in providing business support services. It paid management fees under 'shared service agreement' for acquisition of two US contract centres. Said amount had been debited in assessee's Profit & Loss account as revenue expenditure. During scrutiny assessment, Assessing Officer accepted assessee's claim and completed assessment. Subsequently, he initiated reassessment proceedings taking a view that expenditure of management fees ought to have been treated as 'capital expenditure'. On writ allowing the petition the Court held that it was noted from director's report itself that assessee had disclosed what was relevant and necessary for purpose of making assessment, moreover, assessee did not hold back any document or failed to supply any information in addition to explanation given by it in writing concerning said management fees, in aforesaid circumstances, initiation of re-assessment proceeding, merely on basis of change of opinion was not sustainable. (AY. 2007-08)
Tata Business Support Services Ltd. v. Dy. CIT (2015) 232 Taxman 702 (Bom.)(HC)

1828 **S.147 : Reassessment – After the expiry of four years – Salary paid to partners – Reassessment was held to be bad in law. [S.143(3), 148]**
Allowing the petition of assessee the Court held that where assessment in case of assessee was completed under section 143(3) wherein assessee's claim for salary paid to partners was allowed, in view of fact that assessee had submitted all material facts fully and truly in support of its claim along with audit report, in view of proviso to section 147, Assessing Officer could not initiate reassessment proceedings after expiry of four years from end of relevant assessment year taking a view that claim for payment of salary was wrongly allowed. (AY. 2008-09)
SKY Diamonds v. ACIT (2015) 232 Taxman 494 (Guj.)(HC)

1829 **S.147 : Reassessment – After the expiry of four years – Objections should be disposed by the Assessing Officer by passing speaking order – Disallowance of expenditure exempt income – There was no failure to disclose all relevant facts – Reassessment was quashed.[S.14A, 148]**
Allowing the petition, the Court held that Assistant Commissioner without making any reference to assessment and appellate proceedings or specific disallowances filed an

affidavit in reply in Court and merely copied reasons which had been recorded by her predecessor. Court held that a speaking order was required to be passed dealing with objections and reproduction of reasons and reiterating them again was no compliance with law laid down by court. Further there being nothing on record to suggest that assessee had failed to fully and truly disclose all materials facts necessary for assessment for relevant assessment year, impugned notice seeking to reopen assessment beyond four years was to be quashed and set aside. (AY. 2007-08)
Godrej Industries Ltd. v. Dy. CIT (2015) 232 Taxman 380 / 281 CTR 372 / 126 DTR 417 (Bom.)(HC)

S.147 : Reassessment – After the expiry of four years – Where working of MODVAT claim is available at the time of passing of original order reassessment initiated to disallow excess claim was held to be bad in law. [S.148] 1830
Dismissing the appeal of Revenue the Court held that when the AO had failed to record anywhere his satisfaction or belief that income chargeable to tax had escaped assessment on account of the failure of the assessee to disclose truly and fully all material facts necessary for the assessment, the notice issued was beyond the period of four years was wholly without jurisdiction and cannot be sustained Court also held that it is a case of mere change of opinion on the same material already available on record, which has been submitted by the assessee in Annex. IA of the tax audit report at point No. 12(b) of the return of income, neither Explanation 1 nor Explanation 2(c) to section 147 were attracted.(AY. 2001-02)
CIT v. Schwing Stetter India P. Ltd. (2015) 378 ITR 380 / 122 DTR 289 / 234 Taxman 487 / (2016) 282 CTR 504 (Mad.)(HC)

S.147 : Reassessment – After the expiry of four years – Preliminary expenses – There was no failure on the part of the assessee to disclose fully and truly all the material facts necessary for the assessment – Reassessment was held to be bad in law. [S. 35D, 37(1), 148] 1831
Assessee is engaged in business of manufacture and sale of drugs, filed return of income of ₹ 14.45 lakhs. During scrutiny income was assessed at ₹ 17.16 lakh. After four years reassessment proceeding were initiated by department. According to department, the assessee-company purchased software package and expenses incurred in this regard was claimed as revenue deduction, which was contrary to section 37 and, said deduction should have been allowed under section 35D. Commissioner (Appeals) dismissed assessee's appeal. Tribunal accepted assessee's plea that there was no failure on part of assessee to disclose fully and truly all material facts necessary for assessment. The AO had failed to consider materials placed before him at time of regular assessment. The Assessee could not be found fault with and, therefore, notice issued under section 147 was not sustainable. Assessee-company fully disclosed expenses incurred on purchase of software package and expenses were allowed in scrutiny assessment, reopening of assessment after expiry of four years was not permissible.(AY 1996-97)
CIT v. Arvind Remedies Ltd. (2015) 378 ITR 547 / 124 DTR 36 / 60 taxmann.com 330 (Mad.)(HC)

1832 **S.147 : Reassessment – After the expiry of four years – Revenue accepting all relevant facts pertaining to claim of depreciation were disclosed and produced at time of assessment – Reassessment not valid.**

Held, allowing the petition, that when even according to the Revenue, all the relevant facts pertaining to the claim of depreciation were disclosed and produced at the time of the earlier assessment and when there was no non-disclosure of true and correct relevant material, the bar of four years, according to the first proviso to section 147 would apply and the action under section 147 of reopening the assessment could be said to be without jurisdiction and the action could not stand in the eye of law. (AY. 2008-09)

Gujarat Eco Textile Park Ltd. v. ACIT (2015) 372 ITR 584 / 234 Taxman 345 (Guj.)(HC)

1833 **S.147: Reassessment – After the expiry of four years – Satisfaction of Chief Commissioner or Commissioner – No such permission was obtained before issuing notice – Change of opinion – Reassessment notice was held to be not valid. [S.148, 151]**

The assessment for the AY. 2006-07 was reopened. The reasons accompanied a letter dated November 25, 2013, of the Department and stated that the assessee had claimed excess cost of acquisition and income from capital gains had been under assessed. The reasons were dated February 5, 2013. On a Writ Petition:

Held, allowing the petition, that there could be no formation of an opinion by the Commissioner to issue such a notice under section 148 on January 30, 2013, in the absence of cogent reasons, which were recorded later on February 5, 2013. The notice under section 148 was also dated February 5, 2013. A specific declaration in the notice that it was being issued after obtaining the necessary satisfaction of the Commissioner and the Chief Commissioner was scored out. Therefore, in the absence of reasons on January 30, 2013, the Commissioner could not have recorded satisfaction under section 151.

(ii) That the assessment was sought to be reopened on a mere change of opinion, the change of opinion being with regard to estimation of the indexed cost of acquisition on April 1, 1981. It had been declared in the formal reasons that the justification for reassessment was to be found the view of the Income-tax officer, Chennai. On the face of the records the Department was acting on a change of opinion. The reasons dated February 5, 2013, had been sought to be improved in the affidavit-in-opposition which was not permissible. Therefore, the reassessment was not valid. (AY. 2006-07)

Asiatic Oxygen Ltd. v. Dy. CIT (2015) 372 ITR 421 (Cal.)(HC)

1834 **S.147 : Reassessment – After the expiry of four years – Reopening only on the basis of information received that the assessee has introduced unaccounted money in the form of accommodation entries without showing in what manner the AO applied independent mind to the information renders the reopening is void. [S.148]**

Reopening only on the basis of information received that the assessee has introduced unaccounted money in the form of accommodation entries without showing in what manner the AO applied independent mind to the information renders the reopening is void. (AY.2003-04)

PCIT v. G & G Pharma India Ltd. (2015) 94 CCH 39 / (2016) 384 ITR 147 (Delhi)(HC)

S.147 : Reassessment – After the expiry of four years – Interest on securities – Deduction at source – Beneficial owner – Change in ownership – Reassessment was held to be bad in law. [S.4] 1835

Assessee sold securities issued by R.B.I. to Hindustan Steel Ltd., however, change of ownership was not recorded in R.B.I. records and resultantly R.B.I. paid half-yearly interest payable thereafter to assessee after deducting tax at source. Assessee paid gross amount of interest to beneficial owner, i.e., H and filed application for refund of TDS. On that basis, Assessing Officer reopened assessment on ground that interest chargeable to tax had escaped assessment. Allowing the Writ Petition the Court held that interest income belonged to H and not to assessee and, therefore, there was no occasion for assessee to disclose said receipt. As there was no failure on part of assessee to make a full and true disclosure for purposes of its assessment and, therefore, reopening of assessment after four years from relevant assessment year was held to be bad in law. (AY. 1997-98)

ICICI Securities Ltd. v. ACIT (2015) 231 Taxman 460 (Bom.)(HC)

S.147 : Reassessment – After the expiry of four years – Depreciation on ATMs at rate of 60 per cent as applicable to computers – Notice based on assessment made in subsequent years – Reviewing earlier decision is not permissible – Notices and the orders were quashed. [S.148] 1836

Held, the reasons for reopening the assessments which had already been concluded did not show that there was any failure on the part of the assessee to disclose fully and truly all the material facts and thus, it was merely a change of opinion and in view of the settled position of law, the assessee would be entitled to setting aside of the notices issued. The additional factor regarding the change of opinion by the Assessing Officer, would also be a valid ground for setting aside the notice issued. Further, the reason for reopening was merely a change of opinion on account of the assessment being made for the subsequent years would not give the Assessing Officer the jurisdiction to reopen as he would, thus, be reviewing his earlier decision which has been held not to be permissible. Thus, the notices and the orders were accordingly, quashed.(AY. 2005-06 to 2007-08)

State Bank of Patiala v. CIT (2015) 375 ITR 109 / 233 Taxman 21 (P&H)(HC)

S.147 : Reassessment – After the expiry of four years – Share premium amount – No lack of disclosure or suppression of any material facts – No tangible reasons in notice – Notice not valid. [S.148, 151] 1837

Notices under section 148, were issued to the assessee on the ground that the assessee was in receipt of huge share premium amounting to ₹ 14,10,01,300 during the financial year 2007-08 relevant to the assessment year 2008-09. As scrutiny assessment under section 143(3) had not been done in this case for this year, the share premium received by the assessee had not been examined. The assessee was an unlisted company and the nature of the share application money received was not substantiated by any cogent evidence. Subsequently, an order of reassessment was passed rejecting the objections of the assessee challenging the validity of reassessment. On writ petitions:

Held, allowing the petitions, (i) that the transactions seemed to be entirely arm's length transactions. The subscribers were limited companies who were reportedly stated to be

public limited companies. The assessee was a company in the hospitality sector and it could not be seen how the premium charged from the subscribers could be questioned without the Revenue providing valid reasons. Apart from being public limited companies, the subscribers included other infrastructure hospitality companies. There was no justification for the issuing of notices under section 148 on the facts of the case. There was no lack of disclosure or suppression of any material facts. All queries of the Assessing Officer had been answered by the assessee or the subscribers in question and all questionnaires addressed to subscribers were duly answered by the subscribers. The notice did not contain any tangible reasons for reopening the assessment. In fact, the very same Assessing Officer who had completed the assessment and issued an assessment order on March 22, 2014 had proceeded to issue the notice under section 148 within seven days of the assessment order. Therefore, the notices were not valid.
(ii) That although the assessee had relied upon the decision of the Court and the Department had accepted the decision and decided not to challenging it by issuing a circular, all cases of share premium could not be equated as being covered by the judgment and circular. In a given case and the given fact situation, assessees may be required to be probed for valid reasons. (AYs. 2008-09, 2009-10)
Alliance Space P. Ltd. v. ITO (2015) 375 ITR 473 / 232 Taxman 503 (Bom.)(HC)

1838 **S.147 : Reassessment – After the expiry of four years – Assessee filing with return balance-sheet in which total value of plant and machinery certified – No omission or suppression on part of assessee of true and correct facts – Reassessment was held to be not valid. [S.80IB, 148]**
Held, along with the original return, the assessee had produced the balance-sheet in which the total value of the plant and machinery was shown. The Assessing Officer allowed the deduction under section 80-IB and, therefore, it could not be said that there was any omission or suppression on the part of the assessee in disclosing the true and correct facts. Therefore, the reassessment proceedings were not permissible and were not legal and were bad in law. Under the circumstances, the Tribunal had rightly not considered the appeal preferred by the Revenue which was on the merits of deletion of disallowance under section 80-IB. (AY.2003-04)
CIT v. Lincoln Pharmaceuticals Ltd. (2015) 375 ITR 561 / (2016) 282 CTR 588 / 123 DTR 199 (Guj.)(HC)
Editorial: Order in ACIT v. Lincoln Pharmaceuticals Ltd. (2014) 35 ITR 498 (Ahd.) (Trib.) is affirmed.

1839 **S.147 : Reassessment – After the expiry of four years – Income deemed to accrue or arise in India – Business connection – Software licence fee – Royalty – Change of opinion – Deduction at source – Reassessment was held to be bad in law. [S.9(1)(i), 148, 195, OECD Convention, Art.12]**
Assessee-company was engaged in IT enabled services and software development. It filed return declaring certain taxable income. Assessing Officer passed assessment order under section 143(3) accepting assessee's claim that payment of software licence fee to foreign company was revenue in nature. Subsequently Assessing Officer reopened assessment taking a view that software licence fee paid to foreign company was in nature of royalty and, thus, assessee was required to deduct tax at source while making said payment.

On Writ allowing the petition the Court held that, since full particulars with respect to 'software licence fee' paid by assessee to foreign companies were disclosed at time of assessment, initiation of reassessment proceedings merely on basis of change of opinion after expiry of four years from end of relevant year was not sustainable. (AY. 2008-09)
E-Infochips Ltd. v. Dy. CIT (2016) 380 ITR 449 / (2015) 231 Taxman 838 (Guj.)(HC)

S.147 : Reassessment – After the expiry of four years – Income deemed to accrue or arise in India – Business connection – Deduction at source – Non disclosure of facts – Reassessment was held to be valid. [S.9(1)(i), 148, 195, OECD Convention, Art.5] 1840
For relevant year Assessing Officer initiated reassessment proceedings in case of assessee on ground that it had made payments to its parent company located in Korea without deducting tax at source and, thus, said payments were to be disallowed. Assessee raised an objection that in absence of any failure on its part to disclose truly and fully all material facts necessary for assessment, initiation of reassessment proceedings after expiry of four years from end of relevant year was not sustainable. Dismissing the petition the Court held that in view of non-disclosure of fact *qua* assessee's parent company having a PE in India, there had not been full and true disclosure of all material facts which could have led Assessing Officer to examine as to whether tax was payable on remittances to non-resident Indian company or not. In such circumstances, validity of impugned reassessment proceedings was to be upheld.(AY. 2006-07)
Principal Officer, L.G. Electronics (P.) Ltd. v. ACIT (2015) 376 ITR 281 / 231 Taxman 326 (All.)(HC)

S.147 : Reassessment – After the expiry of four years – No failure to disclose material facts – Reassessment was held to be not valid. [S.143(3), 148] 1841
Where Assessing Officer having completed assessment under section 143(3), initiated reassessment proceedings after expiry of four years from end of relevant assessment year, since it was not Revenue's case that assessee had failed to disclose truly and fully all material facts necessary for assessment, impugned reassessment proceedings deserved to be set aside.
CIT v. Mirza International Ltd. (2015) 229 Taxman 443 (All.)HC)

S.147 : Reassessment – After the expiry of four years – Capital gains disclosed in original assessment – Reassessment proceedings after four years to recompute capital gains was held to be not valid. [S. 45, 48, 148] 1842
Allowing the petition the Court held that in relation to capital gains all relevant details including the date on which the property was acquired and the sale deed were submitted in the return for the assessment year 2008-09. The notice issued under section 148 seeking to recompute the capital gains was not valid and was without jurisdiction. On the merits also it could not be said that there was any escapement of the income for assessment. The reassessment proceedings were not valid. Unless it is specifically found by the competent authority that there was failure on the part of the assessee to make a true and full disclosure of the material facts for assessment, the assessment already made cannot be reopened after a period of four years. (AY. 2008-09)
Jagdishbhai Govindlal Patel v. ITO (2015) 371 ITR 419 / 232 Taxman 334 (Guj.)(HC)

1843 **S.147 : Reassessment – After the expiry of four years – Additional depreciation allowed in scrutiny assessment – No failure to disclose material facts necessary for assessment – Notice was held to be not valid. [S. 32, 148]**

The assessee derived income from manufacturing and trading in steel tubes and pipes and in generation of electricity. For the assessment year, notice was issued to it under section 143(2) of the Income-tax Act, 1961. After making detailed inquiry, the Assessing Officer granted additional depreciation in respect of windmills. A notice was issued after four years for reopening the assessment on the ground that the assessee was not entitled to the additional depreciation. On a Writ Petition to quash the notice :

Held, allowing the petition, that a perusal of the record of the case revealed that the return of income filed by the assessee for the assessment year 2007-08 was accompanied by the requisite statements required to be furnished under the relevant statutory provisions. The statement of the depreciation claimed by the assessee under the provisions of the Act contained separate columns in respect of the depreciation claimed by the assessee for building, plant and machinery, vehicles, windmills, etc. The statement clearly showed that the assessee had claimed depreciation at the rate of 80 per cent and additional deprecation at the rate of 10 per cent in respect of the windmill. The claim for depreciation had been allowed during the course of scrutiny assessment after verification of all the details. There was no failure to disclose material facts. Hence, the notice was not valid. (AY.2007-08)

Rantnamani Metals and Tubes Ltd. v. Dy. CIT (2015) 371 ITR 301 (Guj.)(HC)

1844 **S.147 : Reassessment – After the expiry of four years – Assessing Officer in original assessment opining that assessee engaged in shipping and allowing deduction under section 33AC – Application of mind by Assessing Officer in original assessment-Reopening of assessment on basis of letter of Commissioner (Appeals) containing identical facts stated by assessee-Not valid. [S.33AC, 148]**

Assessment was completed u/s. 143(3) allowing the claim of deduction u/s. 33AC. The AO issued the notice for reassessment on the basis of letter of CIT(A) containing the identical facts. The assessee challenged the said notice by filing the writ petition. Allowing the petition the Court held that the reopening notice was issued by the Assessing Officer on the basis of the letter of the Commissioner (Appeals), wherein he had extracted the very information as furnished by the assessee in regard to the nature of its business in shipping. This disclosure was in fact identical to the disclosure as made by the assessee in response to the notice of the Assessing Officer under section 142(1) which raised various queries in the course of assessment proceedings for the assessment year 2000-01. Therefore, the Assessing Officer's attempt to reopen the assessee's assessment on the assessee's own disclosure could in no manner be termed an appropriate exercise of his jurisdiction and authority under section 147 so to reopen the assessment beyond the period of four years as this could in no manner be said to be any failure on the part of the assessee to disclose fully and truly all the facts necessary for assessment. Hence, the notice was to be quashed and set aside. (AY. 2000-01)

United Shippers Ltd. v. ACIT (2015) 371 ITR 441 / 230 Taxman 201 / 275 CTR 397 / 116 DTR 22 (Bom.)(HC)

S.147 : Reassessment – After the expiry of four years – Book profits – Alternative remedy no bar – Reassessment was held to be bad in law. [S. 115JA, 143(3), 148] 1845
There was no failure on the part of the assessee to disclose fully and truly all material facts in relation to determination of MAT liability under S.115JA. Also, such disclosed material facts were duly considered by the AO in making the assessment order under s.143(3). If all such circumstances are cumulatively considered, it is not appropriate to reject the present petition on the ground of availability of alternate remedy. Reopening of assessment was therefore not sustainable.
Crompton Greaves Ltd. v. ACIT (2015) 275 CTR 49 / 114 DTR 153 / 229 Taxman 545 (Bom)(HC)

S.147 : Reassessment – After the expiry of four years – Export business – Computer software – Reassessment was held to be not valid [S.80HHE, 148] 1846
Assessing Officer issued notice under section 148 for reassessment regarding adoption of incorrect turnover by assessee-company while computing deduction under section 80HHE which resulted in excess claim. Where assessing authority had no fresh material and it was drawing conclusion and inferences from same material that had been scrutinized in original assessment proceedings, reopening of assessment after five years was not tenable. (AY. 2003-04)
Donaldson India Filters Systems (P.) Ltd. v. Dy. CIT (2015) 371 ITR 87 / 274 CTR 73 / 229 Taxman 249 / 114 DTR 217 (Delhi)(HC)

S.147 : Reassessment – After the expiry of four years – Income deemed to accrue or arise in India – Business connection – DTAA-India-Australia. [S.9(1)(i), 148, Art. 11(2)] 1847
Assessee was a tax resident of Australia. It declared interest income mainly from investment and offered same for taxation at rate of 15 per cent taking benefit of Article 11(2). Revenue sought to reopen assessment after four years on ground that tax was to be levied at rate of 40 per cent. On writ the Court held that since there had been no failure on part of assessee to make a full and true disclosure for making assessment, notice under section 148 should be quashed. (AY. 2006-07)
Standard Chartered Grindlays (P.) Ltd. v. Dy. DIT (2015) 228 Taxman 199 (Mag.)(Delhi)(HC)

S.147 : Reassessment – After the expiry of four years – Claim for deduction of royalty considered and partly allowed in original assessment – Reassessment proceedings to disallow entire expenditure – Reassessment was held to be not valid. [S.37(1), 148] 1848
Allowing the petition the Court held that during the original assessment proceedings, the assessee had clearly indicated the nature of the royalty payments. The Assessing Officer had specifically asked in his questionnaire as to the nature of the royalty payments and the assessee was asked to justify them. Upon further information provided by the assessee, the Assessing Officer considered the aspect of royalty payment and also noted the fact that the assessee had claimed it as revenue expenditure and disallowed a part. Hence, the reassessment proceedings after four years to disallow the entire claim were not valid and were set aside along with the consequential orders. (WP(C) NO 13896/09, CM NO 15790/09 dt. 25-9-2014) (AY. 2002-03)
Oracle India P. Ltd. v. DCIT (2015) 370 ITR 91 / 114 DTR 228 / 229 Taxman 177 / 276 CTR 40 (Delhi)(HC)

1849 **S.147 : Reassessment – After the expiry of four years – No failure on part of assessee to disclose fully and truly all material facts necessary for assessment – Reasons for reopening based on assessment records – Reopening of assessment contrary to law. [S.148]**

Allowing the petition the Court held that the reasons for reopening the assessment beyond the four years indicated that according to the Assessing Officer, it was from a perusal of the assessment records it was revealed that during the previous year, the assessee had not carried out any manufacturing or trading activities and that the assessee had given its plant and machinery and land and building on lease, while claiming depreciation which, according to the Assessing Officer, was not allowable. There was not even an averment in the reasons to the effect that the assessee had failed to fully and truly disclose all material facts necessary for the assessment, it was evident that the reasons for reopening were based on the assessment records. Hence, there was no failure on the part of the assessee to fully and truly disclose all material facts necessary for the assessment, and hence, the jurisdictional condition for reopening an assessment beyond the four years had hence not been fulfilled. Hence, the notice was quashed and set aside. (AY. 2007-08)

ACI Oils P. Ltd. v. DCIT (2015) 370 ITR 561 (All.)(HC)

1850 **S.147 : Reassessment – After the expiry of four years – Method of accounting – No failure on part of assessee – Assessing Officer disagreeing with audit objection yet issuing notice – Reassessment was held to be not valid. [S. 145,148]**

Allowing the petition the Court held that; the assessee did not have any opening stock on April 1, 2005. By virtue of a business transfer agreement dated February 19, 2005, it received a stock valued at ₹ 19,90,92,944 from HM which became its initial stock in the year in question. There were additions to the stock and the difference between the initial stock and the closing stock at the end of the year, that is, on March 31, 2006, came to ₹ 5,76,42,819. This had been reflected in the Profit and Loss account as the sum had been reduced from the expenditure, the clear implication of which was that the income has been increased by the amount of ₹ 5,76,42,819. Therefore, there had been no failure on the part of the assessee to make a full and true disclosure of the material facts pertaining to the closing stock and that the allegation raised by the Revenue was not borne out by the record. Also, the Assessing Officer believed that no income had escaped assessment and he had disagreed with the audit objection. Even then he went on to issue the notice under section 148. This could not be countenanced in law. Hence, the notice as well as the order were quashed. (AY.2006-07)

AVTEC Ltd. v. DCIT (2015) 370 ITR 611 / 229 Taxman 440 / 122 DTR 131 (Delhi)(HC)

1851 **S.147 : Reassessment – After the expiry of four years – Notice on basis that disallowance of interest paid on borrowings for subsequent year – No indication in reasons that assessee failed to disclose truly and fully material facts necessary for assessment – Notices not valid. [S.36(1)(iii), 148]**

Allowing the petitions, the Court held that the notices were issued to the assessee beyond the period of four years and the reasons did not indicate even remotely any failure on the part of the assessee to disclose truly and fully material facts necessary

for assessment. The reasons proceeded on the basis that for the subsequent assessment year, the Assessing Officer had held the interest paid on borrowings was capital in nature and, therefore, not allowable as expenditure and that consequently, income chargeable to tax had escaped assessment. However, the reasons nowhere indicated any failure on the part of the assessee to disclose truly and fully material facts necessary for assessment. Thus, the notices being without jurisdiction could not be sustained. (AY. 1998-99, 1999-2000)
Business India v. DCIT (2015) 370 ITR 154 / 299 Taxman 289 (Bom.)(HC)

S.147 : Reassessment – After the expiry of four years – Interest payments allowed after enquiry in original assessment – Reassessment was held to be not valid. [S.40A(2), 148] 1852
Dismissing the appeal of Revenue the Court held that the Tribunal had specifically recorded the finding that the assessee did furnish the relevant information asked for by the Assessing Officer. The assessee had explained the reasons for the higher interest which had been accepted by the Assessing Officer during original assessment proceedings. The reassessment proceedings after four years were not valid. (AY 2003-04)
CIT v. Asia Tubes (2015) 370 ITR 414 / 229 Taxman 294 (Guj.)(HC)

S.147 : Reassessment – After the expiry of four years – Depreciation – offshore platform – Plant and machinery – Reassessment was held to be not valid. [S.32, 148] 1853
The assessee was a non-resident company deriving income from the business of exploration, prospecting, production and marketing of natural gas and mineral oil. In the original assessment proceedings the AO allowed depreciation at 25% on off shore platform treating the same as Plant and machinery. Thereafter the Assessing Officer issued notice under section 148 seeking to reopen the assessment of the assessee on the ground depreciation is at the rate of 25 per cent on construction of "offshore platform" was valued though offshore platform was not a plant and machinery in itself and it could therefore, correctly be classified under the Block of assets "Building" on which depreciation at the rate of 10 per cent was allowable. On Writ allowing the petition the Court held that, where assessee disclosed full and complete facts and at time of original assessment all these details were examined, merely because there was some error earlier on part of Assessing Officer himself or because he chose not to opine on issue and interprets material or law otherwise than what was done by him, reassessment was held to be bad in law. In any case this being the reopening beyond the period of 4 years in absence of any material to indicate the failure on the part of the assessee to disclose fully and truly all material facts, when the assessee had discharged onus of having revealed the primary facts, on jurisdictional ground itself, notice must fail. Accordingly petition succeeds with all consequential relief. (AY. 2005-06)
Niko Resources Ltd. v. ADIT (2015) 229 Taxman 86 (Guj.)(HC)

S.147 : Reassessment – After the expiry of four years – Expenditure on advertisement – Failure to disclose all material facts was not mentioned in the recorded reasons – Reassessment was held to be not valid. [S.37(1), 148] 1854
Allowing the petition the Court held that; Reassessment was initiated after four years on the ground that advertisement expenses were wrongly allowed. The assessee challenged the reassessment proceedings. Allowing the petition the Court held that reasons supplied

do not state that there was any failure on the part of the assessee to provide material particulars. Grounds that the assessee had failed to disclose all the relevant material was not incorporated in the reasons supplied to the assessee and therefore the AO had no jurisdiction to proceed with the impugned reassessment proceedings. (AY. 2005-06). *Tao Publishing (P) Ltd. v. Dy. CIT (2015) 370 ITR 135 / 114 DTR 72 / 228 Taxman 371 (Mag.)(Bom.)(HC)*

1855 **S.147 : Reassessment – After the expiry of four years – Non application of mind – Change of mind – Capital or revenue – Management fee – The notice should not be in a standard format but indicate why reassessment has been resorted to. The term "failure to disclose material facts" has a specific legal connotation – Reassessment was quashed. [S.37(1)]**

The assessee challenged the reassessment notice issued under section 148. Allowing the petition the court held that i) We have noted, on several occasions, that notices of this nature are issued in a standard format and often the officers merely fill in the blanks or tick mark whatever is applicable. We would highly appreciate if the department draws a notice not in this format, but something by which it would be clear in indicating to the Assessee as to why section 147 of the IT Act has been resorted to.

(ii) We are sorry to see such non-application of mind and which is apparent …. In the present case, when the Revenue alleges failure to make full and true disclosure of material facts, then, the term failure has some specific legal connotation. Here, material facts are pertaining to the expenses under the head "management fees". It is apparent that the words employed are material facts. It is not just facts but material facts. The word "material" in the context means "important, essential, relevant, concerned with the matter, not the form of reasoning" (see Oxford Dictionary Concise Eighth Edition). Just as disclosure of every fact would not suffice but for proceeding under section 147 non-disclosure ought to be of a material fact. The Assessee disclosed that loss under this head is derived from the acquisition of two centers. If that is known to the Revenue in this case, then, what further facts were expected to be disclosed so as to make the assessment has not been indicated. It is not enough to allege that there is a distortion of facts and as per the convenience of the Assessee. On facts the Court held that there was no failure to disclose material facts the AO in the original assessment proceedings has applied his mind and allowed the expenditure as revenue in nature, hence reassessment was held to be invalid. (AY.2007-08)

Tata Business support Services Ltd. v. DCIT (2015) 121 DTR 222 / 232 Taxman 702 (Bom.) (HC)

1856 **S.147 : Reassessment – Intimation – Reassessment was held to be justified. [S. 10A, 143(1), 148]**

Assessee filed return of income claiming exemption under section 10A. Assessing Officer accepted assessee's claim. Subsequently, Assessing Officer issued notice under section 148 seeking to reopen assessment on ground that assessee had not fulfilled condition laid down in clauses (ii) and (iii) of sub-section (2) of section 10A. Assessee challenged the proceedings by filing the Writ Petition, Dismissing the Petition the Court held that; since at time of allowing assessee's claim, there was only an intimation under section 143(1) which did not amount to assessment, Assessing Officer was justified in initiating

reassessment proceedings subsequently on basis of aforesaid ground. (AY. 2007-08 to 2010-11)
Naren Sadashiv Burade v. ITO (2015) 234 Taxman 27 (Guj.)(HC)

S.147 : Reassessment – Change of opinion – Notice based on erroneous assumption of facts – Reassessment proceedings not valid. [S.148] 1857
On appeal to the High Court allowing the appeal the Court held that it was not disputed that the reasons that led the Assessing Officer to reopen the assessment were factually incorrect. It was not disputed that the assessee was carrying on only one business – general insurance business, which is regulated under the Insurance Act, 1938. Indisputably, insurers cannot carry on any business other than the insurance business or any prescribed business. The business of general insurance is regulated and there was no allegation that the regulatory authority had found the assessee to be in default of any provisions of the Insurance Act, 1938. The Revenue also did not dispute that the Assessing Officer's assumption that the assessee was carrying on two streams of business was incorrect. Thus, this reason to believe that the assessee's income had escaped assessment was clearly without any factual basis. The proceedings under section 147 of the Act were liable to be quashed as being without jurisdiction. The Assessing Officer had expressed his firm opinion that profits and gains on realisation of investments were exempt from taxation. Admittedly, such profits had been included by the assessee in its profit and loss account, which had been subjected to scrutiny in the assessment proceedings. The income from profit on sale and redemption of investments was now sought to be taxed as income which had escaped assessment. This clearly represented a change in the opinion with regard to the taxability of the income. The notice and consequent reassessment were not valid.(AY. 2004-05)
Oriental Insurance Co. v. CIT (2015) 378 ITR 421 / 235 Taxman 388 / (2016) 283 CTR 78 / 130 DTR 64 (Delhi)(HC)

S.147 : Reassessment – Within four years – Interest free loan out of interest bearing funds – Reassessment was held to be valid. [S.148] 1858
Dismissing the Petition the Court held that reassessment on ground interest had escaped assessment because interest-free loan given out of interest-bearing funds to partners who were also partners of sister concern. No inquiry or application of mind by Assessing Officer in original assessment. Assumption of jurisdiction by Assessing Officer to reopen assessment was held to be justified. (AY. 2009-10)
Jivraj Tea Co. v. ACIT (2015) 377 ITR 337 (Guj.)(HC)

S.147 : Reassessment – Within four years – Payments to non-residents – Deduction at source – Specific questions in the original assessment proceedings – Reassessment was held to be bad in law. [S. 40(a)(ia), 148, 195] 1859
Allowing the Petition, the Court held that the specific questions were asked by the Assessing Officer regarding the expenditure in foreign currency, which was inclusive of the amount paid to the five companies and the non-resident individually and the reasons for failure to deduct tax with supporting evidence and the assessee furnished necessary documents with supporting reasons why the tax at source had not been deducted and only, thereafter, had the Assessing Officer finalised the assessment

proceedings. Thus, it was nothing but a case of change of opinion by the Assessing Officer. At the time when the Assessing Officer passed the original assessment order, section 9 had already been amended by the Finance Act, 2010, with effect from June 1, 1976, and was very much there. Therefore, the notice issued under section 148 to reopen the assessment for the assessment year 2009-10 was to be quashed and consequently, the reassessment proceedings for the assessment year 2009-10 set aside. (AY. 2009-10)
Sai Consulting Engineers P. Ltd. v. Dy. CIT (2015) 377 ITR 354 (Guj.)(HC)

1860 **S.147 : Reassessment – Opinion of audit party – Assessing Officer tried to justify his order and requested to drop the proceedings – Notice based solely on opinion of audit party – Not valid. [S.148]**
Allowing the Petition the Court held that when the Assessing Officer tried to justify the assessment order and requested the audit party to drop the objections and there was no independent application of mind by the Assessing Officer with respect to the subjective satisfaction for initiation of the reassessment proceedings, the reassessment proceedings could not be sustained. (AY 2009-10)
Shree Ram Builders v. ACIT (OSD) (2015) 377 ITR 631 / 121 DTR 101 (Guj.)(HC)

1861 **S.147 : Reassessment – Reason for notice not furnished to assessee – Reassessment based on statement of third party – Assessee not given opportunity to be heard – Reassessment not valid. [S. 143(1), 148]**
Allowing the appeal, the Court held that the non-furnishing of the reasons for reopening an already concluded assessment goes to the very root of the matter. Since such reasons had not been furnished to the assessee even though a request for them had been made, proceedings for the reassessment could not have been taken further on this ground alone. Besides this, the statement of some other person which was recorded was the basis of reassessment and the assessee was asked to explain it but the statement was itself not furnished to the assessee. As such, besides non-furnishing of reasons for reopening there was also a gross violation of the principles of natural justice. The reassessment was not valid. Decision of the single judge set aside. (AY. 2006-07)
Kothari Metals v. ITO (2015) 377 ITR 581 (Karn.)(HC)

1862 **S.147 : Reassessment – Change of opinion – Reassessment on ground that conversion of portion of outstanding interest into shares will not amount to actual payment of interest was held to be not valid. [S.43B, 148]**
Dismissing the appeals, the Court held that the conversion of a portion of interest into shares should be taken to be "actual payment" within the meaning of section 43B of the Act. This was a case of mere change of opinion by the Assessing Officer as a specific query was raised by the Assessing Officer in the original assessment proceedings itself as regards the conversion of a portion of the interest into shares. There was no justification in seeking to reopen the assessment under section 147 on a mere change of opinion. (AY. 2002-03)
CIT v. Rathi Graphics Technologies Ltd. (2015) 378 ITR 107 / 235 Taxman 550 / 128 DTR 163 (Delhi)(HC)

S.147 : Reassessment – Notice was found to be invalid on ground income with respect to which the Assessing Officer entertained reason to believe – He cannot reassess other incomes which may have escaped assessment. [S. 148] 1863

Dismissing the appeal of Revenue the Court held that If in the course of proceedings under section 147 of the Income-tax Act, 1961, the Assessing Officer were to come to the conclusion that any income chargeable to tax which, according to his "reason to believe", had escaped assessment for any assessment year, did not escape assessment, then, the mere fact that the Assessing Officer entertained a reason to believe, albeit even a genuine reason to believe, would not continue to vest him with the jurisdiction to subject to tax any other income chargeable to tax which the Assessing Officer may find to have escaped assessment and which may come to his notice subsequently in the course of proceedings under section 147.

CIT v. Takshila Educational Society (2015) 378 ITR 520 / (2016) 131 DTR 322 (Patna)(HC)

S.147 : Reassessment – Capital gains – Value as on 1-4-1981 was adopted by assessee at ₹ 280 per sq.ft and as per Govt. Notification it was ₹ 45 per sq.ft. – Reassessment was held to be valid. [S. 48, 143(1), 148] 1864

Assessee sold an asset and declared certain capital gain which was accepted by Assessing Officer. Subsequently, Assessing Officer noticed that assessee while computing indexed cost of acquisition, had taken value of said asset as on 1-4-1981 at ₹ 280 per sq. ft. but as per Govt. Notification value was at ₹ 45 per sq. ft. Reassessment was upheld by the lower authorities. On appeal dismissing the appeal the Court held that Assessing Authority was right in recording an opinion that income chargeable to tax had escaped assessment. (AY. 2005-06)

Rahana Siraj (Mrs.) v. CIT (2015) 232 Taxman 327 / 128 DTR 302 (Karn.)(HC)

S.147 : Reassessment – Within four years – Change of opinion – Order of Commissioner (Appeals) – Independent application of mind is required – Reassessment was held to be bad in law. [S. 148] 1865

The assessee and others were co-operative societies manufacturing sugar out of sugarcane supplied by their members. Their assessments had been completed under section 143(3) accepting returned income. Notices under section 148 were issued to reopen assessment *inter alia* on the ground that by paying amount to the cane growers in excess of the Statutory Market Price (SMP) declared by the Govt., the assessees were passing/distributing their profits and to that extent there was escapement of income. The assessees filed objections to the notices but the Assessing Officer rejected same. On Writ; Allowing the Petition the Court held that on basis of order passed by Commissioner (Appeals) in case of some other assessee satisfaction of Assessing Officer and formation of opinion in case of present assessee cannot be sustained; such satisfaction can be said to be a borrowed satisfaction from another officer which in absence of any application of mind and any real finding in case of assessee does not constitute valid reason to believe that income has escaped assessment. The Court held that reassessment on the basis of change of opinion was bad in law. (AY. 2007-08)

Shree Chalthan Vibhag Khand v. Dy. CIT (2015) 376 ITR 419 / 233 Taxman 469 / 281 CTR 389 / 126 DTR 320 (Guj.)(HC)

1866 **S.147 : Reassessment – With in four years – Free trade zone – Setting off losses of other units – Query was raised in the original assessment proceedings – Reassessment notice was held to be bad in law. [S.10A]**
Assessing Officer issued reassessment notice on basis that assessee claimed section 10A deduction without setting off losses of other unit - Assessee objected to reassessment order by stating that complete facts relevant to section 10A deduction were before Assessing Officer during course of original assessment - Further a specific query had been raised by Assessing Officer in relation to section 10A deduction, after which Assessing Officer passed order under section 143(3) allowing deduction - Whether thus reopening assessment would be a clear case of revisiting claim which was clearly impermissible. (AY. 2007-08)
Capgemini India (P.) Ltd. v. ACIT (2015) 232 Taxman 149 / 280 CTR 352 (Bom.)(HC)

1867 **S.147 : Reassessment – Change of opinion – Labour charges – Subsequent assessment year – Reassessment was held to be bad in law. [S. 37(1), 148]**
In regular assessment proceedings the Assessing Officer had called upon assessee to give details of labour charges. Assessee made available said details along with quantum of work done by each of labour contractor, TDS amount on labour charges and sample bills. It was only after Assessing Officer was satisfied with claim of labour charges that he accepted claim of assessee in regular proceedings. Later on, Assessing Officer on basis of material obtained during subsequent assessment year which indicated that deduction on account of labour charges had been excessively claimed, re-opened assessment for current year. Dismissing the appeal of the revenue the Court held that reopening of assessment was a mere change of opinion and could not be sustained. (AY. 2004-05)
CIT v. Srusti Diam (2015) 232 Taxman 127 (Bom.)(HC)

1868 **S.147 : Reassessment – Second notice – Genuineness of expenses – Fishing or roving enquiry – Reassessment was held to be bad in law. [S. 37(1), 148]**
Allowing the petition the Court held that by second reassessment notice, Assessing Officer was of opinion that certain expenses incurred abroad were not disclosed by assessee in return. Facts revealed that earlier for same assessment year and also on same facts Assessing Officer had resorted to reassessment which was quashed by High Court. Moreover, 'reasons to believe' nowhere revealed as to what tangible material Assessing Officer had obtained to justify reassessment notice. Therefore impugned notice was not justified and beyond authority of law. (AY. 2006-07)
Le Passage To India Tours & Travels (P.) Ltd. v. Addl. CIT (2015) 232 Taxman 277 (Delhi) (HC)

1869 **S.147 : Reassessment – Intimation – Bogus purchases – The assessment is reopened on the ground of "bogus purchases", the reasons must contain an averment of which details on record reflect the bogus purchases. [S. 143 (1), 148]**
Allowing the petition the Court held that it is settled legal position as held by a catena of decisions that the substratum for formation of belief that income liable to tax has escaped assessment has to form part of the reasons recorded. In the present case, the substratum for formation of belief, as indicated in the order rejecting the objections

as well as the affidavit-in-reply, is the information given by the DGIT (Inv.), Mumbai, which got no relation with the reasons recorded, which are stated to be based upon the material available on record. Under the circumstances, the Assessing Officer, on the basis of the material on record, could not have formed belief that there was any escapement of income chargeable to tax so as to validly assume jurisdiction under section 147 of the Act. As held by the Supreme Court in a catena of decisions, the reasons recorded cannot be supplemented in the affidavit or by the order rejecting the objections. The material, on the basis of which, the belief that income chargeable to tax has escaped assessment has been formed, has to find place in the reasons itself.
(ii) In the aforesaid premises, the formation of belief that income has escaped assessment not being based upon record, it is evident that the substratum for reopening the assessment is not laid in the reasons recorded, but on material extraneous thereto. Under the circumstances, the basic requirement for assumption of jurisdiction under section 147 of the Act for reopening the assessment is not satisfied in the present case. The impugned notice under section 148 of the Act, therefore, cannot be sustained. (AY.2009-10)
Varshaben Sanatbhai Patel v. ITO (2016) 129 DTR 261 / 282 CTR 75 (Guj.)(HC)

S.147 : Reassessment – Block assessment – Undisclosed income – Requisition – Reassessment was held to be bad in law. [S.132A, 158BA, Voluntary Disclosure Scheme] 1870
Assessee made disclosure of certain amount under Voluntary Disclosure Scheme, which was denied by department on ground that an authorisation had already been made under section 132A. Thereafter proceedings were initiated under section 148 and the amount in question was added under section 69A in the hands of the assessee. On appeal, the Commissioner (Appeals) and the Tribunal held that there was no legal scope to initiate and complete the reassessment proceedings under sections 147/148 as the money was covered within the meaning and scope of section 132A and the only course that was open to the department was to frame assessment under Chapter XIV-B. On Revenue's appeal to the High Court dismissing the appeal of Revenue the Court held that; when department denied benefit of Voluntary Disclosure Scheme to assessee in view of requisition being issued by Revenue under section 132A, said amount should have been assessed as 'undisclosed income' in accordance with provisions of Chapter XIV-B and not under section 143(2), read with section 147. (AY. 1997-98)
CIT v. Nandalal Pander (2015) 232 Taxman 266 (Karn.)(HC)

S.147 : Reassessment – Full and true disclosure was made – Failure of Assessing Officer examine the documents in the original assessment proceedings cannot be the basis to reopen the assessment, then it is default of officer and not assessee – Reassessment was held to be bad law. [S.10A, 148] 1871
Assessee-company was granted exemption under section 10A. Thereafter, Assessing Officer noticed that business corporation agreement (BCA) between assessee and its holding company indicated that assessee's business came into existence only with takeover of entire infrastructure facilities, employees and all pending orders of holding company and he, thus, held that exemption under section 10A was impermissible. He

initiated section 147 proceeding on ground that assessee had failed to disclose fully and truly all material facts. On writ allowing the petition the Court held that it was found that BCA was available in files of Assessing Officer before assessment was completed for assessment year 2003-04, on facts, no proceedings could be initiated under section 147 particularly when it could not be said that grant of exemption, from assessment year 2003-04, was in absence of full and true disclosure by assessee. If essential and basic documents which are to be necessarily examined before grant of exemption under section 10A are not gone into, then it is default of officer and not assessee. (AY. 2004-05 to 2006-07)

IBS Software Services (P.) Ltd. v. UOI (2015) 379 ITR 66 / 232 Taxman 674 (Ker.)(HC)

1872 **S.147 : Reassessment – Objection – Assessing Officer was bound to decide objections on merits and orders, disposing of objections. [S.148]**

Assessments were completed under section 143(1) and 143(3). Thereafter notices under section 148 were issued stating to file returns of income within 30 days from service of notices. The assessee raised objections against the reopening of the assessments and the Assessing Officer had disposed of the said objections without dealing anything on merits and solely on the ground that the assessee had not filed returns of income within a period of 30 days from the receipt of the notice under section 148. On Writ allowing the Petition the Court held that the Assessing Officer was bound to decide objections on merits and orders, disposing of objections on ground that assessee had not filed returns of income within a period of 30 days from service of notices, were to be quashed and set aside and matter was to be remanded to Assessing Officer to consider, decide and dispose of objections on its own merits. (AY. 2007-08, 2009-10)

Pushpak Bullion (P.) Ltd. v. Dy. CIT (2015) 379 ITR 81 / 233 Taxman 326 (Guj.)(HC)

1873 **S.147 : Reassessment – Once reassessment was held to be valid, the Assessing Officer is empowered to make addition even on ground on which reassessment notice might not have been issued. [S. 143(3), 148]**

Court held that in view of Explanation 3 to section 147, Assessing Officer is empowered to make addition even on ground on which reassessment notice might not have been issued, therefore, if notice under section 148(2) is found to be valid, then addition can be made on all grounds or issues which may come to notice of Assessing Officer subsequently during course of proceedings under section 147, even though reason for notice for 'such income' which may have escaped assessment, may not survive. (AY. 2004-05)

N. Govindaraju v. ITO (2015) 377 ITR 243 / 233 Taxman 376 / 280 CTR 316 (Karn.)(HC)

1874 **S.147 : Reassessment – Business income – Capital gains – Reassessment on the basis of subsequent year's assessment was held to be valid. [S. 45, 143(1)]**

Assessee Company engaged in portfolio management services was filing its return of income showing the profits from sale of shares under 'capital gains'. For A.Y. 2006-07, the said claim was accepted by AO while processing the return under section 143(1) of the Act. However, assessment for said year was reopened on the basis of the assessment completed under section 143(3) of the Act for A.Y. 2008-09, where it was stated that the income from sale of shares having average holding period of 3 days to 91 days

of 45 scrips in a systematic manner should be treated as business income not short term capital gains. Thus, the impugned order did not require any interference and the reopening of the assessment was permissible under section 147 of the Act. (AY. 2006-07, 2008-09)
Equity Intelligence India (P.) Ltd. v. ACIT (2015) 376 ITR 321 / 124 DTR 113 / 61 taxmann.com 256 (Ker)(HC)

S.147 : Reassessment – Department is warned not to harass taxpayers by reopening assessments in a mechanical and casual manner. Pr CIT directed to issue instructions to AOs to strictly adhere to the law explained in various decisions and make it mandatory for them to ensure that an order for reopening of an assessment clearly records compliance with each of the legal requirements. AOs also directed to strictly comply with the law laid down in GKN Driveshafts (2003) 259 ITR 19 (SC) as regards disposal of objections to reopening assessment [S.148] 1875

(i) The Court is of the view that notwithstanding several decisions of the supreme Court as well as this Court clearly enunciating the legal position under section 147/148 of the Act, the reopening of assessment in cases like the one on hand give the impression that reopening of assessment is being done mechanically and casually resulting in unnecessary harassment of the Assessee.

(ii) The Court would have been inclined to impose heavy costs on the Revenue for filing such frivolous appeals but declines to do so since the appeals are being dismissed *ex parte.* However, the Court directs the Revenue through the Principal Chief Commissioner of Income Tax (Pr. CIT) to issue instructions to the AOs to strictly adhere to the law explained in various decisions of the Supreme Court and the High Court in regard to Sections 147/148 of the Act and make it mandatory for them to ensure that an order for reopening of an assessment clearly records the compliance with each of the legal requirements. Secondly, the AOs must be directed to strictly comply with the law explained by the Supreme Court in *GKN Driveshafts (India) Ltd. v. Income Tax Officer (2003) 259 ITR 19 (SC)* as regards the disposal of the objections raised by the Assessee to the reopening of the assessment. (ITA 768/2015, dt. 12.010.2015) (AY.2002-03)

PCIT v. Samcor Glass Ltd. (2015) 94 CCH 475 (Delhi) (HC); www.itatonline.org
PCIT v. Samtel Color Ltd; www.itatonline.org

S.147 : Reassessment – Notice was not served on assessee – Reassessment is bad in law. [S. 148] 1876

When notice under section 148 is not duly served on assessee, proceedings under section 147 is one without jurisdiction. (AY. 1995-96)
CIT v. ITC Hotels (2015) 231 Taxman 57 (Karn.)(HC)

S.147 : Reassessment – Notice was not issued – Deeming fiction of service did not arise – Reassessment was held to be bad in law. [S. 143(2), 148, 292BB] 1877

The AO completed the reassessment proceedings u/s. 147 on the assessee, pursuant to issuing notice u/s. 148 for escapement of income. However, no notice u/s. 143(2) was issued to the assessee. On appeal, the CIT(A) confirmed the order of the AO on merits.

On appeal, the Tribunal held that the order of the AO was void as no notice u/s. 143(2) was issued. On appeal dismissing the appeal of Revenue the Court held that Revenue's reliance on proviso to S.292BB was incorrect as the essential requirement is 'issuance of notice' u/s. 143(2) for validity of reassessment proceedings. Therefore, when the initial requirement of issuance of notice was not meet made by the AO, the deeming fiction of service of notice u/s. 292BB did not arise. (AY. 2006-07 to 2011-12)
ACIT v. Greater Noida Industrial Development Authority (2015) 379 ITR 14 / 281 CTR 204 / 126 DTR 176 (All.)(HC)

1878 **S.147 : Reassessment – Service of notice is mandatory – Notice of demand to be valid in certain circumstances – Objection was raised prior to completion of assessment – Reassessment was held to be bad in law. [S. 143(1),148, 282(1), 292BB Order V, Rule 12, Order III Rule 6, CPC]**
Dismissing the appeal of Revenue the Court held that; where prior to completion of reassessment, assessee raised an objection that he had not been duly served with a notice in accordance with S. 148, proviso to S. 292BB was attracted and Revenue could not take advantage of main portion of S. 292BB. (AY. 2001-02)
CIT v. Chetan Gupta (2015) 62 taxmann.com 249 / 126 DTR 401 / (2016) 382 ITR 613 (Delhi)(HC)

1879 **S.147 : Reassessment – Failure to disclose material facts necessary for assessment – Reassessment proceedings were valid. [S.68]**
Allowing the appeal of Revenue, the Court held that there was failure to disclose material facts hence reassessment was held to be valid. (AY. 1993-94)
CIT v. Velocient Technologies Ltd. (2015) 376 ITR 131 / 280 CTR 142 / 60 taxmann.com 353 (Delhi)(HC)

1880 **S.147 : Reassessment – Purchase and sale of shares – Business income or capital gains – Based on subsequent years assessment – Reassessment was held to be valid. [S.143(1), 148]**
Dismissing the appeal of assessee the Court held that the law mandates that the Assessing Officer should have reason to believe that income chargeable to tax has escaped assessment for any assessment year to invoke the power to reopen the assessments under section 147. Admittedly, the assessment for the year 2006-07 was completed treating the income as capital gains. Once the assessment for the year 2008-09 was completed and the income for that year was assessed as business income, the Assessing Officer had sufficient material to believe that income chargeable to tax as business income for the assessment year 2006-07 had escaped assessment. It was on that basis, that proceedings under section 147 were initiated. The initiation of such proceedings under section 147 was fully within the four corners of section 147. Thus, the reopening of assessment was not based on the mere change of opinion of the Assessing Officer. (AY. 2006-07, 2008-09, 2010-11)
Equity Intelligence India P. Ltd. v. Dy. CIT (2015) 376 ITR 321 / 61 taxmann.com 256 (Ker.)(HC)

S.147 : Reassessment – Change of opinion – Business connection – Sell advertising on products and to distribute products – Reassessment was held to be not valid – DTAA-India-USA-Re [S. 9(1)(1), 115JA, 148, Art. 27] 1881

The assessee derived income from the grant of exclusive rights to an Indian company to sell advertising on certain products and to distribute certain products. The Assessing Officer held that only 10 per cent of the total advertisement and distribution revenue earned in India was taxable in India. The Assessing Officer in the assessment order referred to the Mutual Agreement to avoid double taxation under article 27 of India-USA DTAA for the assessment years 2001-02 to 2004-05 and the fact that subsequently for the assessment year 2005-06, assessment was concluded following the MAP resolution. Later on, the Assessing Officer reopened assessment on the ground that as the MAP Resolution was only for assessment years 2001-02 to 2004-05 and the Revenue was accruing to the assessee in assessment Years 2007-08 and 2008-09 in pursuance of the agreement, which was effective from 01-04-2006, it should have been offered and taxed at 10 per cent on gross basis as per section 115A. The assessee's objections against reopening were rejected.

On writ:

A perusal of the assessment orders in both the petitions clearly shows that an opinion was formed by the Assessing Officer that taxation of advertisement and distribution Revenue earned by assessee was to be governed by MAP resolution and the competent authorities of USA and India had agreed to an attribution of 10 per cent of the total revenue generated from the said distribution and advertisement sales agreement. The same was agreed to be treated as business income.

No fresh information or material has been referred to in the reasons recorded for seeking to reopen the assessment. The material that is referred to is the very same material that was already before the Assessing Officer at the time of framing of the assessment under section 143(3) and even the reasons record that 'from the perusal of the assessment record, it is observed that'. This clearly shows that the Assessing Officer has sought to reappreciate the material that was already there at the time when the assessment was framed under section 143(3). Thus, it is clearly a case of change of opinion, which is clearly not permissible. In view of above, the impugned orders and notices were to be set aside. (AY. 2007-08, 2008-09)

Turner Broadcasting Systems Asia Pacific Inc. v. Dy. DIT (2015) 235 Taxman 328 / (2016) 380 ITR 412 (Delhi)(HC)

S.147 : Reassessment – Notice based solely on audit objection – Not valid. [S. 148, Constitution of India, Art. 226] 1882

Allowing the Petition the Court held that from the correspondence between the Assessing Officer and the higher authority showed that though the Assessing Officer maintained that the audit objection raised by the audit party was not correct, however as the amount involved was very high as mentioned by the audit party and to safeguard the interests of the Revenue and the guidelines issued the reassessment proceedings have been initiated. Therefore, the formation of the opinion by the Assessing Officer that the income chargeable to tax had escaped assessment was vitiated the reopening of the assessment could not be sustained and deserved to be quashed and set aside.

Held also, that when the reopening of the assessment was found to be invalid and

not justifiable and the reassessment was solely based on the audit objection raised by the audit party, this was a fit case to exercise the powers under article 226 of the Constitution of India. (AY. 2010-11)
P. C. Patel and Co. v. Dy. CIT (2015) 379 ITR 151 (Guj.)(HC)

1883 **S.147 : Reassessment – Royalty – Licensing of duplicate software – Change of opinion – Reassessment was held to be bad in law – DTAA-India-USA. [S.9(1)(i), Art.7, 12]**
Assessee a US based company, was engaged in business of supplying and replication of software. Assessee's income from licensing of duplicate software was treated as royalty. Assessee paid 15 per cent tax in terms of Article 12(2)(a)(ii) of India-US DTAA and it had been accepted by Assessing Officer at the time of original assessment under section 143(3). Subsequently Assessing Officer opined that Article 12(2)(a)(ii) of DTAA would not apply because royalties were connected with Permanent Establishment of assessee in India and therefore, by virtue of Article 12(6) of DTAA, royalties should have been taxed under Article 7 of DTAA. On Writ allowing the petition the Court held that since original assessment had been completed under section 143(3), in absence of any new material on record, initiation of reassessment proceedings merely on basis of change of opinion was not sustainable. (AY. 2002-03, 2003-04)
Oracle Systems Corporation v. ADIT (2015) 235 Taxman 337 / (2016) 380 ITR 232 (Delhi) (HC)

1884 **S.147 : Reassessment – Depreciation – Audit objection – Assessing Officer maintained that the objection raised by the Audit party was held to be not valid – Reassessment was held to be bad in law. [S. 32, 143(3), 148]**
Assessing Officer completed assessment proceedings under section 143(3). Subsequently, Assessing Officer initiated reassessment proceedings on ground that assessee had been granted higher rate of depreciation in respect of earth moving machinery used for excavation work. On writ in view of fact that even while sending proposal to higher authority to grant approval for initiation of reassessment proceedings, Assessing Officer still maintained that audit objection raised by audit party was not valid, it could be concluded that there was no independent reason to believe that income had escaped assessment, therefore, impugned notice seeking to reopen assessment was to be quashed. (AY. 2010-11)
National Construction Co. v. Jt. CIT (2015) 234 Taxman 332 (Guj.)(HC)

1885 **S.147 : Reassessment – Depreciation – Intangible assets – Depreciation on vendor and dealer network – Participated in the reassessment proceedings without raising the objection – Petition was dismissed. [S. 32, 148]**
Assessee-company was engaged in business of manufacture and assembly of automobile parts/components. It acquired Customer Care Parts business from its holding company 'H'. Assessing Officer finding that assessee had claimed depreciation on vendor and dealer network which did not fall in category of intangible asset, initiated reassessment proceedings. Assessee participated in said proceedings. Subsequently, assessment order was passed rejecting assessee's claim. Assessee filed Writ Petition challenging validity of reassessment proceedings. Dismissing the Petition the Court held that in absence of raising any objection to reopening of assessment, question of disposing objections

by passing a speaking order before proceeding with reassessment did not arise. Even otherwise, assessee having participated in reassessment proceedings in pursuance to issuance of notice under section 143(2), impugned order passed under section 143(3), read with section 147, was in accordance with law. (AY. 2008-09, 2009-10)
Mobis India Ltd. v. Dy. CIT (2015) 234 Taxman 440 / (2016) 380 ITR 170 (Mad.)(HC)

S.147 : Reassessment – Objection – Assessing Officer cannot Continue the proceedings without disposing the objection – Matter remanded. [S. 56 148] 1886
Assessee-firm is engaged in business of iron ore. Assessment was completed under section 143(3). Subsequently, Assessing Officer relying upon a Supreme Court order, took a view that mining activities were illegal and hence could not be chargeable as income from profits and gains of business but as 'Income from other sources'. He thus issued notice under section 148 seeking to reopen assessment. Assessee raised an objection that it was not engaged in mining activities at all and that they were only in business of buying iron ore, processing and exporting same. Assessing Officer without disposing of said objection, continued to proceed with reassessment proceedings. On Writ allowing the Petition the Court held that since assessee's objection was of primary nature going to root of matter, Assessing Officer was required to dispose of same before starting reassessment proceedings, since Assessing Officer failed to do so, matter was to be remanded back for disposal afresh. (AY. 2008-09)
V. M. Salgaoncar Sales International v. ACIT (2015) 234 Taxman 325 (Bom.)(HC)

S.147 : Reassessment – Wilfully made false or untrue statements at the time of original assessment proceedings – Reassessment was held to be valid.[S. 148] 1887
Dismissing the Petition the Court held that assessee having wilfully made false or untrue statements at the time of original assessment and when that falsity comes to notice, it is not fair on the part of the petitioner to turn around and say 'you accepted my lie, now your hands are tied and you can do nothing. (AY. 2007-08)
Sword Global India (P.) Ltd. v. ACIT (2015) 234 Taxman 187 (Mad.)(HC)

S.147 : Reassessment – Audit objection – Assessing Officer has given cogent reasons while rejecting the objection – Reassessment was held to be valid – Limitation of four years – Section 149 does not relax restriction of four years prescribed in proviso. [S. 148, 149, 154] 1888
Dismissing the petition the Court held that Where Assessing Officer had given cogent reasons in his speaking order while rejecting objections raised by assessee against reopening of assessment, it could be said that Assessing Officer had not applied his mind and reopened assessment solely based on audit report. Where material which is subject matter of proceedings under section 147 was not disclosed in the original return filed by the assessee on 30-9-2008, but only on 25-01-2011 in form of rectification petition under section 154, wherein rectification order had been passed by Assessing Officer on 6-09-2011, period of four years under proviso had to be calculated not from the end of relevant assessment year but from date of filing of rectification petition. (AY. 2008-09)
PVP Ventures Ltd. v. ACIT (2015) 234 Taxman 205 / (2016) 382 ITR 582 (Mad.)(HC)
Editorial: This case is seta side in (2016) 65 taxmann.com 221 (Mad.)(HC) by Division Bench.

1889 **S.147 : Reassessment – Notice – Validity – Change of opinion – No new material to show escapement of income – Reappreciation of material already on record – Reassessment not valid.**

Held, allowing the petitions, that no fresh information or material had been referred to in the reasons recorded for seeking to reopen the assessment. The material that was referred to was the very same material that was already before the Assessing Officer at the time of framing of the assessments u/s. 143(3) of the Act and even the reasons recorded that "from the perusal of the assessment record, it is observed that". This clearly showed that the Assessing Officer had sought to reappreciate the material that was already there at the time when the assessment was framed u/s. 143(3). It was clearly a case of change of opinion, which is clearly not permissible. The notices were not valid. (AY 2007-08, 2008-09)

Turner Broadcasting Systems Asia Pacific Inc. v. Dy. DIT (2015) 235 Taxman 328 / (2016) 380 ITR 412 (Delhi)(HC)

1890 **S.147 : Reassessment – Writ – Validity of reassessment – Assessee participating in reassessment proceedings – Alternative remedy of appeal available against order of reassessment – Writ would not issue to quash reassessment [S.148, 246A - Constitution of India, Art. 226]**

Held, dismissing the Writ Petitions, that the main purpose in initiating proceedings for reopening the assessment was that the issue regarding depreciation claim on the dealer network and vendor network was not dealt with during the original assessment u/s. 143(3). The assessee did not file any objections to the notice of reassessment. On the other hand, it participated in the reassessment proceedings. Further, as against the reassessment proceedings, the assessee had an efficacious remedy of appeal u/s. 246A of the Act before the Commissioner (Appeals). The reassessment orders could not be quashed in a writ proceeding. (AY 2008-09)

Mobis India Ltd v. Dy. DY. CIT (LTU) (2015) 234 Taxman 440 / (2016) 380 ITR 170 (Mad.) (HC)

1891 **S.147 : Reassessment – Capital gains considered in block assessment proceedings prior to initiation or reassessment proceedings – Reassessment cannot be done on protective basis. [S. 45, 148, 158BC]**

Allowing the appeal of assessee the Court held that Protective assessment could only be made at the stage when there was any doubt or dispute about the assessability of a particular sum either in relation to the AY or in relation to the assessee. The amount which was alleged to have escaped assessment was duly indicated by the assessee in his return u/s. 139 and was also considered in the block assessment order u/s. 158BC. In the block assessment order, the assessing authority had assessed this amount of long-term capital gains as undisclosed income. The block assessment order was set aside on the ground that such amount was not an undisclosed income which finding was affirmed by the Tribunal. Once the Tribunal has given a categorical finding that the amount was not an undisclosed income, which order had attained finality, the amount could not be treated as an escaped income chargeable to tax u/s. 147. (AY. 2002-03)

Shiva Kant Mishra (Dr.) v. CIT (2015) 280 CTR 98 / 61 taxmann.com 201 / (2016) 380 ITR 257 (All.)(HC)

S.147 : Reassessment – Business expenditure – Audit objection – Repoening was held to be not justified. [S. 37(1), 148] 1892

Assessing Officer reopened assessment only on objection raised by audit party regarding allowance of repairs on spare parts as revenue expenditure. Dismissing the appeal of revenue the Court held that, where Assessing Officer simply followed objections raised by audit party and did not record his independent satisfaction, reopening of assessment was unjustified. (AY. 2000-01 to 2002-03)

CIT v. DRM Enterprises (2015) 230 Taxman 61 / 120 DTR 401 (Bom.)(HC)

S.147 : Reassessment – Income from other sources – Sworn statement was not furnished to the assessee before reassessment – Reassessment proceeding was quashed. [S.56, 148] 1893

Assessing Officer initiated reassessment proceedings on ground that assessee purchased certain shares out of income that escaped assessment and same was liable to tax under head 'Income from other sources'. However, reassessment was initiated on basis of sworn statement given by a person regarding said transaction and copy of same was not furnished to assessee before reassessment. On Writ the Court held that reassessment was held to be not justified. (AY. 2009-10)

Devichand Kothari (HUF) v. ITO (2015) 230 Taxman 301 (Karn.)(HC)

S.147 : Reassessment – Export business – Supporting manufacturer – As the reassessment proceedings against manufacturer was quashed, reassessment proceedings against the assessee was also quashed. [S. 80HHC, 148] 1894

Assessees were supporting manufacturer who supplied goods to 'A' for purpose of export. Benefits under section 80HHC was allowed to 'A' and also to assessees on basis of disclaimer certificate issued by 'A'. Notice under section 148 was issued to 'A' for denying benefit under section 80HHC on certain ground. Reopening notice was also issued in case of assessees on ground that in absence of benefit of section 80HHC being available to 'A' it was not in position to issue a disclaimer certificate. However, notice issued in case of 'A' was set aside as being without jurisdiction. Allowing the petition the Court held that view of this fact, notices issued in case of assessees also did not survive. (AY.2000-01)

Frigorifico Allana Ltd. v. ITO (2015) 230 Taxman 435 (Bom.)(HC)

S.147 : Reassessment – Export business – Supporting manufacturer – As the reassessment proceedings against manufacturer was quashed, reassessment proceedings against the assessee was also quashed. [S. 80HHC, 148] 1895

Assessees supporting manufacturer supplied goods to one 'A' for purpose of export and claimed benefit under section 80HHC on basis of disclaimer certificate issued by 'A'. Assessing Officer issued notice under section 148 on ground that in absence of benefit of section 80HHC being available to 'A', assessees were not in a position to availed benefit of section 80HHC Where notice under section 148 issued to assessees on basis of re-opening notice issued to 'A' which was found to be without jurisdiction, impugned notice issued to assessees was to be set aside. (AY. 1999-2000)

Allana Cold Storage Ltd. v. ITO (2015) 230 Taxman 87 (Bom.)(HC)

1896 **S.147 : Reassessment – Export business – Merger – Reassessment proceeding was quashed.[S. 80HHC]**

Assessee, engaged in export of diverse commodities, claimed deduction of ₹ 5 crores under section 80HHC. Assessing Officer restricted benefit to ₹ 3.98 crores. On appeal, Commissioner (Appeals) granted certain relief which resulted in making available deduction of ₹ 4.83 crore under section 80HHC to assessee. Thereafter Assessing Officer without giving effect to order of Commissioner (Appeals) issued notice under section 148 to recompute deduction under section 80HHC on certain ground. On Writ allowing the Petition the Court held that as assessment order would stand merged/ modified in/by order passed by Commissioner (Appeals), Assessing Officer ought to have considered modified figures of deduction while applying his mind to reach prima facie view that income chargeable to tax had escaped assessment. Even otherwise since very issue which formed reason for issuing notice was a subject-matter of consideration in assessment order, impugned notice was not sustainable. (AY. 1999-2000)

Allanasons Ltd. v. ACIT (2015) 230 Taxman 436 (Bom.)(HC)

1897 **S.147 : Reassessment – Transfer – Reassessment on the basis of amendment was held to be invalid. [S.2(47)(v)]**

Amendment with effect from 1-4-1988 by Finance Act, 1987 enlarging scope of word 'transfer' used in section 2(47)(v) was not retrospective in nature and, therefore, re-opening of assessment for assessment year 1977-78 on basis of said amendment was invalid.

Narayan Construction Co. v. ACIT (2015) 230 Taxman 316 (Guj.)(HC)

1898 **S.147 : Reassessment – Within four years – Reassessment order passed with a period of 4 weeks from the date of disposal of objection was liable to be quashed – Notice – At the time of issue of notice, AO must have only a *prima facie* view and not a final / concluded view. [S. 80IB, 148]**

The AO sought to reopen on the ground that the claim u/s. 80IB was incorrectly allowed since the audit certification in Form 10CCB was issued by an accountant other than the one who audited the accounts and the date of commencement of production mentioned was prior to the date of issue of Factory Licence by the competent authority. The Assessee had not declared during the course of original assessment that it had not received the factory licence. Thereafter the AO passed the order u/s. 143(3) r.w.s 147 within 4 weeks of passing of the order disposing of the objections raised by the assessee against the reopening. Consequent to the Writ filed by the assessee, the HC quashed the reassessment order since the AO did not wait for a period of 4 weeks as stipulated by the Bombay HC in the case of *Asian Paints Ltd. v. DCIT*. However, the HC upheld the reopening notice since the AO had a *prima facie* view that the income had escaped assessment and date of commencement of production required further investigation. The AO was not required to have a final / concluded view at the time of issue of notice. (AY. 2005-06)

Raman & Weil (P) Ltd. v. DCIT (2015) 117 DTR 57 / 231 Taxman 395 (Bom.)(HC)

S.147 – Reassessment – Change of opinion – Depreciation – Non-compete fees – Intangible assets – Goodwill – Reassessment was held to be not valid. [S. 32, 148] 1899

Where assessee's claim of depreciation on non-compete fees was accepted by Assessing Officer in regular assessment after considering details furnished by assessee in response to queries raised by Assessing Officer, notice issued for reassessment on change of opinion was not sustainable. (AY. 2002-03)

Godrej Agrovet Ltd. v. CIT (2015) 230 Taxman 633 (Bom.)(HC)

S.147 : Reassessment – Change of opinion – All particulars were before the AO in the original assessment proceedings – Reassessment was held to be not valid. [S. 10A,148] 1900

Assessee company was engaged in the business of development and export of software. Assessee Company claimed deduction u/s. 10A of the Act for its units II & III without setting off losses of unit IV from the profits derived by the eligible units. The assessment was completed u/s. 143(3). The AO invoked provisions of section 147 of the Act as the income of ₹ 5,14,12,534 was chargeable to tax has escaped assessment. Assessee filed Writ Petition challenging the order of the AO. The Hon'ble HC allowed the WP of the assesee and held that Respondent cannot justify the issuance of the notice u/s. 148 by referring to details including of the claim of deduction u/s. 10A. All the particulars and profits were before the AO at the time of original assessment. A different opinion is now held by the respondents and for which they want to reopen the assessment. Such a course was clearly impermissible. (AY. 2007-08)

Capgemi India (P) Ltd. v. ACIT (2015) 232 Taxman 149 / 120 DTR 1 / 280 CTR 352 (Bom.) (HC)

S.147 : Reassessment – Change of opinion – Capital gain – Recompute capital gain was held to be not valid. [S.45, 48, 55, 148] 1901

On appeal the Court held that, with reference to the assessment year 1989-90 the notice for reassessment simply relied upon the assessment order for the assessment year 1990-91 to observe that the cost of acquisition as shown by the assessees was wrong. In other words, the plea and stand of the Revenue was that erroneous and incorrect computation was made, relying upon the reasoning in the assessment orders for the assessment year 1990-91. This would fall in the category of "change of opinion" as the "reason to believe" proceeded on the premise that the opinion formed in the original assessment orders was wrong or erroneous. The reassessment proceedings were not valid. (AY. 1989-90)

Prabhu Dayal Rangwala v. CIT (2015) 373 ITR 596 / 231 Taxman 790 / (2016) 130 DTR 43 / 283 CTR 58 (Delhi)(HC)

Indulata Rangwala v. CIT (2015) 373 ITR 596 (Delhi)(HC)

S. 147 : Reassessment – Time limit for notice – For a valid reopening, it is necessary that the notice is issued within the period of limitation, is served on the assessee and reasons to believe were recorded and sanction was duly obtained by the AO. [S.148, 149, 292B] 1902

Three notices u/s. 148 were issued by the AO, dated 24-03-2005, 28-03-2005 and 17-6-2005. The last date for issuance of notice u/s. 148 was 31-03-2005. The HC quashed

the reassessment proceedings on the basis that the first notice was invalid because no reasons to believe were recorded nor sanction order was obtained by the AO. The second notice returned unserved and as per provisions of s. 148, service of notice is necessary for an AO to assume jurisdiction. The third notice was issued after the period of limitation and hence was not a valid notice. Reliance by the Tribunal that the notice dated 17-06-2005 was in fact a notice 28-03-2005, which was a curable defect u/s. 292B is totally misplaced. S.292B has no application in the instant case. The notice dated 17-6-2005 could not be treated as notice dated 28-03-2005 or a notice in continuation of notice dated 28-03-2005. (AY. 1998-99)
Lal Chand Agarwal v. CIT (2015) 116 DTR 65 / 275 CTR 547 (All.)(HC)

1903 **S.147 : Reassessment – Additional details sought or verification proposed to be done cannot be a substitute to reasons for reopening. [S. 143(1), 148]**
The assessee is a private limited company and while filing its return of income, added back an amount being book value of shares transferred as gift to its business income. The AO accepted the returned income and losses carried forward u/s. 143(1). However subsequently it issued notice u/s. 147 and provided reasons recorded for reopening but did not give an opportunity to the assessee to file its objections. The assessee produced its objections which were rejected.
The High Court observed that the Revenue did not state that any income had escaped assessment and all the Revenue wanted to do was verify certain details pertaining to a gift. The High Court held that merely for verification of the value of shares and whether the computation was made at market rate, etc. the Revenue could not resort to section 147. (AY. 2010-11)
Nivi Trading Ltd. v. UOI (2015) 375 ITR 308 / 118 DTR 339 / 278 CTR 219 (Bom.)(HC)

1904 **S.147 : Reassessment – Notice – Having participated in the proceedings not specifying the period in the notice will not viatiate the reassessment proceedings – Reassessment was held to be valid. [S.148, 292B]**
Dismissing the appeal the Court held that having participated in the proceedings not specifying the period in the notice will not vitiate the reassessment proceedings. Reassessment was held to be valid. (AY. 1997-98)
CIT v. Sri Durga Enterprises (2015) 231 Taxman 886 (Karn.)(HC)

1905 **S.147 : Reassessment – Alternative remedy – Issue raised by the assessee could also be urged by way of a reply notice and appeal, Writ Petition was held to be not maintainable. [S 2(47) 148, Article 226]**
Assessing Officer issued notice dated 25-3-2013 called upon assessee intimating that assessable tax of year 2007-08 had escaped assessment within meaning of section 147. Petitioner challenged the notice by filing writ petition and contended that reassessment notice dated 25-3-2013 had been issued only on 9-4-2014 and, therefore, same was beyond limitation. Revenue, however, denied allegation made by petitioner submitting that notice was issued in time, but received belatedly by petitioner and, thus, there was no fault on part of department. Dismissing the petition the Court held that since

issues raised by petitioner could also be urged by way of a reply to notice, writ petition should fail. (AY. 2007-08)
S. Balasubramanian Adityan v. Dy. CIT (2015) 231 Taxman 56 (Mad.)(HC)

S.147 : Reassessment – Depreciation – Windmill – Change of opinion – Reassessment was held to be in valid. [S.32] 1906
Assessing Officer in his assessment order examined petitioner's claim of depreciation on Windmill electric generator and granted 50 per cent depreciation. AO issued reassessment notice. On Writ the Court held that reopening of assessment on ground of wrong charge of depreciation was a mere change of opinion and, hence, unjustified. (AY. 1998-99)
ICICI Bank Ltd. v. Dr. Ramsingh, Dy. CIT (2015) 231 Taxman 796 (Bom.)(HC)

S.147 : Reassessment – Change of opinion – Business expenditure – Royalty – Capital or revenue – Reassessment was held to be bad in law. [S.37(1)] 1907
The assessee had made payment of royalty for technology transfer and patent license which was claimed entirely as revenue expenditure.
The Assessing Officer allowed the expenditure as claimed.
Subsequently, the Assessing Officer reopened assessment on the ground that in view of judgment of the Supreme Court, part of the royalty was to be treated as capital expenditure and, therefore, to that extent there was under assessment of income. On writ allowing the petition the Court held that when it was established that Assessing Officer and Transfer Pricing Officer were not only aware of payment of royalty but had taken same into consideration at every stage and Assessing Officer in fact expressly called for said information, reopening of assessment was clearly based on change of opinion which is not permissible in law. (AY. 2006-07)
Mitsubishi Electric Automotive India (P.) Ltd. v. UOI (2015) 377 ITR 266 / 231 Taxman 343 (P&H)(HC)

S.147 : Reassessment – Housing projects – Reassessment proceedings could not be initiated to reexamine assessee's claim afresh. [S.80-IB(10)] 1908
Assessing Officer allowed the deduction after making detailed enquiries. The Assessing Officer initiated reassessment proceedings. The Assessee filed instant writ petition challenging initiation of reassessment proceedings. Allowing the Petition the Court held that it was noted that assessee's claim of deduction came up for scrutiny by Assessing Officer in original assessment proceedings. Moreover, Assessing Officer had disallowed claim to extent he was convinced that same was exaggerated. In view of above, if Assessing Officer had any doubt about basis of claim itself, same could have been examined at time of completion of assessment proceedings. therefore, reassessment proceedings could not be initiated to re-examine assessee's claim afresh. (AY. 2009-10)
Sarla Rajkumar Varma v. ACIT (2015) 231 Taxman 889 (Guj.)(HC)

S.147 : Reassessment – Industrial undertakings – Factory Licence was issued after commencement of business – Reassessment was held to be justified. [S.80IB(4)] 1909
The assessee-company had claimed deduction under section 80-IB(4) for its two units situated at Daman. An assessment order was passed under section 143(3). It was found

that in the 10CCB certificate, date of commencement of unit-II had been shown as 22-3-2004. However, the factory licence was issued on 22-4-2004 by the Chief Inspector of Factories, Daman.

Thereafter, the Assessing Officer sought to reopen the assessment by holding that the assessee's claim of deduction under section 80IB was not in order and had resulted in income escaping assessment within the meaning of section 147. The assessee contended that they had commenced manufacturing activity during the relevant previous year and in support thereof produced licence given by the Drug Authorities, registration with Excise Authorities, Sales tax Authorities, etc. It was also contended that the impugned notice was on account of mere change of opinion.

The Assessing Officer rejected the assessee's objections to the reasons for reopening of the assessment.

On Writ: dismissing the Petition that initiation of reassessment proceedings on basis of *prima facie* view that assessee might not have started manufacturing during relevant year which would disentitle assessee from claiming deduction, was justified. (AY. 2005-06)

Raman & Weil (P.) Ltd. v. Dy. CIT (2015) 231 Taxman 395 (Bom.)(HC)

1910 **S.147 : Reassessment – Objection – Assessing Officer cannot proceed with the reassessment proceedings without disposing the objection of assessee by passing speaking order. [S. 142, 148]**

Assessee-company filed return of income which was taken in scrutiny assessment and same was finalized. Assessing Officer issued notice for reopening assessment. Assessee raised his objections and contended that a speaking order needs to be passed before proceeding with assessment. Assessing Officer observed that such objections would be decided at time of assessment order. He initiated reassessment proceeding. On Writ since Assessing Officer continued with reassessment proceeding without disposing of assessee's objections by passing a speaking order, matter was to be relegated to Assessing Officer. (AY. 1999-2000)

Torrent Power SEC Ltd. v. ACIT (2015) 231 Taxman 881 (Guj.)(HC)

1911 **S.147 : Reassessment – No information received by Assessing Officer during the course of reassessment proceedings regarding escapement of commission income – Assessing Officer could not have formed opinion it has escaped assessment – Reasons to believe did not record the factum of escapement of commission – Reassessment is not valid. [S.148]**

Held, it was not the case of the Assessing Officer that during the course of proceedings under section 147, he came across any material relating to the payment of commission suggesting escapement of income under any of the heads. On the other hand, the Commissioner (Appeals) had given a categorical finding that the assessee had claimed as expenditure the commission of ₹ 58,59,913 in its trading and Profit and Loss account and this was available on the record. Consequently, in the absence of any information having been received by the Assessing Officer regarding the escapement of commission income during the course of proceedings under section 147 he could not have formed

an opinion on this issue that it had escaped assessment. Further, the reasons to believe did not record the factum of escapement of commission. (AY. 1999-2000)
CIT v. Barnala Steel Industries Ltd. (2015) 375 ITR 281 (All.)(HC)

S.147 : Reassessment – Survey report and other materials not indicating any income chargeable to tax has escaped assessment – Nothing before Assessing Officer to record belief that escapement has taken place – Reasons recorded prior and subsequent to survey not satisfying requirement of law – Notice is not valid. [S. 133A, 148] 1912

There was an allegation that there was a group of assessees engaged in wholesale trading of potato on commission basis. The authorities conducted a survey on the basis of the allegation that the group of assessees were resorting to hoarding of potatoes and making huge profits by fluctuating the day-to-day price of potatoes in the market. The authorities physically verified the assessee's manual books of account, cash balance, stock, etc. and prepared inventory. The authorities impounded the back up of the books of account maintained on computer for further verification. The details of the group's bank accounts were obtained. Notices under section 148 were issued to the assessee for the assessment years 2009-10 to 2011-12. On Writ Petitions contending that there were no reasons much less leading to a belief that income chargeable to tax has escaped assessment, that the survey report was made the basis for reopening the assessment and for the assessment years 2009-10, 2010-11 and 2011-12, that the survey was stated to be of January 7, 2011, that in the circumstances, there was no satisfaction recorded that any income chargeable to tax had escaped assessment and as pointed out in the survey report or from such other relevant material and that, therefore, the notices were *ex facie* bad in law and the proceedings in pursuance thereof were totally without jurisdiction: Held, allowing the petitions, that neither the survey report nor any other material indicated that any income chargeable to tax for the relevant assessment years had escaped assessment. The Assessing Officer, therefore, had nothing before him which would enable him to record his belief that any such escapement had taken place. Notice was held not valid. (AY. 2009-10 to 2011-12)
Hemant Traders v. ITO (2015) 375 ITR 167 (Bom.)(HC)

S.147 : Reassessment – Reason must be based on direct or circumstantial evidence – Reason to believe and not reason to suspect – Cash seized from assessee – Explanation for possession of cash accepted by income-tax authorities – Notice on ground that amount represented undisclosed income – Notice based on suspicion and surmise – Notice is not valid. [S. 148] 1913

The assessee was a company registered under the Companies Act. According to the assessee, on January 5, 2012, Anil Kumar Dhir, one of the directors of the assessee, who was also a director of Krown Agro Foods Pvt. Ltd. was carrying ₹ 5 lakhs from Delhi to Ghaziabad. Both companies had separate factories at Ghaziabad and head offices in Delhi for payment of wages and other normal expenses on the factories. This amount allegedly consisted of withdrawals made on January 3, 4, 2012, of ₹ 4 lakhs, i.e. ₹ 2 lakhs from each of the bank accounts of the company in Delhi and ₹ 1 lakh from cash balance from the books of Krown Agro Foods Pvt. Ltd. According to the assessee, in the beginning of February, 2012, elections were to be held for the U. P. State Assembly,

the Election Commission had issued instructions that if cash of more than ₹ 2,50,000 was found with any person, the cash may be seized and enquiry made whether this cash was for distribution amongst the voters. Anil Kumar Dhir, was stopped by the U. P. Police on the border of Delhi and U.P. and as cash of ₹ 5 lakhs was found, this amount was seized. His statement was recorded by the Deputy Director of Income-tax (Investigation-I), Ghaziabad, before whom the relevant copies of the bank accounts and extract of cash books were produced. The authorities initiated proceedings under section 153C, for the assessment years 2006-07, 2007-08, 2008-09, 2009-10, 2010-11, 2011-12 and 2012-13. However, during the assessment proceedings, it was noticed that the company was incorporated on July 18, 2008, and, therefore, proceedings under section 153C for the assessment years 2006-07, 2007-08 and 2008-09 were dropped. The proceedings were also dropped for the assessment years 2009-10, 2010-11 and 2011-12 as no incriminating information was received for proceeding under section 153C. Thereafter, a notice was issued under section 148 on Krown Agro Foods Pvt. Ltd. on the ground that an amount of ₹ 2 lakhs had escaped assessment. On a Writ Petition to quash the notice:

Held, the reasons to believe recorded did not show on what basis the Assessing Officer had formed a reasonable belief that the amount of ₹ 2 lakhs had escaped assessment. It was apparent that the Assessing Officer suspected that the income had escaped assessment. The notice of reassessment was not valid and was liable to be quashed. The requirement of law is "reason to believe" and not reason to "suspect". (AY. 2012-13)

Krown Agro Foods P. Ltd. v. ACIT (2015) 375 ITR 460 / 232 Taxman 113 (Delhi)(HC)

1914 **S.147 : Reassessment – Recorded reasons must be furnished to the assessee – If Department behaves in an irresponsible manner and does not furnish the recorded reasons on the basis that the assessee was already aware of them, the assessment has to be quashed. [S. 143(1), 148]**

(i) It is axiomatic that power to reopen a completed assessment under the Act is an exceptional power and whenever Revenue seeks to exercise such power, they must strictly comply with the prerequisite conditions viz., Reopening of reasons to indicate that the Assessing Officer had reason to believe that income chargeable to tax has escaped assessment which would warrant the reopening of an assessment.

(ii) These recorded reasons as laid down by the Apex Court must be furnished to the assessee when sought for so as to enable the assessee to object to the same before the Assessing Officer. Thus in the absence of reasons being furnished, when sought for would make an order passed on reassessment bad in law. The recording of reasons (which has been done in this case) and furnishing of the same has to be strictly complied with as it is a jurisdictional issue. This requirement is very salutary as it not only ensures reopening notices are not lightly issued. Besides in case the same have been issued on some misunderstanding/misconception, the assessee is given an opportunity to point out that the reasons to believe as recorded in the reasons do not warrant reopening before the reassessment proceedings are commenced. The Assessing Officer disposes of these objections and if satisfied with the objections, then the impugned reopening notice under Section 148 of the Act is dropped/withdrawn otherwise it is proceeded with further. In

issues such as this, i.e. where jurisdictional issue is involved the same must be strictly complied with by the authority concerned and no question of knowledge being attributed on the basis of implication can arise. We also do not appreciate the stand of the revenue, that the respondent-assessee had asked for reasons recorded only once and therefore seeking to justify non-furnishing of reasons. We expect the state to act more responsibly. (AY. 2008-09)

CIT v. Trend Electronics (2015) 379 ITR 456 (Bom.)(HC)

S.147 : Reassessment – Failure by AO to comply with the law in *G. K. N. Driveshafts (India) Ltd. v. ITO (2003) 259 ITR 19 (SC)*, and pass order on objections renders assessment order void. Even assessment u/s. 143(1) assessment cannot be reopened in the absence of new/ tangible material. [S. 40(a)(ia),143(1), 148] 1915

(i) The Court is of the considered view that after having correctly understood the decision of the Supreme Court in *G.K.N. Driveshafts (India) Ltd. v. ITO (2003) 259 ITR 19 (SC)* as mandatorily requiring the AO to comply with the procedure laid down therein and to dispose of the objections to the reopening order with a speaking order, the CIT (A) committed an error in not quashing the reopening order and the consequent assessment;

(ii) Though only an assessment u/s. 143(1) and not 143(3) was made, the reopening order of the AO only refers to the report of Statutory Auditor under section 44AB of the Act which report was already enclosed with the return filed by the Assessee. Therefore, factually, there was no new material that the AO came across so as to have "reasons to believe that the income had escaped assessment".

(iii) The Department's contention that the judgment in *CIT v. Orient Craft Ltd. (2013) 354 ITR 536 (Del.)* is contrary to the Full Bench verdict in *CIT-VI v. Usha International Ltd. (2012) 348 ITR 485* and the issue should be referred to a larger Bench is not acceptable because the central issue examined in the decision of the Full Bench in Usha International Ltd. was as to what constituted a "change of opinion". The Court, therefore, does not consider the decision in Orient Craft Ltd. as being contrary to the decision in Usha International Ltd. In other words, there is no occasion for the Court to refer to a larger Bench the question of the correctness of the decision in Orient Craft Ltd. which decision squarely applies to the facts of the present case. (AY. 2003-04)

PCIT v. Tupperware India Pvt. Ltd (2015) 127 DTR 161 / (2016) 236 Taxman 494 / 284 CTR 68 (Delhi)(HC)

S.147 : Reassessment – Change of opinion – Audit objection – Reassessment was held to be not justified. [S.40A, 44AB, 80HHC, 143(3), 148] 1916

Held that the belief has been borne only because of the primary facts (audit report) furnished by the assessee for the purpose of assessment of its income and other material information available on record. The details of payments made by the assessee to the persons specified in section 40A, audit report under section 44AB and the controversy in relation thereto were well within the knowledge of the AO who had passed the original order under s. 143(3) of the Act. The information regarding the assessee's claim under section 80HHC was also filed along with the return of income in the form

of CA certificate which was also referred by AO in his order under section 143(3) r/ws. 147 of the Act. By invoking the provisions of section 147, the successor AO has simply sat over the decision of the earlier AO passed u/s. 143(3) in respect to issues sought to be covered u/s. 147. Hence the CIT(A) was completely justified in annulling the reassessment order of successor AO.
Raymon Glues & Chemicals v. Dy. CIT (2015) 114 DTR 27 / 231 Taxman 376 (Guj.)(HC)

1917 **S.147 : Reassessment – Recorded reasons – Where order disposing of objection raised by petitioner was beyond reasons recorded for reopening of assessment, Assessing Officer was to be directed to dispose of objections of petitioner to notice afresh keeping in mind reasons recorded for issuing notice under section 148. Matter remanded. [Ss. 143(1), 148]**
Return of income was processed under section 143(1). The Assessing Officer seeks to reopen the assessment. The petitioner objected to the reasons recorded for reopening of the assessment. In particular the petitioner sought information on the basis of which the Assessing Officer came to the conclusion that the purchases recorded by the petitioner were not genuine. The petitioner on facts submitted the purchases were genuine besides pointing out that there was no nexus between the information/material received by the Assessing Officer and the formation of belief that income chargeable to tax had escaped the assessment.
On Writ Petition:
In this case the order disposing of the objections refers to and relies upon investigation carried out by Sale Tax department, the information put up by Sales Tax department on its website and the affidavit cum-declaration filed by the defaulting parties with the Sales Tax authorities. None of the above facts were even remotely adverted to in the grounds recorded for reopening the assessment. It is settled position in law that the validity of reopening of an assessment can only be tested by the reasons recorded at the time of issuing the notice for reopening an assessment. These grounds for reopening of assessment can neither be substituted and/or supplemented. The reopening of assessment will either stand or fall only upon the reasons recorded before issuing the impugned notice. Thus, the order disposing of the objection raised by assessee on relying on facts, which were not a part of the reasons recorded makes the same unsustainable in law.
Even when an assessment which had been earlier processed under section 143(1), the jurisdictional requirement for reopening an assessment is that the Assessing Officer must have reason to believe that income chargeable to tax has escaped assessment, must be satisfied. Besides where the proviso to section 147 is invoked, the additional requirement, viz., failure to disclose fully and truly all facts necessary for assessment should also be satisfied. Therefore, the decision relied upon by the Revenue does not address the grievance of the petitioner. In view of the fact that the order disposing of the objections is beyond the reasons recorded for reopening the assessment. The order is set aside disposing of the objections. The Assessing Officer is directed to dispose of the objections of the petitioner to the impugned notice afresh keeping in mind the reasons, recorded for issuing the impugned notice. (AY. 2007-08)
Pransukhlal Bros. v. ITO (2015) 229 Taxman 444 (Bom.)(HC)

S.147 : Reassessment – Enquiry before assessment – where in course of reassessment proceedings, AO sought certain details by issuing notice – Issue subject matter of appeal – Writ Petition to stop the enquiry was held to be not maintainable. [S. 142(1), 143(3), 148] 1918

For relevant assessment years, AO reopened the assessment in case of assessee. In course of reassessment proceedings, the AO issued a notice under section 142(1) seeking details on certain issues in dispute. The assessee filed instant writ petition contending that those issues were subject matter of pending appeal from the original order of assessment under section 143(3) for the relevant assessment years. Therefore, in terms of the third proviso to section 147, the Assessing Officer could not enquire into the same during the reassessment proceedings. During the course of adjudication, the adjudicator is entitled to raise queries and it is open to the assessee as in this case to respond to the queries and point out it is not germane to adjudication and/or that it is not his jurisdiction to enquire into the aspects as suggested by the queries. The Assessing Officer/Adjudicator is duty bound to consider the response and apply the law as it stands. There is no bar to the assessee pointing out all objections in Writ Petition to the AO and the AO would deal with them in the assessment order. However, it would not be proper that during the assessment/reassessment proceedings to stifle/restrict the scope of enquiry. The petitioner seeks that this Court exercise its writ jurisdiction merely because according to the petitioner the enquiries raised by the Assessing Officer are without jurisdiction and that the Assessing Officer would not accept their submissions. During the course of assessment proceedings the AO is certainly entitled to ask questions which according to him are relevant and it is for the assessee to point out that the questions raised do not arise for consideration in the facts before him or they are without jurisdiction. The entire process of adjudication is to serve the above purpose. In view of the above, there is no reason to interfere at this stage with regard to impugned notice. Accordingly, the Writ Petitions is dismissed.(AY. 2007-08 to 2009-10)

HDFC Bank Ltd. v. ACIT (2015) 229 Taxman 458 (Bom.)(HC)

S.147 : Reassessment – Business income – Notes forming part of subsequent year – Material information – Reassessment was held to be valid. [S.28(i), 148] 1919

Assessee company commenced its business using asset of erstwhile company 'N', which was not available among material filed with return of income-tax of relevant assessment year. Subsequent to assessment, while perusing records for another year, Assessing Authority from notes forming part of account, found out this fact. These notes constituted material information for Assessing Officer as assessment was done without taking note of above facts and, thus, reassessment proceeding that was initiated was proper. Matter remanded.

CIT v. Micron International Ltd. 229 Taxman 485 (Karn.)(HC)

S.147 : Reassessment – Confined to incomes which had escaped assessment – Other issues cannot be considered at the instance of assessee. [S.143(3)] 1920

A matter not agitated in the concluded original assessment proceedings cannot be permitted to be agitated in reassessment proceedings unless relatable to the item sought to be taxed as "escaped income". If the assessee cannot be allowed to convert

the proceedings initiated under section 147 as revisional or review, the conversion of proceedings would also be not available to the Revenue. (AY. 1969-70)
J. K. Cotton Spinning and Weaving v. CIT (2015) 375 ITR 533 (All.)(HC)

1921 **S.147 : Reassessment – Business income – Warranty services – Deferred revenue was not included in subsequent years – Reassessment was held to be valid – Availability of alternate remedy under Act would not be a bar for Court to examine notice issued under section 148 if it is challenged on ground of no jurisdiction. [S.28(i), 148, Constitution of India, Art.226]**
Assessee offers warranty services to its customers and attributes revenue generated, proportionally over period of service contract and offers same to tax in subsequent assessment year when obligation to render services arose. Reassessment was initiated on ground that deferred revenue for assessment year 2009-10 was not admitted or included by assessee in assessment year 2010-11, or in any subsequent year/s. On writ dismissing the petition the court held that burden was on assessee to demonstrate that deferred revenue was offered to tax in assessment year 2010-11 or in any subsequent assessment year. In case of warranties, income may be spread over subsequent years as and when claim arises, but nothing prevented to place such material to establish that such deferred revenue had been actually included as its income in subsequent assessment years. Thus initiation of reassessment for examining tax implications of deferred revenue on warranty claims was justified. Court also held that availability of alternate remedy under Act would not be a bar for Court to examine notice issued under section 148 if it is challenged on ground of no jurisdiction, violation of principles of natural justice, no authority of law and validity or vires of statutory provision being under challenge. (AY. 2009-10)
Dell India (P.) Ltd. v. Jt. CIT (2015) 231 Taxman 680 / 127 DTR 291 / 281 CTR 416 (Karn.) (HC)
Editorial: Affirmed by division Bench JCIT v. Dell India Pvt. Ltd. (2016) 382 ITR 310 (Karn.)(HC)

1922 **S.147 : Reassessment – Bad debt – Reassessment was held to be justified. [S.36(1)(viia)]**
Petitioner-bank claimed bad debts on basis of deduction originally claimed in earlier assessment years. It was observed that there was change in quantum of provisions created under section 36(1)(viia) for earlier assessment year. Petitioner was aware of such rectification order; however, it did not bring it to notice of Assessing Officer and continued to claim on basis of old figure. Since income had escaped assessment, initiation of reassessment proceedings was justified. (AY. 1998-99)
ICICI Bank Ltd. v. Dr. Ramsingh, Dy. CIT (2015) 231 Taxman 796 (Bom.)(HC)

1923 **S.147 : Reassessment – Reason to believe – Tangible material – Issue raised in second reassessment was part of original assessment hence second reassessment was held to be not valid. [S. 10(29), 148]**
Original scrutiny assessment disallowing certain amounts including exemption under section 10(29) as well as certain categories of income and purchase. First reassessment was set aside in appeal and order attaining finality. AO issued second reassessment notice. Tribunal quashed the reassessment proceedings. On appeal by revenue the Court

held that finding that material or explanation in respect of issues in second reassessment were part of original record hence second reassessment was held to be not valid. (ITA No. 575/12 dt. 15-1-2015.) (AY. 2002-03)
CIT v. Central Warehousing Corporation (2015) 371 ITR 81 (Delhi)(HC)

S.147 : Reassessment – Deduction – Excessive – Notice on ground that deduction was found to be excessive – On similar circumstances for latter year the Tribunal holding that deduction was not excessive – Notice was held to be not valid. [S. 10A, 148] 1924
AO issued the notice for reassessment on the ground that the assesse had claimed excess deduction under section 10A, based on his finding for the assessment year 2009-10. On a writ petition to quash the notice, the Court held that the Tribunal for the assessment year 2009-10 had held that the Assessing Officer had simply treated high profit earned by the assessee as a reason to invoke sub-section (10), without even remotely demonstrating the existence of any "arrangement" between the assessee and its associated enterprises aimed at producing extraordinary profits in the hands of the assessee. The conclusion drawn by the authorities below in such circumstances could not be ex consequent sustained. Consequently, the notice of reassessment was not valid. The court also observed that if the case were ultimately decided in favour of the Revenue in respect of the assessment year 2009-10, then the Revenue shall be entitled to revive its proceedings pursuant to the notice under section 148 and the assessee shall not take up the plea of limitation. (AY 2008-09)
A. T. Kearney India Ltd. v. ITO (2015) 371 ITR 179 (Delhi)(HC)

S.147 : Reassessment – Reasons recorded by Assessing Officer referring to facts already on file – No rational and tangible nexus between reasons and belief – Assessing Officer had no jurisdiction to initiate reassessment proceedings. [S. 143(1), 148] 1925
The assessment was completed under section 143(1). The reassessment notice was issued on the ground that since the interest received is much less than interest paid resulting substantial business loss, it transpires that it is a case of diversion of business funds for non-business purposes The assessee challenged the reassessment proceedings by filing the Writ petition; allowing the petition the Court held that That sufficient or adequate material was not available with the Assessing Officer. This information or material was already available in the computation of income filed by the assessees in their returns. Nothing new had been received by way of information or otherwise by the Assessing Officer. The present was not a case of testing the sufficiency of material available but a case of absence of material. There was no direct nexus or live link between the material coming to the notice of the Assessing Officer and the formation of his belief that there had been escapement of income of the assessees from the assessments in the particular years in question. There was no rational and tangible nexus between the reason and the belief and in the absence of material the Assessing Officer had no jurisdiction to initiate the proceedings under sections 147/148. Further the contention of the Department that the partners' entities were controlled and run by the family members/relatives of the assessees and that such firms were covered by the provisions contained under section 40A(2)(b) and, therefore, reassessment proceedings were justified was patently erroneous. This ground was taken by the Department while rejecting the objection of the assessees. Such fresh ground which was not part of the

reasons to believe could not form the basis to initiate the reassessment proceedings under sections 147/148. Further, there was no material on record to indicate that the partnership entities were controlled and run by the family members or relatives of the assessees. In the absence of cogent evidence being brought on record, such ground could not be taken as a reason to reinitiate reassessment proceedings. There was no fresh material before the Assessing Officer to form a belief that income had escaped assessment. In the absence of material, the Assessing Officer had no jurisdiction to initiate the proceeding for reassessment. Therefore, the notice under section 148 for the assessment year 2006-07 was set aside. (AY. 2006-07)
Arun Gupta v. UOI (2015) 371 ITR 394 / 122 DTR 370 (All)(HC)
Ishwar Chandra v. UOI (2015) 371 ITR 394 (All)(HC)
Vineet Chandra v. UOI (2015) 371 ITR 394 (All)(HC)
Raghav Gupta v. UOI (2015) 371 ITR 394 (All)(HC)
Preem Chand Gupta v. UOI (2015) 371 ITR 394 (All)(HC)

1926 **S.147 : Reassessment – Depreciation – Change of opinions – Where the assessee's claim of depreciation on non-compete fees was accepted by the AO in regular assessment after considering details submitted by the assessee in response to queries raised by the AO, notice issued for reassessment on change of opinion was not sustainable. [S.32, 148]**
The assessee claimed depreciation on its intangible assets, such as goodwill and non-compete fees as a part of its block of intangible assets claiming depreciation at 25 per cent. The AO called upon the assessee to give detailed working of the claim for depreciation. The AO, satisfied with the assessee's response, accepted the assessee's claim on account of depreciation. The notice under section 148 was issued by the AO, seeking to re-open the assessment on the basis that the depreciation claimed on non-compete fees at 25 per cent could not be allowed the same is not mentioned among the intangible assets set out in the Appendix to the Income-tax Rules, 1962.
On a writ by the assessee, the Court observed that the assessee had supplied the necessary details and the AO passed an order under section 143(3) in the regular assessment proceedings allowing the claim for depreciation on non-compete fees. In fact, the order passed in the regular assessment proceedings specifically discussed the assessee's claim for depreciation and disallows the excess depreciation claimed on buildings at 10 per cent to the extent it is in excess of the prescribed 5 per cent. In view of the above the Court held that the reason recorded in support of the impugned notice seeking to deny depreciation on non-compete fees has been issued on account of a change of opinion and accordingly, allowed the writ filed by the assessee.
Godrej Agrovet Ltd. v. DCIT (2015) 115 DTR 257 / 230 Taxman 633 (Bom.)(HC)

1927 **S.147 : Reassessment – Notice – Reassessment – Retrospective amendment to the statute – Quashing of reassessment was held to be not justified. [S. 143(2), 148]**
Tribunal was not justified in quashing assessment under s. 148 on the ground of non-issuing notice under s.143(2) within 12 months from the date of submission of return in the light of the retrospective amendment to the statute by the Finance Act, 2006. (AY. 1997-98)
CIT v. A. K Dutta (2015) 114 DTR 214 (MP)(HC)

S.147 : Reassessment – Change of opinion – Once a query has been raised during the assessment proceedings and the assessee has responded to the query to the satisfaction of AO, it must apply that there is due application of mind by the AO to the issue raised-It is not open to the AO to improve upon the reasons recorded at the time of issuing the notice either by adding and/or substituting the reasons by affidavit or otherwise – Reassessment was quashed.[S.80-IA, 80IB, 143(3), 148] 1928

Once a query has been raised during the assessment proceedings and the assessee has responded to the query to the satisfaction of the AO as it is evident from the fact that the assessment order dated 9th March, 2005 accepts the assessee's claim for deduction under s. 80IA/80IB, it must follow that there is due application of mind by the AO to the issue raised; therefore as there is a change of opinion in issuing the impugned notice having regard to the opinion formed while passing the assessment order under s.143(3), the AO would cease to have any reason to believe. Tangible material i.e. communication dated 15th Jan, 2007 received by the AO from Addl. CIT. who had assessed for A.Y. 2004-05 could have undoubtedly been the basis for issuing the impugned notice and so recorded in the reasons in support of the impugned notice. Reopening notice has to stand or fall on the basis of the reasons recorded at the time of issuing the notice for reopening. It is not open to the AO to improve upon the reasons recorded at the time of issuing the notice either by adding and/or substituting the reasons by affidavit or otherwise. (AY. 2002-03)

GKN Sinter Metals Ltd. v. Ramapriya Raghavan (Ms.) ACIT (2015) 371 ITR 225 / 274 CTR 1 / 114 DTR 121 / 232 Taxman 386 (Bom.)(HC)

S.147 : Reassessment – Capital gains – Conversion of a capital asset into stock-in-trade – Where industrial land converted into residential plots and sold, provisions of section 45(2) did not apply – Reassessment was held to be invalid. [S.45(2), 148] 1929

The assessee company was declared sick by BIFR and with due approval of the Government convert its industrial land in residential plots. The assessee sold a part of said land and declared certain amount as long term capital gain. The AO completed the assessment after accepting amount of long term capital gain. Subsequently, AO issued notice u/s. 148 after expiry of four years taking a view that assessee had understated taxable amount of long term capital gains and opined that assessee failed to disclose 'capital gain' u/s.45(2).

On a Writ Petition by the assessee, the High Court observed that the computation of the 'Long Term Capital Gain' was furnished during the course of the assessment proceeding along with computation chart and valuer's report and there was complete disclosure of material fact on the part of the assessee. It further observed that the assessment after making necessary scrutiny and enquiries and thereafter, 'Long Term Capital Gain' has been accepted, under section 45(1). The High Court held that there is no failure on the part of the assessee to disclose fully and truly all material facts, in the assessment of the relevant assessment year, exception to proviso to section 148 is not applicable and the notice issued u/s. 148 was barred by limitation and also invalid (AY. 2003-04 to 2006-07)

Amrit Corp. Ltd. v. ACIT (2014) 46 taxmann.com 32 / (2015) 113 DTR 436 / 275 CTR 174 (All.)(HC)

1930 **S.147 : Reassessment – Capital gains – Profit on sale of property used for residence – Reassessment proceedings were held to be not valid. [S.2(14), 2(47), 45, 54, 148]**
For relevant assessment year, assessment in case of assessee was completed under section 143(3) wherein assessee's claim for deduction under section 54 was allowed. Subsequently, initiated reassessment proceedings on ground that property transferred by assessee was agriculture land and, therefore, capital gain arising out of it was not eligible for deduction under section 54. It was noted that property sold was located in urban area and was subjected to property tax. Even otherwise, in case land had to be treated as agricultural land, then sale was not a sale of a capital asset within meaning of section 2(14) and thus, no capital gains tax would have been payable, in aforesaid circumstances, Assessing Officer was not justified in initiating reassessment proceedings.)
CIT v. Chintoo Tomar (2015) 229 Taxman 260 (Delhi)(HC)

1931 **S.147 : Reassessment – Capital gains – Conversion of stock-in-trade to investment – Question of fact – Writ petition was dismissed. [S.45(2), 148]**
For relevant assessment year assessee had offered certain amount on account of sale of land which during preceding assessment year had been converted into stock-in-trade from investment. Assessment was completed under section 143(3). Thereafter, Assessing Officer reopened assessment on ground that cost of said land taken by assessee was much more than fair market value computed under section 45(2) which had resulted in underassessment of income. Assessee challenged impugned notice by filing writ petition. Court held that the question of determining fair market value of property of assessee converted into stock-in-trade from investment was really a question of fact which could not be determined in writ jurisdiction and, therefore writ petition was to be dismissed. (AY. 2009-10)
Chandler Investment & Trading Company (P.) Ltd. v. ITO (2015) 229 Taxman 263 (Bom.) (HC)

1932 **S.147 : Reassessment – Change of opinion – Within four years – Set off loss – Long term capital gains – Depreciation – Bad debt – If the recorded reasons show contradiction and inconsistency it means necessary satisfaction in terms of the statutory provision has not been recorded at all. The Court cannot be called upon to indulge in guess work or speculate as to which reason has enabled the AO to act – Reassessment was quashed. [S.32(2), 45, 148]**

(i) Though the power to reopen is much wider, but the interpretation that the words "reason to believe" must receive an interpretation which is in consonance with the scheme of the law. There cannot be arbitrary powers to the Assessing Officer to reopen assessment on the basis of mere change of opinion. The Assessing Officer has no power to review. He has only a power to reassess. In the garb of reopening the assessment review cannot take place.

(ii) If the assessee has not made full and true disclosure of income and its particulars in the return or during the assessment proceedings, then, we do not see how these figures have been derived by the Assessing Officer. In one breath he says that he has perused the records and which reveals the above position. At the same time, he holds that the petitioner has not made full and true disclosure of income and

its particulars in the return or during assessment proceedings. This contradiction and inconsistency in the reasons would indicate that the necessary satisfaction in terms of statutory provision has not been recorded at all. This would be further clear if one refers to the other reason viz. that the income has escaped assessment and also in view of sub-clause (I) of clause (c) of Explanation 2 to section 147 of the Act if income chargeable to tax has been underassessed. Such recording of reasons can never be termed as satisfactory. There is either a satisfaction based on the income escaping assessment by virtue of it being chargeable to tax and, therefore, reassessment and in terms of substantive provision is required. The satisfaction can also be said to be that the case is covered by the deeming fiction and the income chargeable to tax has escaped assessment by virtue of Explanation 2 clauses (a), (b), (ba) and (c) and (d). However, if one refers to the failure on the part of the assessee to make full and true disclosure of income, then, what the Assessing Officer has in mind is the first proviso to section 147. That enables reassessment after expiry of four years from the end of the relevant assessment year if the income chargeable to tax has escaped assessment for such assessment year by reason of failure on the part of the assessee to make a return under section 139 or in response to a notice issued under sub-section (1) of section 142 or section 148 or to disclose fully and truly all material facts necessary for his assessment for that assessment year. In the present case, both are referred viz. the first proviso to section 147 and Explanation 2 thereof. However, this is not a case where action under section 147 is taken after the expiry of four years from the end of the relevant assessment year but it is within four years period. Thus, this proviso cannot be of any assistance. At the same time, the Assessing Officer says that he has reason to believe that income has escaped assessment and also in view of sub-clause (1) of clause (c) of Explanation 2. The Court cannot be called upon to indulge in guess work or speculate as to which reason has enabled the Assessing Officer to act in terms of this section. If more than one reason is assigned as in this case then the Court can sustain the notice only if it is of the opinion that an erroneous reference to a statutory provision has been made but still there is an income chargeable to tax which has escaped assessment and on account of which issuance of notice is justified. Which ground is sufficient to sustain the notice is something which must be indicated in clear terms and should not be a matter of speculation or guess work. (AY. 2009-10)

Plus Paper Food Pac Ltd. v. ITO (2015) 374 ITR 485 / 118 DTR 29 / 231 Taxman 747 (Bom.)(HC)

S.147 : Reassessment – Unabsorbed depreciation – Carry forward and set-off – Effect of amendment of section 32 by Finance Act of 2001 – No time limit for carry forward and set off from 1-4-2002 – Reassessment was held to be not valid. [S.32(2)] 1933

In the return for the assessment year 2008-09, the assessee claimed set-off of brought forward unabsorbed depreciation allowance of ₹ 4.26 crores pertaining to the period between the assessment years 1984-85 and 2007-08 against the assessee's income from long term capital gains arising during the year under consideration. The return was taken in scrutiny of the Assessing Officer. The Assessing Officer did not disallow the set-off. Subsequently, a notice of reassessment was issued on the ground that there had

been excess set-off of depreciation. Though no specific ground was mentioned why the Assessing Officer held a belief that the set-off claimed was irregular, his reference was to the provisions of section 32(2) of the Act and he objected to the loss being carried forward beyond eight years. On a writ petition :
Held, allowing the petition, that the very basis for the Assessing Officer to hold a belief that income chargeable to tax had escaped assessment lacked validity. The notice was invalid. (AY. 2008-09)
Synbiotics Ltd. v. ACIT (2015) 370 ITR 119 / 228 Taxman 256 (Mag.)(Guj.)(HC)

1934 **S.147 : Reassessment – Change of opinion – Charitable trust – Accumulation accepted in scrutiny assessment – Subsequent notice on ground that accumulation not valid – Mere change of opinion – Reassessment was held to be not valid. [S.11, 148]**
Allowing the petition the Court held that with the return the assessee had produced Form 10 as well as the resolution of the trust setting apart such amount for a period of five years to be utilised for the purposes of the trust. It was after scrutinising the claim of deduction under section 11(2) of the Act that the Assessing Officer had framed the assessment. He had made no disallowance on such claim. Under the circumstances, the notice could be said to be based on a mere change of opinion on the part of the Assessing Officer. The notice was not valid and was quashed. (AY.2008-09)
Friends of WWB v. DCIT(E) (2015) 370 ITR 26 (Guj.)(HC)

1935 **S.147 : Reassessment – Change of opinion – All information, documents or records relating to assessee available before Assessing Officer – Reasons for notice showing discovery of new facts from existing records – Reassessment was held to be not valid. [S.148]**
Allowing the petition the Court held that; (i) that during the proceedings for section 143(3) assessment, all information, documents and other records relating to the assessee for the relevant assessment year were before the Assessing Officer. The reasons which were advanced showed discovery of new facts from the existing records. So the Assessing Officer wanted to change his opinion regarding the assessment and to reopen it. Therefore, it could not be said that there was escapement of income or that there were reasons for believing that there was escapement of income."Escapement of income" should be given a strict construction. Not only should it not be used to justify a change of view, it should not be used to reopen an assessment on facts, information or documents which were before the Assessing Officer or could have been easily found by him while making the assessment. Otherwise, there would be no finality of assessment. (AY. 2009-10)
Debashish Moulik v. ACIT (2015) 370 ITR 660 (Cal.)(HC)

1936 **S.147 : Reassessment – Set-off brought forward losses against income from other sources – Cancellation of licence – No failure to disclose material facts necessary for assessment – Reassessment was held to be not valid. [Ss. 71, 148]**
Allowing the petition the Court held that; for the assessment year 2005-06 with respect to the very assessee, the Assessing Officer initiated reassessment proceedings under section 147 of the Income-tax Act, 1961, on the same ground on which reassessment proceedings were initiated for the assessment years 2006-07 and 2007-08. For the present

assessment year also reassessment proceedings were initiated after a period of four years from the end of the relevant assessment year. The court had quashed and set aside the initiation of reassessment proceedings with respect to the assessment year 2005-06 on the ground that there was no failure on the part of the assessee to disclose truly and fully all material facts. The court observed that the banking licence of the assessee had been cancelled by the Reserve Bank of India, which was disclosed in the original return itself. Hence, the notices for the assessment years 2006-07 and 2007-08 and consequent reassessments were not valid. (AY.2006-07, 2007-08)

Charotar Nagrik Sahakari Bank Ltd. (In liquidation) v. DCIT (2015) 370 ITR 30 / 230 Taxman 556 (Guj.)(HC)

S.147 : Reassessment – Reasons to believe not indicating Assessing Officer's reason for re-examining documents – Materials placed in assessment not showing assessee unjustifiably suppressed valid or relevant information which was otherwise available – Assessing Officer's omission sole basis for issuing notice – Reassessment was held to be not valid.[S.148] 1937

The assessee returned a total income of ₹ 58,73,098. During the course of finalisation of the assessment, a notice was issued seeking certain clarifications and the return was thus taken up for scrutiny. Eventually the assessment was made and a demand for ₹ 60,04,860 was raised by the Revenue. Thereafter, the assessee was issued notice proposing reassessment proceedings. The reason was that the assessee was allowed deduction of other provisions amounting to ₹ 1,28,18,673. As the provision towards an unascertained liability was not allowable under the Act, it should have been disallowed and taxed. The omission resulted in underassessment of income by ₹ 1,28,18,673 with consequent tax effect of ₹ 56,95,490. The Revenue did not furnish any reason as to why the assessee's representation was rejected. On a writ petition:

Held, that the "reasons to believe" nowhere highlighted what, if at all, was the material which the Assessing Officer came upon or became aware of subsequent to the original assessment. In other words, what triggered the Assessing Officer's curiosity to impel him to re-examine the files and documents pertaining to a completed assessment was unknown. Nor did the materials placed in the assessment show that the assessee had unjustifiably suppressed valid or relevant information which was otherwise available. The advertence to the disallowance of a provision for an unascertained liability points to the Assessing Officer indulging in what amounted to nothing but a masked review. What appeared to have excited the Assessing Officer's mind was that the original assessment order was not framed properly as it overlooked certain materials which led to loss of revenue. The Assessing Officer in the first instance did not perform his job properly for which the assessee could not be faulted. The Assessing Officer's omission was the sole basis for issuing the reassessment notice and, consequently, proceeding to make the demand. Therefore, the notice and the demands arising consequent to the notice were quashed. (AY. 2007-08)

Techman Buildwell P. Ltd. v. ACIT (2015) 370 ITR 771 (Delhi)(HC)

1938 **S.147 : Reassessment – Assessment order is not a scrap of paper & AO is expected to have applied his mind. Reopening on ground of "oversight, inadvertence or mistake" is not permissible. [S.143(3)]**

The assessee made a claim for deduction for bad debts which was allowed by the AO u/s. 143(3). Subsequently, within four years from the end of the assessment year, the AO reopened the assessment u/s. 148 on the ground that the amount written off as bad debts was a capital loss and could not be allowed as a deduction. The Tribunal allowed the assessee's appeal and quashed the reassessment proceedings. Before the High Court, the department urged that the reopening was valid because (a) the AO acted on an audit objection which constitutes "tangible material" and (b) as the AO had not dealt with the issue in the original assessment order, he had jurisdiction as held in Kalyanji Mavji & Co 102 ITR 287 (SC), New Light Trading Co. 256 ITR 391 (Del.) and Dr. Amin's Pathology Laboratory 252 ITR 673 (Bom). HELD by the High Court dismissing the appeal:

(i) The Tribunal has rendered a finding of fact that the AO raised a query with regard to the issue which was responded to by the assessee and on satisfaction of the same the AO passed the assessment order. Therefore, reopening of assessment on an issue in respect of which a query was raised and responded to by the assessee would amount to a change of opinion;

(ii) The argument that the tangible material is the audit objections received by the AO is not acceptable because there is no mention of any tangible material in the reasons recorded. A reopening notice can be sustained only on the basis of grounds mentioned in the reasons recorded. It is not open to the Revenue to add and/or supplement later the reasons recorded at the time of issuing reopening notice;

(iii) The argument that the AO has been careless in bringing to tax a particular amount which is chargeable to tax and that the Revenue should not be precluded from issuing notice u/s. 148 overlooks the fact that power to reopen is not a power to review an assessment order. At the time of passing assessment order, it expected of the AO that he will apply mind and pass an order. An assessment order is not a mere scrap of paper. To accept the submission of the department would mean to negate the well settled position in law as stated by the Supreme Court in *CIT v. Kelvinator of India Ltd. 256 ITR 1 (Delhi)(FB)* that the concept of 'change of opinion' brought in so as to have in built test to check abuse of power;

(iv) Kalyanji Mavji & Co. 102 ITR 287 (SC), where it was held that "oversight, inadvertence or mistake" in passing assessment order will give the AO jurisdiction to reopen the assessment, is not good law in view of the subsequent decision in Indian and *Eastern Newspaper Society v. CIT 119 ITR 996*. An error discovered on a reconsideration of the same material (and no more) does not give him that power. The aforesaid view on the above proportion has been reiterated by the Apex Court in *A.L.A. Firm v. CIT 183 ITR 285. New Light Trading Co. 256 ITR 391 (Del.)* and Dr. Amin's Pathology Laboratory 252 ITR 673 (Bom.) are also distinguishable on facts. (AY.2005-06)

CIT v. Jet speed Audio Pvt. Ltd. (2015) 372 ITR 762 / 230 Taxman 430 / 117 DTR 82 (Bom.)(HC)

S.147 : Reassessment – After the expiry of four years – Subsidy – Reassessment was held to be bad in law. [S.148] 1939

The Tribunal held that there was no failure by the assessee to disclose material facts truly and fully, the notice under section 148 issued after expiry of four years from the end of the relevant assessment year was not valid. (AY. 1997-98)

Nezone Foods (P) Ltd. v. ACIT (2015) 169 TTJ 33 (UO) / 38 ITR 464 / 69 SOT 734 (Guwahati)(Trib.)

S.147 : Reassessment – After the expiry of four years – Reassessment was held to be invalid. [S.143(3)] 1940

The Tribunal held that the Assessing Officer had raised specific query regarding the interest paid on the secured loan during the original assessment proceedings under section 143(3). Therefore, the reassessment proceedings initiated by the Assessing Officer after expiry of four years from the end of the relevant assessment year is based upon the change of opinion and are not valid in view of the proviso to section 147. (AY. 2002-03)

Tata Consultancy Services Ltd. v. ACIT (2015) 174 TTJ 591 (Mum.)(Trib.)

S.147 : Reassessment – After the expiry of four years – Notice was issued far outside prescribed period under section 149 – Reasons for which second notice issued identical to reasons as in first notice under section 148 – Initiation of reassessment proceedings was held to be bad in law. [S. 148, 149] 1941

The assessee filed its return of income for the assessment year 2002-03 on October 31, 2002. The AO issued notice for assessment under section 148 of the Act, on April 2, 2007. The CIT(A) cancelled the reassessment proceedings. The AO issued another notice under section 148 on March 23, 2009. On appeal, the assessee contended that the grounds on which the second notice issued were identical to those in the first notice under section 148 of the Act:

Held, allowing the appeal, (i) that the notice had to be issued within a period of 4 years or 6 years from the end of the assessment year. The Assessing Officer issued the notice far outside the period prescribed under section 149. Hence, the notice issued on March 23, 2009 was bad in law. That there must be cogent reasons for reopening the assessment. The reasons recorded in the notice were the same in sum and substance and there was nothing new to initiate the proceedings. The Tribunal cancelled the initiation of reassessment proceedings. (AY. 2002-03)

GK AK Rathi HUF v. ITO (2015) 37 ITR 501 / 68 SOT 300 (URO)(Mum.)(Trib.)

S.147 : Reassessment – Reason cannot be mere whim – Based on real material – Statement made during survey no evidentiary value – Not a basis for reopening – Reassessment invalid. [S. 143(1), 148] 1942

Assessee had filed return of income declaring income of ₹ Nil as on 30-7-2003. The same was processed under section 143(1) of the Income Tax Act, 1961. Thereafter, case was reopened u/s. 147 of the Act, on the basis that during the course of survey it was found that assessee has suppressed its receipts. Rejecting assessee's objections against reopening; AO estimated the gross receipts and thereby made additions. CIT(A) confirmed the assessment order. The ITAT held that survey operations were carried out at the premises of the assessee as on 26-3-2010 i.e. relating to assessment year

2010-11 and year under consideration under appeal is for AY 2003-04. Material found during the course of survey, whether loose slips or the statement recorded relate to AY 2010-11 only and there is no reference of any material found during the course of survey relating to AY 2003-04. Before reopening the case under section 147, AO must have reason to believe that the income chargeable to tax had escaped assessment. After perusing the reason recorded, the Tribunal was not in agreement with AO or CIT(A) that the AO had reasons to believe that income had escaped assessment in respect of AY 2003-04. AO can assume jurisdiction under this provision only if he has sufficient material before him; he cannot form belief on the basis of his whim and fancy and the existence of material must be real. Further, there must be nexus between the material and escapement of income. Statement was recorded at the time of survey does not have evidentiary value, therefore, cannot be the basis for reopening. Reassessment proceedings initiated u/s. 148 by AO are invalid and thereby were quashed. (AY. 2003-04, 2004-05)
Alfa Radiological Centre Pvt. Ltd. v. ITO (2015) 44 ITR 184 (Chandigarh)(Trib.)

1943 **S.147 : Reassessment – Notice issued by AO having no jurisdiction over assessee – Reassessment not sustainable. [S. 148]**
The assessee filed the return of income as a salaried employee for the A.Y 2008-09 before the ITO, Ward 5(4) who had jurisdiction over salary cases. After retirement, when the assessee had received income from different sources, he filed returns for A.Y 2009-10 and A.Y 2010-11 with the ITO, Ward 3(2) as the ITO Ward 5(4) having jurisdiction over the salary cases declined to accept the returns. During the assessment proceeding for A.Y 2008-09, the AO (ITO 5(4)) has raised a specific query regarding the deposits made by the assessee in his bank account which were relevant to A.Y 2009-10. The assessee had submitted that it was shown as advances received towards sale of agricultural land. Since the return for A.Y 2009-10 was not filed before ITO 5(4), he issued the notice under Section 148 of the Act believing that there is escapement of income. The CIT(A) annulled the assessment framed consequent to the reopening holding that reopening was done by an officer having no jurisdiction over the assessee and therefore not valid. It further held that mere non-filing of return with the jurisdictional officer would not be a valid reason to reopen the assessment. In the absence of return before the said ITO, there could be no occasion for the AO to believe or form reasons for any income escaping assessment. On appeal by Revenue to Tribunal, it held the reassessment as bad in law as the ITO 5(4) had no jurisdiction over the assessee. (AY. 2009-10)
ITO v. Mahendra Singh Tyagi (2015) 44 ITR 265 (Luck.)(Trib.)

1944 **S.147 : Reassessment – Non-deduction of TDS – Payment of subscription to non resident – Reassessment was held to be justified – Due to non-co-ordination between departmental officers amounts remained untaxed – Reopening of assessment was held to be not justified. [S. 40(a)(ia), 148].**
Assessee had filed its return declaring Nil income. AO completed assessment on 11.11.2010 u/s 143(3) r.w.s.144C(5) in accordance with directions of Dispute Resolution Penal (DRP). Assessment was reopened, as per notice issued u/s. 148. Tribunal cannot and should not enter into the merits of the subjective satisfaction of the AO nor should judge the sufficiency of the reasons recorded. What can be seen to whether the belief

of the AO is based on tangible, concrete and new information and whether it is capable of supporting such a conclusion. The law only requires that the information or material on which the AO records his or her satisfaction is communicated to the assessee. The satisfaction arrived at by the AO should be *prima facie* level. Considering the facts of the case Tribunal held that the reassessment was held to be valid. Assessing Officer has not held that there was any failure on part of assessee to disclose material facts fully and truly and further he did not held that the assessee had concealed facts that resulted escapement of income. Tribunal held that due to non-co-ordination between departmental officers amounts remained untaxed hence reopening of assessment was held to be not justified. (AY. 2005-06, 2006-07)
Viacom 18 Media (P) Ltd. v. ACIT (2015) 116 DTR 417 / 169 TTJ 267 / 70 SOT 212 (Mum.)(Trib.)

S.147 : Reassessment – Confession by partner – Bogus loans – Reassessment was held to be valid. [S. 69A, 132, 148] 1945
The assessee an Individual has already been assessed u/s. 143(3). On the basis information found related to assessee during search and seizure on other assessee, reassessment initiated on the assessee, which the assessee challenged as invalid in law. Held Challenge of initiation re-assessment by issue of notice in such case found unsustainable. (AY.1999-2000)
DCIT v. Kumar Traders & Ors. (2015) 151 ITD 788 / 169 TTJ 208 (Kol.)(Trib.)

S.147 : Reassessment – Non-resident – Royalty – Tax was deducted at 15% whereas tax leviable at 30% – Reassessment was held to be valid. DTAA-India-USA. [S.44D, 115A, 143(1), 148] 1946
The assessee, a non-resident company filed its return of income declaring income received as royalty from its Indian subsidiary and discharged its tax liability by way of taxes deducted at source by its wholly owned subsidiary in India. Taxes were deducted at the rate of 15 per cent claiming beneficial provisions of the India-US tax treaty in contrast to section 44D read with section 115A that stipulates tax rate of 30 per cent. The return of income was processed under section 143(1) and thereafter assessment was reopened under section 147 by issuing notice under section 148 and reassessment proceedings were completed accepting the returned income but the Assessing Officer taxed it at the rate of 30 per cent applying section 115A read with section 44D. It was held by the ITAT that the expression "relief in the return" employed in sub-clause (b) of Explanation 2 section 147 would bring in its ambit the benefit that an assessee got by virtue of non-making an assessment or by non-determining its tax liability. Thus, if an assessee offered income by applying lower rate of tax and it was not determined by way of an assessment order then, to that extent assessee would get relief in the return and would fall in the ambit of escaped income. (AY. 2002-03 to 2004-05)
McDonald's Corporation v. Dy. DIT (2014) 151 ITD 261 / (2015) 170 TTJ 722 (Delhi)(Trib.)

S.147 : Reassessment – Change of opinion – Capital gains – Employees stock option – ESOP – Reassessment was bad in law. [S. 2 (42A), 143(1), 148] 1947
Before the Tribunal the assessee submitted that it was mere change of opinion as no fresh material came in the possession of the AO. The Tribunal held that there

was fresh material and there is no change of opinion, hence, the reopening is valid. (AY. 2001-02)
Kamlesh Bahedia v. ACIT (2014) 151 ITD 495 / (2015) 169 TTJ 68 (Delhi)(Trib.)

1948 **S.147 : Reassessment – Business income – Income from house property – Company took flats on tenancy basis, income earned from flats was to be treated as business income and not income from house property – Reassessment was quashed. [S. 22, 28(i), 148]**
Assessee Company was engaged in business of dealing in house property for commercial exploitation. Assessee had taken over several flats on tenancy basis and incomes from these flats were shown as income from business activity and same was duly processed. Thereafter, assessment was reopened by Assessing Officer on ground that receipts from tenancy was to be taxed under head 'Income from house property' instead of 'Business income'. It was observed that during relevant assessment years flats were taken on tenancy basis, from which assessee earned income and it was only from assessment year 2005-06, assessee had purchased these flats and became owner. Further, up to assessment year 2001-02, department itself had treated income from said flats taken on tenancy basis as business income. Material on record itself negated premise on which Assessing Officer had entertained his reason to believe which was based on wrong presumption; therefore, reopening of assessment was void *ab initio*.)(AY. 2003-04, 2004 -05)
Dy. CIT v. Dhanrajgir Business (P.) Ltd. (2015) 155 ITD 892 / 41 ITR 669 (Mum.)(Trib.)

1949 **S.147 : Reassessment – Recorded reasons – Issue of furnishing the 'Reasons' for reopening the assessment goes to the root of the matter. In the event of failure of the AO to furnish the reasons, the reopening is bad in law. [S.148]**
(i) The undisputed facts are that, i) No 'Reasons' are available in the assessment record, and ii) there is nothing on record to show that certified copy of verbatim 'Reasons' was ever provided to the assessee, despite the request made by the assessee before AO, more than once. It clearly indicates that no 'Reasons' were recorded in fact and therefore, these could not have been provided to the assessee. Had the 'Reasons' been recorded by AO, these would have definitely been provided to the assessee. The position of law is clear. It has been held by Hon'ble Supreme Court in the case of GKN Driveshaft 259 ITR 19, that it is mandatory on the part of the AO to provide the copy of the reasons to the assessee and to meet the objections filed by the assessee thereto, if any, before the AO can frame the reassessment order. It is further noted that Hon'ble Bombay High Court in the case of *CIT v. Videsh Sanchar Nigam Ltd. (2012) 340 ITR 66 (Bom.) (HC)*, has held that in case reasons are not furnished by the AO to the assessee before completion of reassessment proceedings, reassessment order cannot be upheld. It is further noted that SLP filed by the Revenue against the order of Hon'ble Bombay High court, has been rejected by Hon'ble Supreme Court. Similar view has been taken by Hon'ble Mumbai bench of ITAT in the case of *Tata International Ltd. v. DCIT [2012] 52 SOT 465 (Mum.)(Trib.)* and also in few other judgments. We further derive support of our view from a latest judgment of Hon'ble Bombay High Court in the case of *CIT v. Trend Electronic in ITA No.1867/2013* order dated 16th September 2015. In this case, Hon'ble Jurisdictional High Court, following its earlier decision in the case of Videsh Sanchar

Nigam Ltd. (supra), held that law laid down by Hon'ble Supreme Court in the case of G.K.N. Driveshafts (India) Ltd., is clear and mandatory for implementation and it is to be strictly followed by the AO before framing the reassessment order. It was further held that rule with regard to furnishing of reasons by the AO is to be followed strictly, as the power given to the AO for reopening of a completed assessment under the Income Tax Act, is an exceptional power and whenever Revenue seeks to exercise such power, it must strictly comply with the prerequisite conditions i.e., 'Reasons' must be recorded and these recorded 'Reasons' must be furnished to the assessee, when sought for, so as to enable the assessee to object to the same, during the course of assessment proceeding. (ii) Similar view has been reiterated by Hon'ble Karnataka High Court in the case of Kothari Metals (Writ Appeal No. 218/2015, order dated 14th August 2015, wherein it has been held that the question of non-furnishing the 'Reasons' for reopening an already concluded assessment goes to very root of the matter, and that the assessee is entitled to be furnished the 'Reasons' for such reopening and that if 'Reasons' are not furnished to the assessee, then the proceedings for the reassessment cannot be taken any further, and reopening of the assessment would be bad in law.(ITA No. 5926/Mum/2009, dt. 28.10.2015) (AY. 2001-02)

Muller & Philpps (India) Ltd. v. ITO (Mum.)(Trib.); www.itatonline.org

S.147 : Reassessment – Bogus bills – Reopening solely on the basis of information received from another AO that the assessee has booked bogus bills but without independent application of mind to the information renders the reopening void.[S. 143(1), 148] 1950

Allowing the appeal of the assessee the Tribunal held that: the observation of the Assessing Officer also shows that it was letter dated 20-12-2013 received by him from the ACIT on the basis of which the Assessing Officer could make a view that the purchase bills provided by these persons or their family members is nothing but bogus purchase bills. At the time of recording of the reasons the Assessing Officer apparently was not having any idea about the nature of the transactions entered into by the assessee. In the reasons recorded there is no mention about the nature of the transactions. As per provision of section 147 an assessment can be reopened if the Assessing Officer has reasons to believe that any income chargeable to tax has escaped assessment. The reasons to believe has to be that of the Assessing Officer and further there have to be application of mind by the Assessing Officer. The Assessing Officer was also not aware of the nature of the accommodation entries. In the reasons recorded he has simply mentioned the names of the party and the amount and nowhere has stated the nature of such entry. This also shows that the Assessing Officer has made no effort to look into the return of the assessee which was available with him. This fact gets further supported from the sheet appended to the reasons and quoted on page 4 of the assessment order whereby against item No. 7, whether the assessment is proposed to be made for the first time, the Assessing Officer has stated 'Yes', and in Column No. 7(a), whether any voluntary return had already been filed and in Column No. 8(b), date of filing the said return 'NA' has been stated. Thus this is a clear case of non-application of mind by the Assessing Officer. It may also be relevant that on page 2 of the assessment order, the Assessing Officer himself has stated that in this case the return of income for

the year under consideration was filed with this ward on 27-9-2006. These facts clearly demonstrate that the return was with the same ward and at the time of recording of the reasons for reopening the assessment, the Assessing Officer has not looked at the return and in a mechanical way, on receipt of the letter from the CIT, the assessment has been reopened. It is a settled position of law that there must be material for formation of a belief that income has escaped assessment. Further reasons referred to must disclose process of reasoning by which the Assessing Officer holds reason to believe. There must be nexus between such material and belief. Further and most importantly the reasons referred to must show application of mind by the Assessing Officer. It is also a settled law that the validity of the initiation of the reassessment proceeding is to be judged with reference to the material available with the Assessing Officer at the point of time of the issue of notice under section 147.

(ii) In the present case, as is evident from the assessment order, the Assessing Officer was having nothing except the list provided by the CIT, Central-2, New Delhi about the list of accommodation entries. Beyond that he was not having the copies of the statement of any of these persons, He was not having copy of the assessment orders and other details or document which would have enabled the Assessing Officer to apply his mind and form a belief that income has escaped assessment. In fact this information was not with the Assessing Officer till fag end of the reassessment proceedings, a fact admitted by the Assessing Officer himself in the assessment order. Consequently, the reopening is not valid. (ITA No. 1372/Del/2015, dated 28.10.2015) (AY. 2006-07)

Unique Metal Industries v. ITO (Delhi)(Trib.); www.itatonline.org

1951 **S.147 : Reassessment – Information collected by Judges Enquiry Committee (JIC) – Agricultural income – Holding land in the names of relatives – Reassessment was held to be valid. [S. 143(1), 148]**

Assessee filed his return of income for AY.2004-05 declaring income of ₹ 6,97,370 including agricultural income of ₹ 2,13,930. Return of income of assessees were processed u/s. 143(1). Re-assessment proceedings were initiated against assessees and notice u/s. 148 were issued to assessees on basis of information collected by Judges Enquiry Committee (JIC). Assessing Officer included income of some of relatives of Assessee on ground that relatives of Assessee were holding lands of Assessee in their names. Lands were later transferred to companies in which Assessee and his family members had substantial interest. Assessing Officer made additions disallowances in income returned by assessees on various counts. CIT(A) upheld validity of re-assessment. Assessee challenged proceedings u/s. 147 initiated on ground that information relied on by AO was not procured from authorized source. Tribunal held that for initiating reassessment proceedings, source of information was not relevant as information and its authenticity would matter in reopening of assessment. If AO had reliable information and on basis of that information he had 'reason to believe' that income escaped assessment, AO was well within his jurisdiction to initiate reassessment proceedings, original assessment in respect of all assessees were completed u/s. 143(1). AO had no occasion to analyse transactions and form any opinion. It was only after receipt of information in form of data collected by JIC that AO initiated reassessment proceedings, after examining information received, AO might have reasons to believe that income escaped assessment. Provisions of S. 147 for reopening were invoked after

information collected by JIC was passed on to AO of Assessee. AO had substantial material to believe that income escaped assessment. Reopening of assessment was held to be justified. (AY. 2004-05, 2007-08 to 2009-10)
DCIT v. Justice P.D. Dinakaran & Ors. (2015) 169 TTJ 329 / 117 DTR 1 / 68 SOT 76 (URO) (Chennai)(Trib.)

S.147 : Reassessment – Within four years – Tangible material – In the absence of "fresh tangible material" reassessment is not valid. [S.148, 151] 1952
Allowing the appeal of assessee the Tribunal held that in the absence of "fresh tangible material" reassessment is not valid. (AY. 2006-07)
Motilal R. Todi v. ACIT (2015) 174 TTJ 185 (Mum.)(Trib.)

S.147 : Reassessment – Revenue audit – Business expenditure – Waiver of interest – The revenue audit cannot perform functions of judicial supervision and a reopening based on the interpretation of the audit cannot be sustained. However, a reopening based on communication of the law or factual inaccuracy by the audit is valid – On facts reassessment was held to be valid. [S.43B, 148] 1953
Tribunal held that the Revenue audit cannot perform functions of judicial supervision and a reopening based on the interpretation of the audit cannot be sustained. However, a reopening based on communication of the law or factual inaccuracy by the audit is valid, hence on facts reassessment was held to be valid. (AY. 2003-04)
Rollatainers Ltd. v. ACIT (2015) 43 ITR 217 / 173 TTJ 1 / 124 DTR 222 (Delhi)(Trib.)

S.147 : Reassessment – Agent of non-resident – Limitation – Reassessment was held to be valid – Fees for technical services – On merit matter remanded to CIT(A). [S.9(1)(vii), 115A, 148, 149(3), 163] 1954
For the assessment year 2005-06, ONGC filed the original return on October 19, 2005 and revised return on November 28, 2006, as the agent or representative assessee of Foster Wheeler Energy Ltd., a non-resident. Notice under section 148 of the Income-tax Act, 1961 was issued on March 31, 2010. ONGC contended that the reassessment done on it as an agent under section 163 of the Act was beyond the time limit prescribed under section 149(3) of the Act. The Assessing Officer held that the notice dated March 31, 2010 having been issued in the name of the non-resident and not in the name of the agent, it was not barred by limitation of time. The Commissioner (Appeals) cancelled the reassessment on the ground that the notice under section 148 of the Act was beyond two years to an agent under section 163 of the Act. On appeal:
Held, allowing the appeal, that ONGC filed the original return and revised return as an agent of the non-resident and signed the return and several other documents for and on behalf of the non-resident. This liability was fastened on ONGC in accordance with clause 11 of the agreement between ONGC and the non-resident. Thus the act and conduct of ONGC showed that ONGC waived the benefit of privilege of opportunity of being heard available under section 163(2) of the Act. The facts and circumstances remained the same at the time of application for reassessment of non-resident through the agent. As assessment includes reassessment, ONGC could not be permitted to contend that it was an agent for filing returns under section 139(1) and for regular

assessment but not for reassessment. The provisions of section 149(3) of the Act and the time limit prescribed therein for the issuance of notice under section 148 of the Act had no application in the case and there was no necessity to pass an order in terms of section 163(2) of the Act. Therefore, the reassessment was valid. Held also, that as the reassessment was held to be valid, the question whether the income of the assessee was payment for services in the nature of technical services and taxable in accordance with the provisions of section 115A of the Act read with section 9(1)(vii) of the Act was remitted to the Commissioner (Appeals) for decision on the merits.(AY. 2005-06)
ADIT(IT) v. Oil and Natural Gas Corporation Ltd. (2015) 39 ITR 11 (Delhi)(Trib.)

1955 **S.147 : Reassessment – Change of opinion – Export oriented undertaking – No fresh tangible material – Reassessment was held to be not valid. [S. 10B,148]**
For relevant year, Assessing Officer allowed assessee's claim for exemption under section 10B in respect of medicinal chemistry and clinical pharmacology - Subsequently, assessment was reopened only for reason that in scrutiny assessment deduction claimed on same basis had been denied - However, there was no fresh tangible material available before Assessing Officer – initiation of reassessment proceeding was not justified. (AY. 2006-07)
GVK Biosciences (P.) Ltd. v. Add.CIT (2014) 29 ITR 684 / (2015) 67 SOT 163 (URO)(Hyd.) (Trib.)

1956 **S.147 : Reassessment – Preference to transfer pricing officer – reference to Transfer Pricing Officer, in absence of any proceedings pending before Assessing Officer, is unsustainable in law – Reassessment was held to be legally unsustainable. [S. 143(2), 92CA)]**
In the case of the Assessee, no notice u/s 143(2) was issued within the time limit i.e. 30-9-2008. It was only on 24-12-2009 that the Assessing Officer made a reference, under section 92CA(3), to the Transfer Pricing Officer for determination of arm's length price of the international transactions entered into by the assessee with its associated enterprise. This reference to the TPO, and the resultant proceedings before him, culminated in the order dated 15-10-2010 proposing an arm's length price adjustment of ₹ 2.81 crores. On the basis of TP Report, notices were issued u/s. 147 reopening the case. The assessee objected to this initiation of re-assessment proceedings. It was contended that the time limit for issuance of notice under section 143(2) had expired. It was also pointed out that reference to the TPO was invalid as it was made before the initiation of re-assessment proceedings under section 147, at a time when no proceedings were pending before the Assessing Officer.
As held by the Karnataka High Court, in the case of the *CIT v. SAP Labs (P.) Ltd.* in [IT Appeal Nos. 842 of 2008] and 339 of 2010, dated 25-8-2014, unless an Income tax return, in respect of which notice under section 143(2) can be issued, is pending before the Assessing Officer, a reference to the Transfer Pricing Officer cannot be made by the Assessing Officer.
Guidance can be found from the Bombay High Court's judgment in the case of *CWT v. Sona Properties [2010] 327 ITR 592*. That was a case in which the Assessing Officer had made a reference to the Departmental Valuation Officer after the end of the assessment

proceedings and the reassessment proceedings were quashed for the short reason of illegality for reference

The assessee's case was rather reopening of assessment on the consequence of the report obtained as a result of the reference. The re-assessment proceedings were held to be legally unsustainable. (AY.2007-08)

XL India Business Services (P.) Ltd. v. ACIT (2014) 51 taxmann. com 549 / 67 SOT 117 / 167 TTJ 467 (Delhi)(Trib.)

S.147 : Reassessment – Failure to comply with the procedure prescribed in G.K.N. Drive Shaft (India) Ltd. vs. ITO 259 ITR 19 (SC) renders the assessment order invalid & void *ab initio*. [S.148] 1957

In the first round of the appeal, the ITAT set aside the matter to the file of the AO with the direction to dispose of the objections raised by the assessee to the jurisdiction of the AO for issuance of notice u/s. 148 of the Act first by passing a speaking order in view of the decision of the Hon'ble Supreme Court in *G.K.N. Drive Shaft (India) Ltd. v. ITO 259 ITR 19 (SC)*. However, though the assessee raised objection on the issue of jurisdiction for issuance of notice u/s 148 of the Act, the AO while disposing of the said objection also proceeded to pass the reassessment order instead of restricting itself for the disposal of the objection passing a separate order.

The Tribunal observed that the ratio of *G.K.N. Drive Shaft (India) Ltd. v. ITO 259 ITR 19 (SC)* and *General Motors India Pvt. Ltd. v. DCIT 353 ITR 244 (Guj.)* is that the Assessing Officer is mandated to decide the objection to the notice u/s. 148 of the Act and supply or communicate it to the assessee. Thereafter, the assessee gets an opportunity to challenge the order in a Writ Petition. Thereafter, the AO may pass the reassessment order. It is not open to the AO to decide the objection raised against notice u/s. 148 by a composite assessment order. Thus, the Assessing Officer was required to first decide the objection of the assessee filed u/s. 148 and serve a copy of the order on assessee. And after giving some reasonable time to the assessee for challenging his order, it is open to him to pass an assessment order. Since such compliance has not been made by the Assessing Officer in the present case, therefore, the ITAT held that the impugned assessment order as not valid and the same is held as void *ab initio*. (ITA No. 3061/ Del/2012, dated 13.03.2015) (AY. 1997-98)

Suresh Chandra v. ITO (Delhi)(Trib.); www.itatonline.org

S.147 : Reassessment – Recorded reasons – If the assessee does not ask for reasons and file objections before the AO, he is not entitled to challenge the reopening proceedings. [S.148, 149] 1958

The Tribunal held that Law does not provide for mandate that the Assessing Officer shall *suo motu* supply the copy of those 'reasons to believe' to the assessee. It is for assessee and if assessee chooses to ask for reasons then he/she can file objection thereto. Only when such objections are filed, it becomes the duty of the Assessing Officer to dispose of all those objections first by passing a speaking order and if the objections are rejected then it gives a cause to the assessee to challenge such order by filing an appropriate writ. This is the law laid down by Hon'ble Supreme Court in *GKN Drive Shafts (India) Ltd. v. ITO – 259 ITR 19*. In the instant case, the assessee did not ask for reasons to believe. The assessee participated in the reassessment proceedings. The

reassessment order was passed. The assessee felt aggrieved to such order and filed the appeal before the CIT(A). The CIT(A) has passed an appropriate order on this issue. Thus, the assessment was reopened by issuing a legal and valid notice u/s. 148 of the Act. On the procedural aspect also, there is no infirmity in the notice. The notices u/s. 143(2) and 143(1) were also properly served on the representative of the assessee.
(ii) Hon'ble Delhi High Court in the case of *A.G. Holdings Pvt. Ltd. v. ITO* reported in 352 ITR 364 has held that there is no requirement in section 147 of the Act or section 148 or section 149 that the reasons recorded for reopening an assessment should also accompany the notice of reassessment issued u/s. 148. The requirement in section 149(1) is only that the notice u/s. 148 shall be issued. There is no requirement that it should also be served on the assessee before the period of limitation. There is also no requirement in section 148(2) that the reasons recorded shall be served along with the notice of reopening the assessment. The requirement, which is mandatory, is only that before issuing the notice to reopen the assessment, the Assessing Officer shall record his reasons for doing so. Thus, the Assessing Officer is duty bound to supply the reasons recorded for reopening the assessment to the assessee, after the assessee files the return in response to the notice issued u/s 148 and on his making a request to the Assessing Officer to that effect. In the case under consideration, even the assessee has not made any request for supply of the reasons. (ITA No. 4328/Del/2011, dt. 11-3-2015) (AY. 2000-01)
Anil Kumar Chaudhary v. ITO (Delhi)(Trib.); www.itatonline.org

1959 **S.147 : Reassessment – Cash credits – Bank deposit – There must be something which indicates, even if not establishes, the escapement of income from assessment – Reopening an assessment on the ground that there is need of an inquiry which may result in detection of an income escaping assessment is not valid. [S. 68, 148]**

(i) The important point is that even though reasons, as recorded, may not necessarily prove escapement of income at the stage of recording the reasons, such reasons must point out to an income escaping assessment and not merely need of an inquiry which may result in detection of an income escaping assessment. Undoubtedly, at the stage of recording the reasons for reopening the assessment, all that is necessary is the formation of *prima facie* belief that an income has escaped the assessment and it is not necessary that the fact of income having escaped assessment is proved to the hilt. What is, however, necessary is that there must be something which indicates, even if not establishes, the escapement of income from assessment. It is only on this basis that the Assessing Officer can form the belief that an income has escaped assessment. Merely because some further investigations have not been carried out, which, if made, could have led to detection to an income escaping assessment, cannot be reason enough to hold the view that income has escaped assessment. It is also important to bear in mind the subtle but important distinction between factors which indicate an income escaping the assessments and the factors which indicate a legitimate suspicion about income escaping the assessment. The former category consists of the facts which, if established to be correct, will have a cause and effect relationship with the income escaping the assessment. The latter category consists of the facts,

which, if established to be correct, could legitimately lead to further inquiries which may lead to detection of an income which has escaped assessment. There has to be some kind of a cause and effect relationship between reasons recorded and the income escaping assessment (*ITO v. Lakhmani Mewal Das [(1976) 103 ITR 437]* followed);

(ii) On facts, all that the reasons recorded for reopening indicate is that cash deposits have been made in the bank account of the assessee, but the mere fact that these deposits have been made in a bank account does not indicate that these deposits constitute an income which has escaped assessment. The reasons recorded for reopening the assessment do not make out a case that the assessee was engaged in some business and the income from such a business has not been returned by the assessee. As the Tribunal do not have the liberty to examine these reasons on the basis of any other material or fact, other than the facts set out in the reasons so recorded, it is not open to deal with the question as to whether the assessee could be said to be engaged in any business; all that is to be examined is whether the fact of the deposits, *per se,* in the bank account of the assessee could be basis of holding the view that the income has escaped assessment. The answer, in our understanding, is in negative. The Assessing Officer has opined that an income has escaped assessment of income because the assessee has amount in his bank account but then such an opinion proceeds on the fallacious assumption that the bank deposits constitute undisclosed income, and overlooks the fact that the sources of deposit need not necessarily be income of the assessee. It may be desirable, from the point of view of Revenue authorities, to examine the matter in detail, but then reassessment proceedings cannot be resorted to only to examine the facts of a case, no matter how desirable that be, unless there is a reason to believe, rather than suspect, that an income has escaped assessment. (AY. 2008-09)

Bir Bahadur Singh Sijwali v. ITO (2015) 68 SOT 197 (URO)(Delhi)(Trib.)

S.147 : Reassessment – Purchase of property and entering into sale agreement – Failure by assessee to file return and disclose fully and truly all material facts – Reassessment was held to be valid. [S.148] 1960

Failure by assessee to file return and disclose fully and truly all material facts necessary for assessment is a valid reason to believe income chargeable to tax escaped assessment. Reassessment was held to be valid. (AY. 2005-06)

Prakash Shantilal Parekh v. ITO (2015) 37 ITR 119 (Mum.)(Trib.)

S.147 : Reassessment – Assessing Officer simply reproducing details received from Director of Income-tax without any verification and examination – Reassessment was held to be not valid. [Ss. 11, 12, 69, 148] 1961

Allowing the appeal the Tribunal held that reasons recorded for issuance of notice under section 148 of the Act. The Assessing Officer had simply reproduced the details received from the Director of Income-tax, Investigation Wing, without any verification and examination of the information received. Notice under section 148 of the Act and all the subsequent proceedings were not sustainable. (AY. 2003-04)

Monarch Educational Society v. ITO(E) (2015) 37 ITR 512 / 68 SOT 315 (URO)(Delhi) (Trib.)

1962 **S.147 : Reassessment – Allegation of bogus billing proved wrong – Reassessment was held to be bad in law. [S.132(4)]**

Assessee's assessment was reopened after four years on the basis of statement of one Mr. Parag Mehta u/s. 132(4) wherein the assessee was indicated as one of the beneficiaries of bogus bills. During the year, the assessee had received ₹ 5 crore from one of the alleged bogus bill provider.

On the issue of reopening, the assessee contended that it had no business dealings except for receipt of share allotment money, and hence, there was no question of bogus billing, and that till date shares are owned by that entity. Also, even in the statements, Mr. Parag Mehta and others did not allege that money invested in the assessee was bogus.

The Tribunal found that all material facts such as details of allotment of shares, application for allotment, company board resolution, return of allotment with ROC etc. had been filed, and when the very reasons which formed the basis of reopening were proved to be wrong, reassessment was not permissible. Furthermore, the reopening was done for suspected bogus billing which was different from the reason for actual addition i.e. share application money received i.e. unexplained cash credits. Therefore, even on this ground, reassessment had to be held bad in law. (ITA No. 2636/M/2013 dt. 6-2-2015) (AY. 2004-05)

Lark Chemicals P. Ltd. v. ACIT (Mum.)(Trib.) www.ctconline.org)

1963 **S.147 : Reassessment – Transfer pricing – Reference to TPO – Condition precedent – When no assessment was pending reference to TPO was held to be bad in law – Reassessment proceedings on the basis of TPO's order held to be bad in law. [S.92CA, 144C, 148]**

The assessee filed the return of income on 29-10-2007, and the time limit for issuance of notice, under section 143(2) selecting for scrutiny assessment was expired on 30-09-2008. AO on 24-12-2009 made a reference under section 92CA(3) to TPO for determination of arm's length price of international transactions entered in to by assessee with its associated enterprise. TPO passed an order on 15-10-2010 proposing to arm's length adjustments. The AO initiated reassessment proceedings. Assessee objected for reassessment however AO rejected the objection of assessee. On appeal DRP also up held the reassessment proceedings. On appeal to the Tribunal the Tribunal held that in the absence of any proceedings pending before the AO a reference to the TPO cannot be made by the AO. On the facts the AO made reference to TPO when no proceedings were pending and the limitation for issue of notice under section 143(2) has expired. Accordingly the reassessment proceedings was quashed. (AY 2007-08)

XL India Business Services (P) Ltd. v. ACIT (2014) 51 taxmann.com 549 (2015) 67 SOT 117 (Delhi)(Trib.)

1964 **S.147 : Reassessment – Notice – Received by accountant – Held to be proper service – Assessment was held to be valid. [S.143(3)]**

Court held that merely because notice under section 148(1) issued to assessee had been taken by authorized representative of assessee who was accountant of assessee, it could

not be said that service of notice was not proper and, therefore, reassessment proceeding initiated would be held to be valid and legal. (AY. 1975-76 to 1977-78)
Modern Farm Services v. CIT (2015) 228 Taxman 106 (Mag.)(P&H)(HC)

Section 150 : Provision for cases where assessment is in pursuance of an order on appeal, etc.

S.150 : Assessment – Finding of Tribunal – Finding given by Tribunal could not enable Assessing Officer to extend period of limitation – Order barred by limitation. [S.158BC] 1965
Tribunal in block assessment proceeding in assessee's case held that extent of claim for depreciation made by assessee would not be a subject matter of enquiry in block assessments but in regular assessment. In view of said decision, Assessing Officer sought to reopen assessment for relevant year after a period of nine years. There had been no failure on part of assessee to disclose truly and fully all material facts necessary for assessment. Moreover, no material was found to establish that claim for depreciation made was incorrect. Allowing the petition the Court held that finding given by Tribunal could not enable Assessing Officer to extend period of limitation as provided under section 150 for purpose of issuing notice in respect of assessment year 1993-94.(AY. 1993-94)
EskayK'n' IT (India) Ltd. v. Dy. CIT (2015) 229 Taxman 204 (Bom.)(HC)

Section 151 : Sanction for issue of notice

S.151 : Reassessment – After the expiry of four years – Sanction for issue of notice – Sanction has to be by Joint Commissioner and not by Commissioner – Order passed with approval of Commissioner was held to be bad in law – Not curable defects. [S. 143(1),147, 148, 292B] 1966
Dismissing the appeal of Revenue the Court held that where re-assessment proceedings were initiated after expiry of four years from end of relevant years, sanction for issuance of notice for reassessment proceedings was to be granted by Joint Commissioner and not by Commissioner. The Court also invokes the principle enunciated by the Privy Council in *Nazir Ahmad v. Emperor AIR 1936 PC 253* that if the statute mandates that something be done in a particular manner, it should be in that manner or not at all. The Court also relying on the ratio in *CIT v. S. P. L's Siddhartha Ltd. (2012) 345 ITR 223 (Delhi)(HC)* rejected the Revenue's contention about its application holding that where a jurisdictional infirmity strikes at the root, in validating the Issuance of notice, Section 292B cannot be rescue it. (AY. 2002-03)
CIT v. Soyuz Industrial Resources Ltd. (2015) 232 Taxman 414 (Delhi)(HC)

S.151 : Reassessment – After the expiry of four years – Sanction for issue of notice – Order passed without following mandatory of sanction of sanction of Chief CIT or CIT under the proviso is inherent lacuna which is not curable hence bad in law. [S. 147, 148, 292B] 1967
The assesse objected to the reassessment on the ground that required sanction of CIT was not taken. AO rejected the objection of the assessee on the ground that required

sanction was not taken due to oversight. On writ allowing the petition the Court held that; order passed without following mandatory of sanction of sanction of Chief CIT or CIT under the proviso is inherent lacuna which is not curable hence bad in law. (AY. 2007-08)
Dhadda Exports v. ITO (2015) 377 ITR 347 / 278 CTR 258 / 232 Taxman 407 (Raj.)(HC)

1968 **S.151 : Reassessment – After the expiry of four years – Sanction for issue of notice – Depreciation – Sanction was given as suggested by Audit party – Reassessment was held to be invalid. [S.147, 148]**
Scrutiny assessment was completed. Notice u/s. 148 was issued by the AO beyond the period of four years from the end of relevant assessment year on ground that excess depreciation was allowed to the assessee in the relevant assessment year. The assessee filed the Writ Petition against the notice and contended that since the Assessing Officer had not obtained approval from the Chief Commissioner or the Commissioner before issuing of such notice, same was invalid. Also, notice for reopening was issued at the instance of the Audit Party. Allowing the petition the Court held that, Certain aspects of matter in case of assessee were brought to notice by audit party and suggestions with respect to remedial measures were also made by them such approval could not be seen as substantial compliance of section 151(1). Under such circumstances, impugned notice was quashed. (AY. 2005-06)
Adani Ports And Special Economic Zone Ltd. v. Dy. CIT (2015) 228 Taxman 114 (Mag.) (Guj.)(HC)

1969 **S.151 : Reassessment – Sanction for issue of notice – Mere non-mentioning of sanction accorded by authority in notice issued would in any way be fatal to process of reopening [S.147, 148]**
Dismissing the petition the Court held that mere non-mentioning of sanction accorded by authority in notice issued under section 148 would in any way be fatal to process of reopening. (AY. 2007-08)
Sword Global India (P.) Ltd. v. ACIT (2015) 234 Taxman 187 (Mad.)(HC)

1970 **S.151 : Reassessment – Sanction for issue of notice – Recording of satisfaction in mechanical manner – Reassessment was held to be invalid. [S. 147, 148]**
Where Joint Commissioner recorded satisfaction in mechanical manner and without application of mind, in order to accord sanction for issuing notice under section 148, assumption of jurisdiction to reopen block assessment was invalid.
CIT v. S. Goyanka Lime & Chemicals Ltd. (2015) 231 Taxman 73 (MP)(HC)

1971 **S.151 : Reassessment – Sanction for issue of notice – Approval of commissioner – Merely stating "Approved" is not sufficient sanction of CIT and renders reopening void. [S. 147, 148]**
A simple reading of the provisions of sec. 151(1) with the proviso clearly show that no such notice shall be issued unless the Commissioner is satisfied on the reasons recorded by the AO that it is a fit case for the issue of notice which means that the satisfaction of the Commissioner is paramount for which the least that is expected from

the Commissioner is application of mind and due diligence before according sanction to the reasons recorded by the AO. In the present case, the order sheet which is placed on record show that the Commissioner has simply affixed "approved" at the bottom of the note sheet prepared by the ITO. Nowhere the CIT has recorded his satisfaction. In the case before the Hon'ble Supreme Court (supra) that on AO's report the Commissioner against the question "whether the Commissioner is satisfied that it is a fit case for the issue of notice under section 148 merely noted "Yes" and affixed his signature thereunder. On these facts, the Hon'ble Supreme Court observed that the important safeguards provided in sections 147 and 151 were lightly treated by the officer and the Commissioner. The Hon'ble Supreme Court further observed that the ITO could not have had reason to believe that income had escaped assessment by reasons of the appellant-firm's failure to disclose material facts and if the Commissioner had read the report carefully he could not have come to the conclusion that this was a fit case for issuing a notice under section 148. The notice issued under section 148 was therefore, invalid (ITA No. 3545/Del/2010, dt. 25-2-2015) (AY. 2002-03)
Direct Sales Pvt. Ltd. v. ITO (Delhi)(Trib.); www.itatonline.org

S.151 : Reassessment – Sanction for issue of notice – Sanction of CIT instead of JCIT renders reopening void – The error cannot be saved u/s. 292BB.[S. 50C,147,148, 292BB] 1972
The Assessing Officer obtained sanction for issuance of notice under section 148 of the Income-tax Act, 1961 for reopening of assessment from the Commissioner of Income-tax instead of the Joint Commissioner of Income-tax (JCIT). Since the approval was not obtained from the competent authority, notice issued under section 148 of the Act is void *ab-initio* and the assessment framed consequent thereto is not a valid assessment. The error is fatal and cannot be saved under section 292BB. The assessment is annulled. (AY. 2003-04)
Sardar Balbir Singh v. ITO (2015) 39 ITR 574 (Lucknow)(Trib.)

S.151 : Reassessment – Sanction for issue of notice – Non-mentioning in the reasons that approval has been obtained from the CIT vitiates the reopening.[S.147, 148] 1973
Another major discrepancy noticed during the course of arguments is that there is no mention of authorization of a higher authority to initiate the current reassessment proceedings. Hon'ble Bombay High Court in the case of *DSJ Communications v. DCIT, reported in 222 Taxman 129 (Bom.)*, held that approval of CIT is mandatory. Since there is no mention of the approval sought from the CIT on the reasons, as recorded by the AO to initiate reassessment proceedings, the entire initiation has been vitiated and become bad in law. (AY. 2002-03)
GTL Limited v. ACIT (2015) 37 ITR 376 (Mum.)(Trib.)

Section 153 : Time limit for completion of assessment, reassessment and recomputation.

S.153 : Assessment – Limitation block assessment – Section 153(2A) is attracted to a block assessment framed in pursuance to an order under section 250 and Chapter XIVB. [S. 153(2A), 158BC, 250] 1974
In the instant case, the assessment order for the block period was passed by the Assessing Authority on 30-9-1999. The Appellate Authority under section 250 had

set aside the order by order dated 24-10-2000. The said order was communicated on 15-1-2001. The period prescribed under section 153(2A) is before the expiry of one year from the end of financial year in which order under section 250 is received by the Chief Commissioner or Commissioner as the case may be. The copy of the Appellate Authority was received on 15-1-2001, 31-3-2001 is the end of the financial year and 31-3-2002 is one year therefrom before which the fresh assessment order ought to have been passed. The fresh assessment order is passed on 28-3-2003, nearly one year after the expiry of the period of limitation. Therefore, it is barred by time. Thus, the said substantial question of law, whether, section 153(2A) is attracted to a block assessment framed in pursuance to an order under section 250 and Chapter XIVB is answered in favour of the assessee and against the revenue and accordingly appeal of revenue was dismissed.
CIT v. Paul Noel Rodrigues (2015) 231 Taxman 811 (Karn.)(HC)

1975 **S.153 : Assessment – Reassessment – Limitation – Conclusion of Tribunal that the assessment order was passed after the period of limitation – Order of Tribunal was affirmed. [S.143(3)]**
No evidence was produced by department to substantiate its claim that assessment order was made and same was dispatched along with notice of demand on or before last day of prescribed time period. However, on basis of available evidence appellate authorities came to conclusion that assessment order was passed after period of limitation. Tribunal was justified in setting aside said assessment order being barred by limitation. (AY. 2006-07)
CIT v. Sincere Construction (2015) 229 Taxman 186 (All.)(HC)

1976 **S.153 : Assessment – Limitation – In terms of Explanation 3 to section 153(3), unless person in whose hand income is directed to be added has been heard before such direction is issued, direction so issued by revisionary, appellate or judicial authority is an exercise in futility. [S. 153(3)]**
Tribunal held that in terms of Explanation 3 to section 153(3), unless person in whose hand income is directed to be added has been heard before such direction is issued, direction so issued by revisionary appellate or judicial authority is an exercise in futility. (AY. 2006-07)
ITO v. Biotech Ophthalmic (P.) Ltd. (2015) 173 TTJ 625 / 2016) 156 ITD 131 (Ahd.)(Trib.)

Section 153A : Assessment in case of search or requisition.

1977 **S.153A : Assessment – Search – Satisfaction recorded on the date of seizure of document is relevant when the Assessing Officer is same. [S. 132, 153C]**
Dismissing the appeal of revenue the Court held that where Assessing Officer of searched person and assessee is same, date on which satisfaction is recorded by Assessing Officer that assets /documents seized in search proceedings belonged to assessee, would be relevant date for application of section 153A. (AY. 2003-04 to 2008-09)
CIT v. RRJ Securities Ltd. (2015) 128 DTR 57 (2016) 380 ITR 612 / 282 CTR 321 (Delhi) (HC)

S.153A : Assessment – Search – Recording of satisfaction – Additional ground – No satisfaction was recorded before issue of notice, the order was bad in law – Tribunal was justified in admitting the additional ground. [S.153C, 254(1)] 1978

Pursuant to search and seizure action under section 132(1) carried out in case of company IM and company TP, Assessing Officer issued notices under section 153C to assessee company. Assessee filed nil returns and assessments were completed. On appeal Tribunal allowed to raise additional ground on validity of proceedings under section 153C. Tribunal allowed the additional ground and also quashed the assessment proceedings as no satisfaction was recorded. On appeal by revenue dismissing the appeal of revenue the Court held that once it was found that there was nothing in assessment order which would indicate that Assessing Officer arrived at satisfaction that seized material pertained to assessee, Tribunal was justified to nullify proceedings. Court also held that the Tribunal was correct in admitting additional ground raised by assessee for first time. (AY. 2002-03 to 2007-08)

DIT v. Ingram Micro (India) Exports (P.) Ltd. (2015) 234 Taxman 464 (Bom.)(HC)

S.153A : Assessment – Search – No incriminating material was found – Addition was held to be invalid. [S. 2(22)e), 132] 1979

Dismissing the appeal of revenue the Court held that while making assessment u/s. 153A, the AO can interfere with completed assessment only on the basis of some incriminating material unearthed during the course of search which were not produced, disclosed or made known in the course of the original assessment. For the relevant assessments years, there were no incriminating material found during the course of search and hence no additions could be made to the assessed income. As no evidence was found during the search proceedings in respect of deemed dividend, addition was deleted. (AY. 2002-03, 2005-06, 2006-07)

CIT v. Kabul Chawla (2015) 234 Taxman 300 / 126 DTR 130 / 281 CTR 45 / (2016) 380 ITR 573 (Delhi) (HC)

S.153A : Assessment – Search – Addition cannot be made based on mere suspicion unless any material fact is brought on record.[S. 132] 1980

Assessee and persons associated with it were subject to search and seizure operations u/s. 132. Addition was made by AO on the basis that loans were taken and repaid in cash. HC upheld the order of the Tribunal in deleting the addition since it was based on a mere suspicion. Neither any material was filed on record to prove that loans were taken and repaid in cash, nor the details of persons to whom interest was paid was ascertained, verified and examined. (AY. 2004-05)

CIT v. Home Developers (P) Ltd. (2015) 117 DTR 248 / 229 Taxman 254 (Delhi)(HC)

S.153A : Assessment – Search – Unexplained investment – Tribunal finding no reliability could be placed on submissions made by assessee – Finding of fact – Addition was held to be justified. [S.153C, 260A] 1981

Tribunal confirmed the addition on the ground that no reliability could be placed on submissions made by assessee. On appeal dismissing the appeal of assessee the Court held that (1) that this was a question of fact, which the assessee should have pursued

before the original authority or before the Commissioner of Income-tax (Appeals). The Tribunal, after examining the issue threadbare, declined to interfere with the order of the Commissioner (Appeals) principally on the ground that no reliability could be placed on the submissions made by the assessee, who had taken different stands before the authorities below. There was no reason to interfere with the order of the Tribunal.
(ii) That the mere statement of Vanaja saying that she did not pay money or receive money was of no avail, when she herself admitted that she signed on the back of the agreement having received the money on the cancellation of the sale agreement. Her statement threw more light on the present case that was not a clear transaction. The entire transaction was shrouded in mystery and the Assessing Officer had correctly made additions. (AY 2004-05)
P. Madhurajan (HUF) v. ACIT (2015) 373 ITR 630 (Mad.)(HC)

1982 **S.153A : Assessment – Search – If inflows in a bank were taxed then question of taxing withdraw as would not arise – Tribunal finding taxation of investment in closing stock as well as withdrawal from bank account not proper - Tribunal taking matter item-wise and addition-wise – Findings based on reflecting a possible view. [S. 69C, 132, 260A]**
Dismissing the appeal of revenue the Court held that the Tribunal exhaustively noted the entire material together with the rival contentions. The Department was wrong in contending that relief had been granted to the assessee in relation to the grounds which were given up. The undisputed factual position had been noted by the Tribunal inasmuch as if there were no books of account and yet the Assessing Officer referred to the bank statements and details of the accounts, then the exercise carried out by him of bringing to tax investment in the closing stock as well as withdrawal from the bank account which was not proper. The Tribunal had extensively referred to the Assessing Officer's order and the exercise carried out by him. It had taken the matter item-wise/addition-wise and found that the Assessing Officer had before him the bank statements/the inflows into the bank account. He had in his order observed that he would consider the investment after the assessee had offered ₹ 10 crores as income. However, he had not considered the same. It found that when receipts in the bank account were taxed then the payment from that very bank account have nexus with the receipts, and the addition could not be sustained by the Commissioner (Appeals). With regard to the expenses relating to service apartment a similar exercise was carried out and the assessee`s contentions had been accepted. With regard to the expenditure on household items that aspect also had been considered and the Tribunal concluded that the declaration of income was more than sufficient to take care of the expenditure. This could not have been a matter and which was not covered by the disclosure. Every single item or addition had been considered and with extensive reference to the findings of the Assessing Officer and that of the Commissioner (Appeals). The materials in support of these claims or additions had also been noted. The finding of double taxation had been rendered after examining the matter in detail, namely, scrutiny of the bank accounts. Either the inflows had been explained with evidence and then the question of taxing the withdrawals would not arise or because there was no evidence, the taxing of the deposits in the bank was justified. The Tribunal held that both inflow and outflow could not be taxed. No substantial relief had been granted as complained by the Revenue

particularly with regard to the items or grounds which had been given up before the Commissioner (Appeals). The findings of fact based thereon, therefore, reflected a possible view of the Tribunal. Such a view did not raise any substantial question of law particularly when it was not perverse as complained. (AY. 2006-07)
CIT v. Jalaj Batra (2015) 372 ITR 622 / 234 Taxman 271 (Bom.)(HC)

S.153A : Assessment – Search – Additions need not be restricted or limited to incriminating material found during course of search. [S. 115JB] 1983
During assessment under section 153A, additions need not be restricted or limited to incriminating material found during course of search and, hence, argument of assessee that addition under section 115JB was not justified in order under section 153A as no incriminating material was found concerning said addition had to be rejected. Appeal of assessee was dismissed.(AY. 2004-05)
Filatex India Ltd. v. CIT (2015) 229 Taxman 555 (Delhi)(HC)

S.153A : Assessment – Search – No addition can be made in respect of an unabated assessment which has become final if no incriminating material is found during the search – An ICD is an "infrastructural facility" for S. 80-IA(4) – Container freight station is entitled to deduction. [S.80IA(4), 132A] 1984
Pursuant to the judgment of the Special Bench of the ITAT in All Cargo Global Logistics (2012) 137 ITD 287 (SB) (Mum.) the Bombay High Court had to consider two issues: (i) whether scope of assessment u/s. 153A in respect of completed assessments is limited to only undisclosed income and undisclosed assets detected during search and (ii) whether in view of the Circular of the CBDT No. 10/2005 the assessee was entitled to deduction u/s. 80 IA(4). HELD by the High Court:

(i) On a plain reading of Section 153A of the Income-tax Act, it becomes clear that on initiation of the proceedings under Section 153A, it is only the assessment / reassessment proceedings that are pending on the date of conducting search under Section 132 or making requisition under Section 132A of the Act stand abated and not the assessments/reassessments already finalised for those assessment years covered under Section 153A of the Act. By a Circular No. 8 of 2003 dated 18-9-2003 ((2003) 263 ITR (St) 61 at 107) the CBDT has clarified that on initiation of proceedings under Section 153A, the proceedings pending in appeal, revision or rectification proceedings against finalised assessment/reassessment shall not abate. It is only because, the finalised assessments/reassessments do not abate, the appeal revision or rectification pending against finalised assessment/reassessments would not abate. Therefore, the argument of the revenue, that on initiation of proceedings under Section 153A, the assessments/reassessments finalised for the assessment years covered under Section 153A of the Income-tax Act stand abated cannot be accepted. Similarly on annulment of assessment made under Section 153A(1) what stands revived is the pending assessment/reassessment proceedings which stood abated as per section 153A(1);

(ii) Once it is held that the assessment has attained finality, then the AO while passing the independent assessment order under Section 153A read with Section 143(3) of the I.T. Act could not have disturbed the assessment/reassessment order which has attained finality, unless the materials gathered in the course of the proceedings

under Section 153A of the Income-tax Act establish that the reliefs granted under the finalised assessment/ reassessment were contrary to the facts unearthed during the course of 153A proceedings. If there is nothing on record to suggest that any material was unearthed during the search or during the 153A proceedings, the AO while passing order under Section 153A read with Section 143(3) cannot disturb the assessment order;

(iii) A perusal of s. 80-IA(4) would indicate as to how the Legislature had in mind deduction in respect of profits and gains from industrial undertakings or enterprises engaged in the infrastructure development etc. We are concerned with sub-section (4) and as it read at the relevant time. It says that this section applies to any enterprise carrying on the business of developing or operating and maintaining any infrastructure facility which fulfils all the conditions, namely, it is owned by a company registered in India or by a consortium of such companies or by an authority or a board or a corporation or any other body established or constituted under any Central or State Act, it has entered into an agreement with the Central Government or a local authority or any other statutory body for developing or operating and maintaining or developing, operating and maintaining a new infrastructure facility and it has started or starts operating and maintaining the infrastructure facility on or after 1st day of April, 1995. The explanation defines the infrastructure facility to mean, *inter alia*, a port, airport, inland waterway, inland port or navigational channel in the sea. The word "inland port" was always there in clause (d). What was there prior to its substitution by Finance Act of 2007 with effect from 1st April, 2008, were the words "or inland port". Now the word "or" is deleted, but the words are "inland port or navigational channel in the sea". Thus, an "inland port" was always within the contemplation of the Legislature and it is treated specifically as a infrastructural facility (*CIT v. Murli Agro Products Ltd Income Tax Appeal No.36 of 2009 dt 29-10-2010* is followed; *CIT v. Anil Kumar Bhatia (2013) 352 ITR 493 (Delhi)(HC)* is distinguished (AY.2008-09)

CIT v. Continental Warehousing Corporation (2015) 374 ITR 645 / 120 DTR 89 / 279 CTR 389 / 232 Taxman 270 (Bom.)(HC)

CIT v. All Cargo Global Logistics Ltd. (2015) 374 ITR 645 / 120 DTR 89/279 CTR 389 / 232 Taxman 270 (Bom.)(HC)

Editorial: Decision of Special Bench in All Cargo Global Logistics Ltd v. Dy. CIT (2012) 137 ITD 287 / 18 ITR 106 (SB)(Mum.)(Trib.) is affirmed.

Editorial: CIT v. Continental Warehousing Corporation (Nhava Sheva) Ltd., SLP is granted (2015) 235 Taxman 568 (SC)

1985 **S.153A : Assessment – Search – Share application and share premium – No incriminating material – No addition can be made. [S.143(3)]**

AO completed the assessment under section 143(3) read with section 153A making addition in respect of the increase of share capital including the premium received by the assessee. CIT(A) opined that AO's conclusion that share capital of the assessee company was bogus referring only to admission of other person that the assessee-company was used for his business operation was far-drawn, baseless and, therefore, devoid of any merit. CIT(A), thus, deleted addition made by Assessing Officer.

ITAT on legal validity of addition made u/s. 153A held from the reading of the provisions of section 153A, it is apparent that this section mandates that where in the case of a person, a search is initiated under section 132 on books of account, other documents or any assets are requisitioned under section 132A after the 31-5-2003, AO shall issue notice to such person requiring him to furnish within such period as may be specified in the notice, the return of income in respect of each assessment year falling within six assessment years referred to in clause (b) in the prescribed form and verified in the prescribed manner a setting forth such other particulars as may be prescribed in this regard.

Scope of determination of total income is different in respect of the years for which assessments are pending vis-a-vis the years for which assessments are non-pending. The total income shall be determined in respect of assessment years for which original assessments have already been completed on the date of search by restricting additions only to those which flow from incriminating material found during the course of search. If no incriminating material is found in respect of such completed assessment then the total income in the proceedings under section 153A shall be computed by considering the original determined income. If some incriminating material is found in respect of such assessment years for which the assessment is not pending, then the 'total income' would be determined by considering the original determined income plus income emanating from the incriminating material found during the course search. In respect of assessment pending on the date of search which got abated in terms of second proviso to section 153A(1), the total income shall be computed afresh uninfluenced by the fact whether or not this any incriminating material. In the case of the assessee, the addition has been made in each of the assessment years on account of share capital and the share premium as well as the disallowance of the expenses. During the course of search taken place in the case of the assessee, no incriminating material was found in respect of additions made by the Assessing Officer in each of the assessment years. The only material which was found was the Bank account which the assessee was having with the banker. The said Bank account was duly disclosed in the return filed by the assessee. The said Bank account can also not be regarded to be incriminating material. Even the Assessing Officer has also not made any addition on the basis of said Bank account in each of the assessment years. Except the Bank account, no other assets or documents or material were brought to knowledge by the revenue, which has been found or seized by department, so that it could be regarded to be the incriminating material in respect of the share capital and the share premium as well as the disallowance of the expenses in respect of which the addition has be made in the assessment completed under section 153A. Since there was no incriminating material found in the course of the search in respect of the share capital and share premium, having regard to aforesaid position, no addition on this account could be made in the case of the assessee in each of the assessment years.(AY. 2004-05 to AY 2006-07)

ACIT v. Budhiya Marketing Pvt. Ltd. (2015) 44 ITR 617 /154 ITD 650 / 173 TTJ 649 (Kol.) (Trib.)

ACIT v. Edward Supply Pvt. Ltd. (2015) 44 ITR 617 / 154 ITD 650 / 173 TTJ 649 (Kol.) (Trib.)

1986 **S.153A : Assessment – Search – Gifts and gross receipt from agricultural income – No incriminating documents were found addition was held to be not justified – Purchase of foreign currency in cash – Addition was held to be justified. [Ss. 69, 132, 143(1)]**

The Tribunal held that the assessee has filed the return showing the gifts received by him and the assessment under section 143(1) having been completed before the date of search, no addition can be sustained on account of the gifts in the assessment under section 153A in the absence of recovery of any incriminating material relating to gifts during the course of search.

For agricultural income also the Tribunal held that the assessment did not get abated and agricultural income as shown by the assessee in the original return got accepted and no incriminating documents were found during the course of search. The Tribunal accepted the net agricultural income as originally shown by the assessee.

As far as the purchase of foreign currency is concerned the Tribunal confirmed the addition on substantive basis. (AY. 2002-03 to 2008-09)

Gaurav Sharma v. ACIT (2015) 169 TTJ 46 (UO) (Indore)(Trib.)

1987 **S.153A : Assessment – Search – Additional ground – No incriminating documents were found and assessment was not pending – Gift – Addition was held to be not justified. [S. 69A]**

The assessee raised additional ground before the Tribunal that the reassessment proceedings under section 153A should confine to the material in possession of the AO detected during the course of search and entire assessment is not open before him. The addition under section 69A and sustained by CIT(A) at ₹ 1,80,000/- is without there being any material found in course of search and is beyond the scope of reassessment proceedings under section 153A.

The Tribunal admitted the additional ground of appeal keeping in view the decision of Apex Court in the case of *National Thermal Power Ltd. v. CIT (1998) 229 ITR 383*. Further held that when assessment is not pending at the time of search and no incriminating material is found during the course of search, AO has no jurisdiction to make addition in the assessment framed under section 153A. The addition of ₹ 1,80,000/- made by the AO and confirmed by the learned CIT(A) is bad in law. (AY. 2000-01)

Rawal Das Jaswani v. ACIT (2015) 169 TTJ 1 (UO)(Raipur)(Trib.)

1988 **S. 153A : Assessment – Search – Approval to the assessment order granted by the Addl. CIT in a casual and mechanical manner and without application of mind renders the assessment order void.[S. 153D]**

The Addl.CIT granted approval u/s. 153D to the draft order u/s. 143(3) r.w.s. 153A by stating that "As per this office letter dated 20-12-2010, the Assessing Officers were asked to submit the draft orders for approval u/s. 153D on or before 24-12-2010. However, this draft order has been submitted on 31-12-2010. Hence there is no much time left to analyse the the issues of draft order on merit. Therefore, the draft order is being approved as it is submitted. Approval to the above said draft order is granted u/s. 153D of the I.T. Act, 1961." The assessee claimed that the said approval was not valid and vitiated the assessment order. HELD by the Tribunal accepting the claim:

(i) The Legislative intent is clear inasmuch as prior to the insertion of Sec. 153D, there was no provision for taking approval in cases of assessment and reassessment in cases where search has been conducted. Thus, the legislature wanted the assessments/reassessments of search and seizure cases should be made with the prior approval of superior authorities which also means that the superior authorities should apply their minds on the materials on the basis of which the officer is making the assessment and after due application of mind and on the basis of seized materials, the superior authorities have to approve the assessment order.

(ii) On facts, the Addl. Commissioner has showed his inability to analyse the issues of draft order on merit clearly stating that no much time is left, inasmuch as the draft order was placed before him on 31-12-2010 and the approval was granted on the very same day. Considering the factual matrix of the approval letter, we have no hesitation to hold that the approval granted by the Addl. Commissioner is devoid of any application of mind, is mechanical and without considering the materials on record. The power vested in the Joint Commissioner/Addl Commissioner to grant or not to grant approval is coupled with a duty. The Addl. Commissioner/ Joint Commissioner is required to apply his mind to the proposals put up to him for approval in the light of the material relied upon by the AO. The said power cannot be exercised casually and in a routine manner. We are constrained to observe that in the present case, there has been no application of mind by the Addl. Commissioner before granting the approval. Therefore, we have no hesitation to hold that the assessment order made u/s. 143(3) of the Act r.w. Sec. 153A of the Act is bad in law and deserves to be annulled.(AY. 2007-08)

Shreelekha Damani v. DCIT (2015) 173 TTJ 332 125 DTR 263 (Mum.)(Trib.)

S.153A : Assessment – Search – Non-mentioning of S.153A in order will not invalidate the order.[S.153C] 1989

Originally assessment was made under section 153C, read with section 153A. However, assessment order was framed under section 153C only without mentioning of section 153A. It was held that order passed by Assessing Officer could not be treated as invalid, merely because there was an omission to mention relevant provision of law or wrong mentioning of provisions of law. (AY. 2007-08, 2008-09)

DCIT v. Damac Holdings (P.) Ltd. (2014) 33 ITR 331 / (2015) 67 SOT 148 (URO)(Cochin) (Trib.)

S.153A : Assessment – Search – Jurisdiction – Once search is initiated, even if no incriminating materials were found Assessing Officer gets jurisdiction for passing an order. [S. 132] 1990

The Assessing Officer gets jurisdiction for passing orders under section 153A, once search action is initiated, whether or not any incriminating material is found during the course of search action. (AY. 2005-06 to 2008-09)

Rupesh Anand v. ACIT (2015) 67 SOT 227 (URO)(Bang.)(Trib.)

1991 **S.153A : Assessment – Search – Notice – There is no requirement to issue a notice u/s 143(2) before making an assessment u/s. 153A – Assessment is not null and void. [S. 143(2), 158BC]**

The Third Member had to consider whether the issue of a notice u/s. 143(2) was mandatory for the completion of an assessment u/s. 153A and whether the non-issue of such a notice rendered the S. 153A assessment null and void. HELD by the third Member:

(i) There is no specific provision in the Act requiring the assessment made under section 153A to be after issue of notice under section 143(2) of the Act. Learned counsel for the assessee places heavy reliance on the judgment of the Hon'ble Supreme Court in *ACIT v. Hotel Blue Moon v. DCIT (2010) 321 ITR 362 (SC)* wherein it was held that the where an assessment has to be completed under section 143(3) read with section 158BC, notice under section 143(2) must be issued and omission to do so cannot be a procedural irregularity and the same is not curable. It is to be noted that the above said judgment was in the context of Section 158BC. Clause (b) of Section 158BC expressly provides that "the AO shall proceed to determine the undisclosed income of the block period in the manner laid down in section 158BB and the provisions of Section 142, sub-sections (2) and (3) of Section 143, Section 144 and Section 145 shall, so far as may be, apply. This is not the position under section 153A. The law laid down in Hotel Blue Moon, is thus not applicable to the facts of the present case.

(ii) It is also to be noted that Section 153A provides for the procedure for assessment in case of search or requisition. Sub-section (1) starts with non-obstante clause stating that it was "notwithstanding" anything contained in sections 147, 148 and 149, etc. Clause (a) thereof provides for issuance of notice to the person searched under Section 132 or where documents etc. are requisitioned under Section 132(A), to furnish a return of income. This clause nowhere prescribes for issuance of notice under Section 143(2). Learned counsel for the assessee/ appellant sought to contend that the words, "so far as may be applicable" made it mandatory for issuance of notice under Section 143(2) since the return filed in response to notice under Section 153A was to be treated as one under Section 139. The words "so far as may be" in clause (a) of sub section (1) of Section 153A could not be interpreted that the issue of notice under Section 143(2) was mandatory in case of assessment under Section 153A. The use of the words "so far as may be" cannot be stretched to the extent of mandatory issue of notice under Section 143(2). As is noted, a specific notice was required to be issued under Clause (a) of sub-section (1) of Section 153A calling upon the persons searched or requisitioned to file return. That being so, no further notice under Section 143(2) could be contemplated for assessment under Section 153A. Followed *Ashok Chadha v. ITO (2011) 337 ITR 399 (Delhi)(HC)*. (AY. 1999 to 2000 to 2005-06)

Sumanlata Bansal v. ACIT (TM) (Mum.)(Trib.); www.itatonline.org

S.153A : Assessment – Search – Income of any other person – Recording of satisfaction by AO of searched persons is a necessary precondition for initiation of proceedings – Assessment proceedings was quashed. [S. 153C] 1992

Assessee submitted that AO of searched person has to record satisfaction that some documents belong to other persons and then hand over same to AO of such persons who again will record his satisfaction. It was submitted that first satisfaction by AO of searched persons has not been done in these cases and therefore assessment proceedings itself were not legal. The Tribunal held, copy of satisfaction note suggested that satisfaction note enclosed with letter was prepared by AO of other entities who had assumed jurisdiction by invoking provisions of Section 153C, recording of satisfaction by AO of searched persons is a necessary precondition for initiation of proceedings u/s 153C which was not done in present appeals, hence assessment proceedings quashed being illegal. (AY. 2003-04 to 2008-09)

DCIT v. Akash Arogya Mandir P. Ltd. (2015) 167 TTJ 578 / 114 DTR 61 (Delhi)(Trib.)

S.153A : Assessment – Search – Retraction of statement – Undisclosed income – Modification to client code of client is not necessarily a *mala fide* act – Disclosure made in a statement recorded at an early hours cannot be given credence – If a voluntary disclosure is retracted, the AO has to make addition on the basis of documentary evidence. [S.69A, 132(4), 145(3)] 1993

(i) The AO held the client code modifications to be *mala fide* with the intention to transfer the profit to other person by modifying the client code so as to avoid the payment of tax. From the circular of the Commodity Exchange, it is evident that client code modification is permitted on the same day. Therefore, unable to find out any justification for the allegation of the Assessing Officer that the client code modification was with the *mala fide* intention. When the client code was modified on the same day, there cannot be any *mala fide* intention. Had client modification done after the transactions period when the price of the commodity has already changed, then perhaps there could have been some basis to presume that client code modification is intentional. However, when the client code modification is done on the same day, there was no basis or justification to hold the same to be *mala fide*.

(ii) Moreover, the AO has computed the notional profit/loss till the transactions period and not till the period by which the client code modification took place. Even if the view of the Revenue is accepted that the client code modification was with *mala fide* intention, then the profit or loss accrued till the client code modification can be considered in the case of the assessee but by no stretch of imagination the profit/loss arising after the client code modification can be considered in the hands of the assessee.

(iii) In *Kailashben Manharlal Chokshi v. CIT (2010) 328 ITR 411 (Guj)*, the High Court held that if a statement is recorded at midnight, much credence cannot be given to such statement because the person would not be in a position to make any correct or conscious disclosure in a statement recorded at odd hours. The ratio of the above decision of the jurisdictional High Court would be squarely applicable to the facts of the assessee's case because the statement was recorded at the midnight of 25th and 26th March, 2008.

(iv) In Kailashben Manharlal Chokshi the Hon'ble High Court has noticed that when during the course of assessment proceedings the assessee has given the proper explanation for investment in various properties, the addition cannot be made on the basis of statement made at odd hours. Similarly, in the case of Ratan Corporation (2005) 145 Taxman 503 (Guj.), the Hon'ble jurisdictional High Court reiterated that when the statement made during the course of search has been retracted, then it is duty of the Assessing Officer to make further inquiries. Similar view is expressed by their Lordships of Hon'ble Jurisdictional High Court in the case of Radhe Associates (2013) 37 taxmann.com 336 (Guj.), wherein the Assessing Officer has made the addition by mentioning that there were clinching documentary evidences with respect to receipt of on-money. However, these clinching documentary evidences were not specified. In the case under appeal. The ITAT find that the officer recording the statement of Shri Nayan Thakkar has mentioned that various defects and discrepancies have been observed from the papers and documents seized from the assessee's premises. However, any defects or discrepancies were not specified. Therefore the ITAT held that facts of the assessee's case the decisions of the Hon'ble Jurisdictional High Court in the cases of Kailashben Manharlal Chokshi, Ratan Corporation and Radhe Associates would be squarely applicable. (AY. 2006-07 to 2008-09)

ACIT v. Kunvarji Finance Pvt. Ltd. (2015) 119 DTR 1 / 40 ITR 64 / 170 TTJ 345 (Ahd.) (Trib.)

1994 **S.153A : Assessment – Search – Assessments which have attained finality cannot be disturbed or varied if no incriminating material is found *qua* the addition made.**

During the course of search and seizure action, no incriminating document, material or unaccounted assets were found from the assessee. Even for the year of search i.e. A.Y. 2008-09, no addition has been made. The Assessing Officer without there being any incriminating material found in the course of search relating to the deemed dividend has made the addition on the basis of information already available in the return of income. This is also evident from the copy of panchanama and statement on oath of the assessee recorded at the time of search, the copy of which have been placed in the paper book form pages 135 to 139. Even in the assessment order there is no whisper about any material or document found at the time of search relating to the transaction of deemed dividend. The learned AO he has noted the facts about receiving of the payments by the assessee from M/s. Lotus investment, which was a division of M/s. La-Fin Financial Services Pvt. Ltd. in which the assessee held 50% of share, from the balance sheets and records already filed along with the return of income. Since the assessment for the A.Ys. 2002-03 & 2004-05 had attained finality before the date of search and does not get abated in view of second proviso to section 153A, therefore, without there being any incriminating material found at the time of search, no addition over and above the income which already stood assessed can be made. This proposition he said, is squarely covered by the decision of *All Cargo Global Logistics Ltd. v. DCIT reported in (2012) 137 ITD 287 (SB) (Mum.)*. Even the Hon'ble jurisdictional (Bombay) High Court in the case of *CIT v. M/s. Murli Agro Products Ltd. ITA No. 36 of 2009* order dated 29-10-2010, has clearly held that, once the assessment has attained finality before the date of search

and no material is found in the course of proceedings u/s. 132(1), then no addition can be made in the proceedings u/s. 153A. This proposition has been reiterated by Hon'ble Rajasthan High Court in the case of *Jai Steel (India) v. ACIT reported in (2013) 259 CTR (Raj.) 281*. Thus, the addition of deemed dividend made by the Assessing Officer is beyond the scope of assessment u/s. 153A for the impugned assessment years. *Satish L. Babladi v. DCIT passed in ITA Nos. 1732 & 2109* order dated 19-3-2013 distinguished(ITA No. 1553 & 3173/Mum/2010, dt. 13-2-2015) (A.Y. 2002-03 & 2004-05)
Jignesh P. Shah v. DCIT (Mum.)(Trib.), www.itatonline.org

S.153A : Assessment – Search – Limitation – Period of limitation should have commenced from 1-3-2007 when for all practical purposes the authorization issued by the department for search in the case of the assessee was executed and subsequent panchanama drawn on 28-4-2007 could not be considered as relevant- Assessment was held to be time barred. [S.132(3), 143(3)] 1995

A search and seizure action was conducted at the premises of the assessee on 28-2-2007 and a panchanama dated 1-3-2007 was drawn wherein cash amounting to ₹ 18 lakhs and some loose papers were seized. On 1-3-2007, a prohibitory order under section 132(3) of the Act was also passed in respect of some articles. The search was recommenced on 28-4-2007 and concluded on the same day and as per the panchanama for this date, no articles were seized and prohibitory order u/s. 132(3) was revoked. Finally, the assessments for the AY 2001-02 to 2006-07 was completed u/s. 153A r.w.s 143(3) on 29-12-2009, which the assessee claimed to have been time barred in view of second proviso to section 153B(1).

Held that if on the date when such prohibitory orders are vacated, it would be relevant to see the action of the department and if no seizure is made on that date and nothing is done except lifting the prohibitory orders then the last panchanama drawn on that date would not be relevant to compute the limitation period for framing the assessment. Hence, period of limitation should have commenced from 1-3-2007 when for all practical purposes the authorization issued by the department for search in the case of the assessee was executed and subsequent panchanama drawn on 28-4-2007 could not be considered as relevant.

Since the period of limitation expired on 31-12-2008, the assessment orders passed on 31-3-2009 were held time barred. ITA Nos. 6437-42/Del./2012 & ITA Nos. 101-07/ Del./2012 dt. 13-2-2015, (AY. 2008-09)
ACIT v. Vijay Kumar Raichand (Delhi)(Trib.) www.ctconline.org

Section 153C : Assessment of income of any other person.

S.153C : Assessment – Search – Income of any other person – Documents not belong to assessee – Proceedings was held to be bad in law. [S. 69C, 153A] 1996

Dismissing the appeal of revenue the Court held that if documents seized from another person not belong to assessee Assessing Officer cannot commence an enquiry. (AY. 2003-04 to 2008-09)
CIT v. RRJ Securities Ltd. (2015) 128 DTR 57 / (2016) 380 ITR 612 / 282 CTR 321 (Delhi) (HC)

1997 **S.153C : Assessment – Search – Income of any other person – Recording of satisfaction – No satisfaction was recorded before issue of notice – Order was quashed. [S.132, 153A, 158BD]**

Assessee was a partnership firm carrying on business of steel fabricators. A search was conducted against partners of assessee-firm under section 132(1). On the basis of seized material, Assessing Officer issued notice under section 153C calling upon assessee to file returns for assessment years in question. Assessee filed its return declaring certain taxable income. Assessing Officer completed assessment under section 153C, read with section 143, making various additions to assessee's income. Tribunal held that no satisfaction had been recorded by the Assessing Officer before issuing of notice under section 153C. Further, none of the papers seized belonged to assessee in course of search proceedings carried out at premises of its partner hence order was quashed. On appeal by revenue, High Court affirmed the order of Tribunal. (AY. 200-01 to 2006-07)

CIT v. Mechmen 11-C (2015) 233 Taxman 540 / 280 CTR 198 / (2016) 380 ITR 591 (MP) (HC)

1998 **S.153C : Assessment – Search- Income of any other person – Recording of satisfaction – Assessing Officer same – Recording of satisfaction is mandatory – As no satisfaction was recorded order was held to be bad in law. [S. 132, 153A]**

A search and seizure operation under section 132 was carried out in the group case of TYG and others. During the course of search documents belonging to the assessee had been seized. On that basis the Assessing Officer initiated action against the assessee and consequently framed an assessment under section 153C. On appeal the Tribunal quashed the assessment on the ground that there was no satisfaction recorded by the Assessing Officer having jurisdiction over the searched person despite the fact that the Assessing Officer of the assessee and the Assessing officer of the searched person were the one and the same. On appeal by the revenue dismissing the appeal the Court held that; recording of satisfaction is a pre-condition for invoking jurisdiction under section 153C and, therefore, Tribunal had correctly followed principle in quashing assessment framed.(AY. 2009-10)

CIT v. Shettys Pharmaceuticals & Biologicals Ltd. (2015) 232 Taxman 268 (AP)(HC)

1999 **S.153C : Assessment – Search – Income of any other person – Intimation – Amalgamation – Notice was issued to transferor company – Since such notice had not been issued to transferee – Company, entire proceedings were a nullity. [S.143(3)]**

Assessee-company amalgamated with other company with effect from 1-4-2008 and this fact was intimated to revenue. While so, revenue issued notice under section 153C to assessee on basis of search conducted in premises of some other parties – Despite assessee's objection that it ceased to exist on account of its amalgamation, Assessing Officer completed assessment in name of assessee-company – Whether since assessee had amalgamated with transferee-company, notice ought to have been sent to latter, and since such notice had not been issued to transferee-company, entire proceedings were a nullity. (AY. 2003-04 to 2008-09)

CIT v. Micra India (P.) Ltd. (2015) 231 Taxman 809 (Delhi)(HC)

S.153C : Assessment – Income of any other person – Search – General satisfaction recorded in the note is not enough – As there was no co-relation document wise-Order of Tribunal quashing the validity of order was held to be justified. [S.260A] 2000

The assessee is an education institution. Before the Tribunal the assessee raised an additional ground stating that the satisfaction recorded by the AO was in general nature hence concluded assessment could not be disturbed. Tribunal allowed the appeal of the assessee. On appeal by revenue, dismissing the appeal the Court held that Tribunal has found that incriminating material seized and stated to be pertaining to all six assessment years did not establish any co-relation document-wise with the assessment years in question and in the circumstances, the general satisfaction as recorded in the note is not enough; hence no substantial question of law arises out of Tribunal's order quashing notice under section 153C. (AY. 2001-02 to 2003-04)

CIT v. Sinhgad Technical Education Society (2015) 378 ITR 84 / 278 CTR 144 / 235 Taxman 163 / 120 DTR 79 (Bom.)(HC)

Editorial : Sinhgad Technical Educational Society v. ACIT (2011) 140 TTJ 233 (Pune) (Trib) is affirmed.

S.153C : Assessment – Search – Income of any other person – Assessment on the basis of documents seized – No specific finding regarding documents – Matter remanded. 2001

A search took place in the premises of RK and one RKM, Secretary General of the Uttar Pradesh Distillery Association. In the course of these search proceedings, various documents including reports narrating amounts alleged to have been received or receivable from various members of the UPDA and the basis thereof were recovered. The Revenue also relied upon the statement of RKM. On the basis of these materials, notices were issued under section 153C to the assessees. The notice was challenged by the respective assessees on the ground that the documents to the extent they reflected payments allegedly made or payable, could not constitute valid material since they did not "belong" to them.

Held, that the Tribunal had not rendered any specific findings on the status of such documents. For instance, if the production figures were in fact forwarded by the concerned unit under a letter or some other form connecting it with the material form seized, the inference would be of particular kind. Having regard to these factors, the Tribunal should render specific findings as to the status of the documents and in that sense, connect them with the concerned assessee's third parties who were issued notice under section 153C, and not merely the general nature of the documents in the form of production figures or amounts tabulated in a chart. This would give a clearer picture as to whether any documents material seized during the course of the proceedings belonged to any of the assessees. Matter remanded.

CIT v. Mohan Meakins Ltd. (2015) 372 ITR 502 / 277 CTR 198 / 118 DTR 198 (Delhi)(HC)

S.153C : Assessment – Search – Income of any other person – Amalgamation – Company ceased to exist – Service of notice to non-existing Company was held to be void and quashed. [S.153A] 2002

The Tribunal held that the assessee company ceased to exist after the date of approval of its amalgamation with another company by the High Court and therefore notice under section 153C issued subsequently in the name of assessee company was void and hence

the same is quashed consequently impugned assessment completed in pursuance of such notice is also quashed. (AY. 2003-04 to 2008-09)
Images Credit & Portfolio (P) Ltd. v. ACIT (2015) 169 TTJ 41 (UO)(Delhi)(Trib.)

2003 **S.153C : Assessment – Search – Income of any other person – Recording of satisfaction by the assessing of person searched is mandatory though the Assessing Officer may be same – No recording of satisfaction – Notice itself is null and void.[S.132]**
Dismissing the appeal of revenue the Tribunal held that Recording of satisfaction by Assessing Officer having jurisdiction over person searched is an essential and prerequisite condition for bestowing jurisdiction to Assessing Officer of 'other person' under section 153C. Where Assessing Officer of searched person and such other person is same, Assessing Officer has to carry out dual exercise first as Assessing Officer of person searched in which he has to record satisfaction, during course of assessment order proceedings of person searched and second as Assessing Officer of other person. Where exercise of recording satisfaction during assessment proceedings of person searched has not been carried out and satisfaction does not satisfy requirement of section 153C, Assessing Officer lacks jurisdiction to initiate proceedings u/s. 153C against assessee and, therefore, issuance of notice itself is null and void. (AY. 2003-04, 2008-09)
Dy. CIT v. Satkar Roadlines (P.) Ltd. (2015) 155 ITD 501 / (2016) 175 TTJ 198 (Delhi)(Trib.)

2004 **S.153C : Assessment – Search – Income of any other person – Satisfaction was not recorded – Condition required was not satisfied – Order was held to be bad in law.**
During search at premises of Group K, an undated cheque issued by assessee in favour of its director was seized. Assessing Officer issued notice u/s. 153C to assessee and assessed the income. On appeal allowing the appeal the Tribunal held that where no satisfaction was recorded by Assessing Officer of person searched, and satisfaction was recorded by Assessing Officer assessee being 'other person', notice issued to assessee u/s. 153C was not valid. since cheque, on basis of which notice was issued, was undated, it could not be said to pertain to any of years for which notice was issued. since cheque was in name of director of Group K which was searched and cheque was found from person upon whom cheque was drawn, cheque, in fact, belonged to said group and could not be said to be continued to 'belonging to' assessee who issued cheque. Therefore, conditions for issue of notice to assessee u/s. 153C were not satisfied.(AY. 1999-2000, 2004-05)
Rekhaben Thakkar (Smt.) v. ACIT (2015) 155 ITD 54 (Ahd.)(Trib.)

2005 **S.153C : Assessment – Search – Income of any other person – Recording of satisfaction by AO of person searched was a condition precedent for AO of 'other person' to acquire jurisdiction – No satisfaction was recorded – Assessment was held to be void *ab-initio*. [S.153A]**
AO recorded instant assessment order after procuring certain documents while conducting search and seizure action u/s. 132 against three persons. Proceedings were initiated against assessee u/s. 153C read with section 153A on basis of documents. AO computed total income at ₹ 22, 49,330. Assessee submitted that proper satisfaction was not recorded by correct AO before taking up proceedings u/s 153C against assessee.

CIT(A) dismissed appeal of the assessee on all legal issues taken up before him. The Tribunal held that as per Section 153C it was clear that where AO satisfied that any money, bullion, jewellery, books of account or other documents belonged to person other than person searched, then, such documents or assets, should be handed over to AO of 'other person'. Bare perusal of provision indicates that before handing over such documents to AO of 'other person', 'satisfaction' had to be recorded by AO of person searched that money, bullion or jewellery, etc., found from person searched belong to the 'other person', recording of satisfaction by AO of person searched was a condition precedent for AO of 'other person' to acquire jurisdiction. AO did not record any satisfaction that some money, bullion, jewellery or books of account or other documents found from those persons belonged to assessee. Absence of such satisfaction, failed to confer any valid and lawful jurisdiction on AO of assessee to proceed with matter of assessment u/s 153C. Assessment initiated by AO set aside as it was void *ab initio*.(AY. 2003-04).

Tanvir Collections (P) Ltd. v. ACIT (2015) 153 ITD 486 / 168 TTJ 145/ 114 DTR 305 (Delhi) (Trib.)

S.153C : Assessment – Search – Income of any other person – Section does not require that seized documents found during search must be incriminating one. 2006

Section 153C gives jurisdiction to Assessing Officer once documents etc. belonging to the assessee are found with other person in whose search had taken place and this section does not require that said documents belonging to assessee must be incriminating documents. (AY 2003-04 to 2008-09)

ACIT v. Gajannan Distributors & Developers (P) Ltd. (2015) 169 TTJ 641 / 61 taxmann. com 287 (Indore)(Trib.)

S.153C : Assessment – Search – Income of any other person – Notice in the name of non-existing amalgamated company – Assessment is held to be bad in law. 2007

The Tribunal held that the notice under section 153C issued in the name of the assessee-company which had already merged and amalgamated with another company and ceased to exist prior to the issuance of the notice was void and, therefore assessment completed in pursuance of the said notice is quashed. (AY. 2003-04 to 2007-08)

Computer Engineering Service India (P.) Ltd. (2015) 172 TTJ 317 (Delhi)(Trib.)

S.153C : Assessment – Search – Income of any other person – Wrong designation – or wrongly mentioning of section will not invalidate order. 2008

Search was conducted in premises of 'H' who was director of assessee company. But in assessment order his designation was wrongly described as managing director. On said ground assessee challenged validity of assessment order. ITAT held that mere wrong description of designation could not be a reason to invalidate order of assessment. The Tribunal also held that wrong mention of section, assessment could not be treated as invalid (AY. 2007-08, 2008-09)

DCIT v. Damac Holdings (P.) Ltd. (2014) 33 ITR 331 / (2015) 67 SOT 148 (URO)(Cochin) (Trib.)

2009 **S.153C : Assessment – Search – Income of any other person – Recording of satisfaction by same Assessing Officer is not mandatory.**

It was held that where same Assessing Officer had completed assessment proceeding of assessee-company and its director, recording of satisfaction may not be necessary because there was no necessity for Assessing Officer to handover document to another Assessing Officer. (AY. 2007-08, 2008-09)

DCIT v. Damac Holdings (P.) Ltd. (2015) 33 ITR 331 / 67 SOT 148 (URO)(Cochin)(Trib.)

2010 **S.153C : Assessment – Search – Income of any other person – Where satisfaction was not recorded by the AO of the searched person, the assessment proceedings are quashed being illegal. [S.153A]**

Assessee obtained copies of letters under RTI from various files of assessees whose premises were searched u/s. 153A of the Act. It was emerged no satisfaction note was recorded by the AO of the searched person with respect to other entities. The Tribunal quashed the assessment proceedings u/s. 153C as AO of the searched person had not recorded the requisite satisfaction. (AY. 2003-04 to 2008-09)

DCIT v. Aakash Arogya Mandir (P) Ltd. (2015) 167 TTJ 578 (Delhi)(Trib.)

2011 **S.153C : Assessment – Search – Income of any other person – No incriminating material belonging to assessee found during course of search – Proceedings under section 153C were held to be not valid. [S. 132A, 143(3)]**

During the search conducted in the case of RD group, certain documents had been referred as 'relating to' the assessee, in the satisfaction note recorded by the Assessing Officer while initiating the proceedings under section 153C against the assessee.

It was held that the satisfaction of the Assessing Officer that the said documents 'belong to' the assessee is condition precedent to initiate proceedings under section 153C. In absence of such finding by the Assessing Officer, the notice issued under section 153C in the present case is held invalid. Besides there was no incriminating material found during the course of search and the assessment was not pending or abated to justify the assessment framed under section 132A, read with section 153C as well as section 143(3) against the assessee. The assessment in the question framed in furtherance to the said invalid notice and in absence of incriminating material is thus held as void. (AY.2004-05)

DCIT v. Qualitron Commodities (P.) Ltd. (2015) 54 taxmann.com 295 / 167 TTJ 553 (Delhi) (Trib.)

2012 **S.153C : Assessment – Search – Income of any other person – Limitation – Assessing Officer empowered to assess or reassess total income of six assessment years immediately preceding assessment year relevant to assessment year in which search conducted – Notice issued to assessee pursuant to search does not fall within preceding six years hence to be quashed. [S.153A(1)(b)]**

For the assessment years 2001-02 and 2002-03, search and seizure action under section 132 of the Income-tax Act, 1961 was carried out on the assessee's group on December 13, 2005 in which certain documents said to belong to the assessee were found. The seized material pertaining to the assessee was received on March 12, 2009 from the Assistant Commissioner and notice under section 153C of the Act was issued and served

upon the assessee on March 24, 2009. On appeal by the assessee contending that issue of notice under section 153C of the Act was barred by limitation:
Held, allowing the appeal, that the seized material was received on March 12, 2009 from the Assistant Commissioner. Thus, the year in which the seized material was seized was the previous year 2008-09 relevant to the assessment year 2009-10. The preceding six years would be assessment years 2008-09, 2007-08, 2006-07, 2005-06, 2004-05 and 2003-04. Therefore, on the facts of the assessee's case and a combined reading of section 153C and section 153A of the Act, the issue of notice under section 153C of the Act for the assessment years 2001-02 and 2002-03 was barred by limitation and was to be quashed and consequentially, the assessment order passed in pursuance to the notice issued under section 153C of the Act was also to be quashed as was the penalty levied under section 271F of the Act. (AY. 2000-01, 2001-02, 2002-03)
R. L. Allied Industries v. ITO (2015) 37 ITR 507 / 54 taxmann.com 222 / 67 TTJ 20 (URO) (Delhi)(Trib.)

Section 154 : Rectification of mistake.

S.154 : Rectification of mistake – Corpus donation – Failure by assessee to produce required documents – Denial of exemption – Remedy lies in regular appeal and not rectification. [S. 11(d), 246] 2013
Dismissing the appeal held that the assessing authority as well as the Commissioner (Appeals) had considered the subject matter on the merits. In a matter like this, the course open to the authorities concerned was first to consider whether or not such an application was maintainable in law. That error committed by the authorities was considered by the Tribunal and it found that there was no mistake apparent from the record so as to invoke section 154. The question raised for invoking section 154 was a question ought to have been raised in a regular appeal and had nothing to do with rectification of any mistake apparent from the record. The findings entered by the assessing authority were based clearly on facts which was susceptible to an appeal. There was no error apparent from the record which enabled the assessee to invoke the provisions of section 154. (AY. 2006-07)
K.K. J. Foundations vs. ADI(E) (2015) 378 ITR 311 / 234 Taxman 712 / (2016) 131 DTR 411 (Ker.)(HC)

S.154 : Rectification of mistake – Merger – Limitation – Reassessment based on issue not covered in original assessment – Not relevant – Limitation under section 154 starts from date of reassessment order – Notice under section 154 issued within four years therefrom – Not barred by limitation. [147, 148, 154(7), 155, Constitution of India, Article 226] 2014
The assessee, a Government of India undertaking, was engaged in the business of manufacture and sale of iron and steel products. For the assessment year 2005-06, the assessee had filed a return of income declaring nil income after setting off unabsorbed depreciation of ₹ 30,81,03,64,095. The assessee admitted the total income of ₹ 3099.81 crores and claimed set of unabsorbed depreciation of the assessment years 1993-94 to 1998-99 aggregating ₹ 3914.69 crores. Further, the assessee admitted book profits

under section 115JB of the Act at ₹ 1107.17 crores and the tax thereon was worked out at ₹ 86.81 crores. The assessment was completed determining the total income at ₹ 3127,21,34,124 and after setting off the unabsorbed depreciation to the extent of the income so determined, the taxable income under the normal provisions was again computed at nil. The assessment that was completed by order dated March 26, 2007, was then reopened by issue of a notice under section 148 of the Act dated October 20, 2009, in respect of computation of minimum alternative tax. The reassessment finally resulted in an order dated March 19, 2010, under section 147 of the Act raising certain additional demands. A notice of rectification of mistakes was issued on August 31, 2012. On a writ petition challenging the notice :

Held, dismissing the writ petition, that the doctrine of merger would apply to the facts of the present case. The notice under section 154 clearly stated that the order under section 147 of the Act made on March 19, 2010, required amendment as there was a mistake apparent from the record and the notice also referred to the details of the mistake. Limitation started from the date of the reassessment order dated March 19, 2010, and since the notice under section 154 was issued on August 31, 2012, it was well within the time stipulated under sub-section (7) of section 154. The question whether the mistake pointed out in the notice was an obvious and patent mistake, and whether to establish such mistake a long drawn process and reasoning would be required could not be and need not be gone into in the writ jurisdiction under article 226 of the Constitution of India. (AY.2005-06)

Rastriya Ispat Nigam Ltd. v. ACIT (2015) 377 ITR 420 / 121 DTR 82 (T&AP)(HC)

2015 **S.154 : Rectification of mistake – Interest on refund – Subsequent decision of Supreme Court – Interest allowed on refund cannot be rectified. [S.244, 244A, The Code of Civil Procedure, Order 47, Rule 1]**

The Assessing Officer, while passing order under section 143(3), allowed interest upon interest on refund. He, however, sought to recall the said order by resorting to proceedings under section 154 on basis of a subsequent decision of the Supreme Court. The order passed by him was upheld by the Commissioner (Appeals) but in an appeal preferred by the assessee, the Tribunal set aside the order passed in exercise of jurisdiction under section 154. On appeal by the revenue:

The fact that the decision on a question of law on which the judgment is based has been reversed or modified by any subsequent decision of a superior court cannot be a ground for exercise of power under section 154. As such, the Tribunal was justified in reversing the order passed in exercise of section 154 by the Assessing Officer.

CIT v. Peerless General Finance & Investment Co. Ltd. (2015) 232 Taxman 615 (Cal.)(HC)

2016 **S.154 : Rectification of mistake – Brought forward losses – Even if assessee offers interest income as "Other Sources" and claims set off of brought forward business loss against it u/s. 72, AO is not permitted to rectify as issue is debatable. [S. 56, 72]**

On appeal to the High Court HELD allowing the appeal:

As to whether this set off which has been claimed by the assessee is to be construed as one falling within four corners of Section 72 of the Act itself would be a debatable point and as such if the issue involves examination in detail, we are of the considered

view that the Assessing Officer could not have resorted to invoking section 154 of the Act so as to bring within the sweep of "error apparent on the face of the record". The Hon'ble Apex Court in *T. S. Balaram v. Volkart Brothers* and others (1971) (82) ITR 50 has observed that a mistake apparent on the record must be obvious and patent mistake and not something which is established by long drawn process of reasoning. Keeping in mind the dicta laid down in the above referred case when the facts on hand are perused yet again, we are left with irresistible conclusion that in the instant case the Assessing Officer sought to rectify the original assessment order on the ground that carried forward business loss was to the tune of ₹ 24,23,760/- and same had been set off against the total income which was inclusive of the income earned by the assessee under the head "Income from Other Sources" and "Income from House Property" as declared by him in the return of income and carried forward loss could have been set off against "Business Income" only. As already observed by us herein above the issue as to whether the said income earned by way of interest on Fixed Deposits, NSCs, would be available to the assessee to seek for set off as business loss or not under section 72 of the Act is a debatable issue and as such we are of the considered view that said issue could not have been gone into in a proceeding under section 154 of the Act. As to whether income earned by way of interest would form part of total income so as to allow the assessee to seek set-off is an issue which will have to be gone into in detail and mere declaration in the return of income by assessee would not alter its status and as such it cannot be held that an error had occurred in the assessment order so as to enable the Assessing Officer to invoke section 154 of the Act for rectification. (AY.2004-05)

K. S. Venkatesh v. DCIT / (2015) 63 taxman.com 343 (Karn.)(HC); www.itatonline.org

S.154 : Rectification of mistake – Interest – When superior authority had already passed an order Assessing Officer could not pass *suo motu* order levying interest. [S.234B, 234C] 2017

At time of completing assessment, Assessing Officer recorded a finding that interest under sections 234B and 234C could be charged as per rules. Commissioner (Appeals), however, allowed assessee's claim holding that no interest could be charged. Subsequently, Assessing Officer took a *suo motu* action and passed an order under section 154 levying interest under sections 234B and 234C. Commissioner (Appeals) as well as Tribunal cancelled order passed by Assessing Officer under section 154. On appeal dismissing the appeal of revenue the Court held that on facts, Assessing Officer could not pass order *suo motu* under section 154 when superior authority had already passed an order against levy of interest, accordingly impugned order of Tribunal deleting interest was to be confirmed. (AY. 1997-98)

CIT v. Brinda Arjena (Smt.) (2015) 231 Taxman 74 (All.)(HC)

S.154 : Rectification of mistake – Income from other sources – Interest income – Set off of business loss – Rectification order was held to be justified. [S.56, 28(i)] 2018

Assessee was engaged in business of share trading. It earned certain interest income which was declared as 'income from other sources'. Assessing Officer passed order, accepting assessee's view. The assessee filed rectification application claiming interest income as 'business income' which was eligible to be set off against business loss. Assessing Officer allowed said application. Subsequently, Assessing Officer passed

another rectification order, restoring his original order. Assessee raised an objection that facts being complex in nature, Assessing Officer could not pass subsequent rectification order. Court held; in respect of same issue in dispute, assessee could not take double standards and, thus, his objection was to be set aside. Since assessee failed to bring any material on record to prove its case, order of Assessing Officer was justified. (AY. 1997-98)
Trade Apartment Ltd. v. CIT (2015) 231 Taxman 578 (Cal.)(HC)

2019 **S.154 : Rectification of mistake – Grant of deduction of interest under section 10B – Intimation under section 143(1) can be rectified in rectification proceedings. [S. 143(1)]**
The return filed by the assessee was processed under section 143(1). Subsequently, the Assessing Officer found that the assessee had interest income of ₹ 11,27,629 from deposits with the Corporation Bank, the Electricity Board and from staff on loans. On that basis he concluded that since the interest was not derived from the business of the undertaking, the income was not eligible for exemption under section 10B. The Assessing Officer under section 154 excluded the interest of ₹ 11,27,629 holding that the income was not eligible for exemption under section 10B.
Held, dismissing the appeal, that the order passed by the Assessing Officer under section 154 was valid and had been rightly upheld by the Tribunal, as the true intent behind passing such a rectification order is to ensure that the law laid down by the Supreme Court in *Pandian Chemicals Ltd v. CIT (2003) 262 ITR 278 (SC)* is followed.(AY. 2000-01)
International Components India Ltd. v. ACIT (2015) 372 ITR 190 (Mad.)(HC)

2020 **S.154 : Rectification of mistake – Business income – Recomputation of turnover – Debatable questions – Rejection of application was held to be justified. [S.29, 132]**
Tribunal computed brokerage of assessee by applying rate of 0.6 per cent on total turnover and same attained finality. Assessee through application under section 154 sought recomputation of said turnover. High Court by impugned order held that said determination would not be confined to arithmetical or adding figures, rather explanation and answers would be required, therefore, recomputation could not be undertaken under section 154.
JRD Stock Brokers (P.) Ltd. v. CIT (2015) 231 Taxman 504 / 115 DTR 244 / 276 PTR 362 (Delhi)(HC)
Editorial: Special Leave Petition filed against impugned order was dismissed. SLA (C) No. 21014 of 2014 dated 5-1-2015), JRD Stock Brokers (P.) Ltd. v. CIT (2015) 230 Taxman 272 (SC)

2021 **S.154 : Rectification of mistake – Export business – Book profit – Debatable issue – Rectification was held to be not proper. [S. 80HHC, 115JB]**
Assessee filed its return of income declaring taxable income of ₹ NIL under normal provisions and ₹ 2,429 crores under section 115JB.
During assessment, the AO disallowed the deduction under section 80HHC while computing the income under section 115JB. AO held that excess deduction was given to assessee under section 80HHC, by an order under section 154 AO made additions to book profits. CIT(A) confirmed same. Tribunal held that there was no mistake apparent on face of record to warrant passing of rectification order. On appeal High Court held

that exercise of powers under section 154 is limited to rectify mistakes which are apparent from record and not to carry out exercise of rectification of debatable issues. (AY. 2002-03)
CIT v. Reliance Industries Ltd. (2015) 228 Taxman 184 (Mag.)(Bom.)(HC)

S.154 : Rectification of mistake – Depreciation – Vapour Absorption Machine, an energy saving device – Allowance of depreciation at 100% was held to be justified. [S.32] 2022
AO found that depreciation on Vapour Absorption Machine, an energy saving device was to be allowed to assessee at rate of 100 per cent. Rectification of said order by merely stating that Vapour Absorption Machine was a part of Centralized Air Conditioner and liable for depreciation at 25 per cent was not justified as same was counter to Para III, 3(iii)D(b) of Appendix-I to Income-tax Rules, 1962. (AY. 2000-01)
CIT v. New Woodlands Hotel (P.) Ltd. (2015) 228 Taxman 360 (Mag.)(Mad.)(HC)

S.154 : Rectification of mistake – Debatable point of law – Not a mistake apparent from record – Doctrine of merger – Weighted deduction – Assessing Officer while implementing first appellate order not entitled to review his earlier order – Assessing Officer on basis of new facts cannot pass new order unless order of appellate order challenged or modified. [S.35C] 2023
Allowing the appeal of assessee it was held that a decision on a debatable point of law is not a mistake apparent on the record. After the implementation of the order passed by the Commissioner (Appeals), it was not appropriate on the part of the Assessing Officer to review the earlier order under the guise of rectification and arrive at new facts and pass a new order unless the order of the Commissioner (Appeals) was challenged or modified. The Tribunal had materially erred in upholding the erroneous finding of fact by the Commissioner (Appeals) and the Assessing Officer and the findings were not only perverse but also against the rules and the provisions of law and, therefore, they were to be set aside. (AY. 1983-84)
Gujarat State Seeds Corporation Ltd. v. ITO (OSD) (2015) 370 ITR 666 (Mad.)(HC)

S.154 : Rectification of mistake – After completion of assessment – On facts the order of Tribunal was affirmed. [S. 147, 148, General Clauses Act, S. 21] 2024
After completion of assessment, AO issued rectification notice for non-consideration of speculative income. CIT(A) and Tribunal set aside rectification order on ground that AO had no power to rectify assessment order under section 154. On appeal by revenue the Court held that, power of rectification can be exercised by AO to effect amendment in assessment order. However on facts the order purporting to be order of rectification was in fact order of reassessment, hence the order of Tribunal was affirmed.
CIT v. Karjat Trade Place (P.) Ltd. (2015) 228 Taxman 119 (Mag.)(Uttarakhand)(HC)

S.154 : Rectification of mistake – Merger – Capital gains – Issue of rectification order passed under section 154 for withdrawal of excess exemption granted under section 54F. [S. 54F, 147] 2025
The Tribunal set aside the issue to the AO for fresh adjudication in accordance with law after giving an opportunity to the assessee. The Tribunal agreed with the contention of

the assessee that the appeal against the order passed under section 147 and the appeal against the order passed under section 154 are separate proceedings and there is no question of merger. These should be disposed of separately. (AY. 2004-05)
Kamlesh Bahedia v. ACIT (2014) 151 ITD 495 / (2015) 169 TTJ 68 (Delhi)(Trib.)

2026 **S.154 : Rectification of mistake – Supreme Court remanding appeal to Commissioner (Appeals) – Commissioner (Appeals) adjudicating issue never in dispute before any of authorities – Beyond jurisdiction – Order to be rectified.**
The Assessing Officer treated the cost of two comber machines and one auto coner as capital expenditure. The Commissioner (Appeals) and the Tribunal accepted the claim of the assessee that the cost was revenue expenditure. The Department carried the matter to the High Court and to the Supreme Court. The Supreme Court remanded the appeal to the Commissioner (Appeals). Pursuant to the directions of the Supreme Court, the Commissioner (Appeals) adjudicated the issue that the cost of two comber machines and one auto coner was capital expenditure. The Commissioner (Appeals) also held that the cost of 339 units of yarn clearers was capital expenditure. The assessee filed a rectification petition under section 154 of the Act contending that the Supreme Court had directed the Commissioner (Appeals) only to consider whether the cost of two comber machines and one auto coner was capital or revenue expenditure and that the issue related to the cost of 339 units of yarn clearers was never in dispute before any of the authorities, as the Assessing Officer had already accepted that as revenue expenditure. The Commissioner (Appeals) rejected the rectification petition. On appeal :
Held, allowing the appeal, that the cost of 339 units of yarn clearers was not the issue before the Supreme Court. Since the issue did not arise out of the orders of any of the authorities originally, the order of the Commissioner (Appeals) was not only incorrect but also beyond his jurisdiction. (AY. 1997-98)
Sri Vignesh Yarns P. Ltd. v. Dy. CIT (2015) 38 ITR 543 (Chennai)(Trib.)

2027 **S.154 : Rectification of mistake – Self-assessment tax – Withdrawal of interest on refund – Debatable issue – Not a matter for rectification. [S. 244A]**
For the assessment year 2008-09, pursuant to the assessment order, the assessee was granted refund with interest under section 244A of the Income-tax Act, 1961. The Assessing Officer rectified the assessment order under section 154 of the Act holding that no interest was payable to the assessee and withdrew the interest granted under section 244A of the Act. The Commissioner (Appeals) confirmed this. On appeal :
Held, that the jurisdictional High Court having held that the assessee was entitled to interest on refund under section 244A of the Act, in respect of self-assessment tax, the Assessing Officer erred in assuming jurisdiction under section 154 of the Act on a debatable issue. (AY. 2008-09)
Otis Elevators Company (India) Ltd. v. Dy. CIT (2015) 38 ITR 631 (Mum.)(Trib.)

2028 **S.154 : Rectification of mistake – Cash credits – Credits of earlier year – Only credits received during the year can be assessed as unexplained cash credits. Credits of earlier years, even if unexplained, cannot be assessed. [S.68]**
Section 68 stipulates that any unexplained sum found credited in the books of the assessee for any previous year, then the same may be taxed as income of the assessee

for that previous year. Thus, section 68 can only be invoked if the loan has been taken or the sums have been credited in the books in the relevant previous year for which assessment is being made and not the loans taken in the earlier years. From the income tax records, it is evident that this loan is coming forward from last several years and is reflected in the balance sheet of the assessee filed for the earlier years along with the return of income. All these records are available with the Assessing Officer. The mistake apparent from record does not mean the assessment order itself but the records which are available with the Assessing Officer. Though the assessee could not furnish the confirmation of the loan and other evidences but such a loan could not have been added in the A.Y. 2005-06 as the same was taken in the earlier years and is being carried forward. In this year it is appearing balance of the current year. Thus, legally such an addition could not sustained in this year and therefore addition made by AO u/s. 68 is a legal mistake, which can be rectified within the ambit and provisions of section 154. (ITA No. 1219/Mum/2013, dt. 25-3-2015) (AY. 2005-06)
Rita Stephen Pinto v. ITO (Mum.)(Trib.); www.itatonline.org

S.154 : Rectification of mistake – Business income – Capital gains – Rejection of claim of capital gains – Expenditure against business expenditure is to be allowed. [S.28(i), 45] 2029
The claim of the assessee of treating the income from sale of shares as capital gains was rejected by the AO and the CIT (A). Thereafter, the assessee filed a Rectification application before the CIT(A) for rectification of the order raising the ground that business expenditure should be allowed against the business income. This Rectification application was rejected by the CIT(A) on the ground that the matter involves a long drawn out process of reasoning, hence cannot be subject matter of rectification under section 154.
On further appeal, the Tribunal held that since the claim of the assessee regarding income from sale and purchase of short term capital gains has been rejected by the lower authorities and the same has been treated as business income, hence the assessee was obviously entitled to deduction of expenditure incurred against earning of the said business income. Hence, there was an error apparent on record. The application of the assessee was allowed and consequently the matter was restored to the AO for the purpose of verification of the expenditure claim of the assessee. (ITA No. 6979/M/2012 dated 14-1-2015. (AY 2008-09)
Shri Uday Chander Khanna v. DCIT, (Mum.)(Trib.) www.ctconline.org

Section 158B : Definitions.

S.158B : Block assessment – NRI gifts – Where no incriminating material indicating undisclosed income was seized and NRI gifts which had already been reflected in original return, no addition could be made as undisclosed income. [S.132, 158BC] 2030
Assessee in regular returns filed under section 139(1), had shown NRI gifts received by her and claimed exemption from payment of income tax. After search, Assessing Officer took view that these gifts were not genuine and, therefore, treating same as undisclosed income, assessed said amount to tax. Since in instant case, no incriminating material

indicating undisclosed income was seized and NRI gifts detected in course of search had already been reflected in returns filed by assessee, same would not constitute undisclosed income) (AY. 1988-89 to 1998-99)
CIT v. Manisha A. Sadhwani (2015) 228 Taxman 121 (Mag.)(Karn.)(HC)

Section 158BB : Computation of undisclosed income of the block period.

2031 **S.158BB : Block assessment – Computation – Undisclosed income – Return of income – Returns were on record of department – Income returned cannot be assessed as undisclosed. [S. 139(1), 158BC, 158BD]**
Dismissing the appeal of revenue the Court held that Tribunal was right in deleting addition as undisclosed income of assessee received from partnership firm on ground that assessee had filed return before search though beyond due date specified under section 139(1) and said returns were on record of department before date of search, said income could not be treated as undisclosed income of assessees in view of section 158BB.
ITO v. Muktaben J. Patira (2015) 231 Taxman 502 (Guj.)(HC)

2032 **S. 158BB : Block assessment – Computation – Undisclosed income – Undisclosed income for block period would be reduced by aggregate of total income to extent such income does not exceed maximum exemption limit, subject to condition that such income is determined on basis of entries recorded in books of account and other documents made by assessee on or before date of search. [S. 158BC]**
Consequent to the search, the Assessing Officer held that the assessee had a very high standard of living and estimated her personal expenses from the date she attained majority and also estimated expenses incurred on her engagement and marriage. Thereafter, total undisclosed income was determined. Being aggrieved, the assessee preferred an appeal to the Tribunal and contended that in determining the undisclosed income the maximum non-taxable limit for each year would not be included.
The Tribunal did not accept the submission of the assessee and upheld the order of the Assessing Officer.
On appeal: The amendment by Finance Act, 2002 replaced/substituted the original sub-section (c) of section 158BB(1) by a new sub-section (c) consisting of sub-sections (A), (B) and (ca). As a consequence of the aforesaid amendment with retrospective effect from 1995, where the due date of filing the return has expired and no return has been filed, yet the total undisclosed income for the block period would *inter alia* be reduced by aggregate of total income to the extent such income does not exceed the maximum amount not chargeable to tax or any previous year falling in the block period. However the same is subject to the condition that such income not chargeable to tax is determined on the basis of entries recorded in the books of account and other documents maintained in the normal course on or before the date of search. It is only when the appellant is able to satisfy the condition precedent in section 158BB(1)(c)(B) would such income be reduced in determining the aggregate of the total undisclosed income for the block period. In the absence of there being any such entries in the books and/or memorandum the appellant's case would fall under the substituted sub-section (ca) of section 158BB(1) and no amount of income would be reduced on the above

account to determine the aggregate of total undisclosed income. In the present facts, in view of the law as prevailing prior to the retrospective amendment of 2002 with effect from 1995, none of the authorities determined the issue whether the amount was arrived at on the basis of entries in the books of account and other documents maintained by the appellant before the search. Therefore though the retrospective amendment to section 158BB by the Finance Act, 2002 would be applicable in case of appellant, the benefit of the same would be available only on the appellant satisfying the authorities that the amount of ₹ 69,298 is duly supported by entries in books of account or such other memorandum. This exercise could be carried out by the Assessing Officer while giving effect to this order. It is only on satisfaction of the aforesaid condition precedent would the benefit be extended to the assessee resulting in reduction of total undisclosed income to the above extent.

The submission of revenue that the benefit of retrospective amendment will not be available prior to 1995 cannot be accepted. This for the reason that section 158BB came into the statute book as part of Chapter XIV-B only with effect from 1-7-1995. Consequently, the retrospective amendment by Finance Act, 2002 with effect from 1-7-1995 would also extend to undisclosed income covering the period of assessment years 1987-88 to 1995-96. In the above circumstances, the First Issue is decided in favour of the appellant, and the same is subject to the assessee satisfying the Assessing Officer that the amount which is sought to be reduced is arrived at on the basis of entires recorded in the books of account and/or other memorandum maintained in the normal course before the date of the search.

Komal Wazir (Mrs.) v. Dy. CIT (2015) 230 Taxman 563 / 281 CTR 506 (Bom.)(HC)

S.158BB : Block assessment – Undisclosed income – Opening cash balance – Renovation expenses of house – Addition was held to be justified – Bad debt – Matter remanded. [S.36(2)], 158BC] 2033

Determination of opening cash balance on basis of cash flow statement furnished by assessee addition was held to be justified.

Assessee claiming that sums paid gratis to him in kind by friends and relatives as a matter of goodwill. Onus on assessee to show how much he received in kind or in value. No material to substantiate the claim. Amount treated as undisclosed income was held to be justified.

Assessing Officer treating as investment in money-lending in year of giving. Tribunal finding bad debt not taken into account in computing income in earlier year. Matter remanded to AO. (BP. 1989-90 to 1999-2000)

R. Mani v. ITO (2015) 373 ITR 226 (Mad.)(HC)

S.158BB : Block assessment – Undisclosed income – Cash credits against assessee reflected in books referable to concerned assessment years – Block assessment unsustainable. [S.132, 158BC] 2034

Dismissing the appeal of revenue, the Court held that the Tribunal recorded a categorical finding to the effect that all the items of cash credits alleged against the assessees were reflected in the books of account referable to the concerned assessment years. Therefore, the very justification for making the block assessment and thereby the passing of assessment order was unsustainable. The Tribunal had taken a correct view in the

matter and based its conclusions on the relevant precedents. Therefore, there was no basis to interfere with the order of the Tribunal.
CIT v. Tharmandal Builders P. Ltd. (2015) 370 ITR 209 / 231 Taxman 75 (T&AP)(HC)
CIT v. J. S. Investments (P) Ltd. (2015) 370 ITR 209 / 55 taxmann.com 20 (T&AP)(HC)
CIT v. S. D. Investments (P) Ltd. (2015) 370 ITR 209 / 55 taxmann.com 20 (T&AP)(HC)

2035 **S.158BB : Block assessment – Computation – Investment was not disclosed in the books – Addition was held to be justified – Income of new unit was not disclosed in the books of account – Exemption was not allowable. [S.69B, 80-IA, 158BC, 158BD]**
Investment was not disclosed in the books of account. There was mismatch in the accounts. The investment was discovered after the search and seizure action hence the addition confirmed by the Tribunal was held to be justified. Income of new unit could not be accepted as the income was not found recorded in the books of account. Income of new unit was not disclosed in the books of account. Exemption was not allowable. (AY. 1999-2000)
Herald Publications (P) Ltd. v. CIT (2015) 274 CTR 102 / 229 Taxman 103 / 114 DTR 98 (Bom.)(HC)

2036 **S.158BB : Block assessment – Undisclosed income – Substantial addition was confirmed – Sale of books – Matter remanded. [S.158BC]**
Held that no proper explanation regarding source of corpus fund was furnished. Additions of income was held to be justified. Assessee collecting monthly fees and term fees from students, there was no entry in books of account and receipts were discovered during search operation. Addition was held to be proper. Assessee receiving money on sale of books. Documents not available before Assessing Officer but filed before Commissioner (Appeals). Genuineness of trust not enquired into by Assessing Officer. Matter remanded. (BP. 1-4-1996-28-5-2002)
ACIT v. Sabarigiri Trust (2015) 152 ITD 637 / 39 ITR 308 / 170 TTJ 586 (Cochin)(Trib.)

Section 158BC : Procedure for block assessment.

2037 **S.158BC : Block assessment – Undisclosed income – Findings of Tribunal recorded in detail based on statement of assessee and other corroborative material that addition was justified – No question of law arises. [S.260A]**
On appeal by the assessee, the Tribunal, holding that the confession by the partner could not be treated as conclusive, remanded the matter to the Assessing Officer to give a fresh finding taking into account both the statement made as well as other corroborative evidence. In the second round, the assessment order gave detailed reasons for arriving at the conclusion that the figures stated in the statement recorded were corroborated, in particular, by various loose sheets found at the premises of the assessee as well as vouchers, some of which related to the two films in question. In an appeal filed to the Tribunal, on the question whether the statement was made under duress and whether it was retracted lawfully, the Tribunal found that the statement could be used as evidence. It examined other corroborative evidence referred to in the assessment order and arrived at a finding that the added income would be income which can be added

under section 158BC for the block assessment period in question. On appeal to the High Court, the High Court found, after narrating the facts, that no substantial question of law arose. On appeal : the Court held that no substantial question of law arose. Not only were the findings of fact recorded in some detail but it was not possible to say that this was a case of no evidence at all inasmuch as evidence in the form of the statement made by the assessee himself and other corroborative material was there on record.
Video Master v. Jt. CIT (2015) 378 ITR 374 / 128 DTR 307 / (2016) 282 CTR 221 / 66 taxmann.com 361 (SC)
Editorial: Decision of the Bombay High Court in I.T.A. No. 216 of 2002 dated 27-8-2004, is affirmed.

S.158BC : Block assessment – Undisclosed income – Assessee paying amount in cash and received identical amount in cheque – Assessee not disclosing identity of persons to whom payment made – Assessing Officer cannot make investigation and issue summons to them – Amount to be treated as undisclosed income. [S. 131, 133(6)] 2038
Dismissing the appeal the Court held that the assessee did not disclose the identity of the persons to whom the payment was made. The assessee could have asked the Assessing Officer to issue summons to the so-called middlemen under section 131 or section 133(6) of the Income-tax Act, 1961. The assessee alone knew the person to whom the payment was made. It was not, therefore, possible for the Assessing Officer even if he wanted to, to undertake any such enquiry. The order of the Tribunal considering the admitted facts and circumstances of the case could not but be said to have expressed a possible view and therefore, the addition of a sum of ₹ 9 lakhs as an undisclosed income was correct in law. The order of the Tribunal was not perverse. Court also held that Assessing Officer has no duty to make investigation for purpose of collecting evidence in support of case of assessee.
Kafeel Ahmed v. CIT (2015) 379 ITR 460 (Cal.)(HC)

S.158BC : Block assessment – Unexplained cash credits – Statement on oath – Retraction – Cross examination – Natural justice – Addition was held to be not justified – The Court declined to remand the matter to comply with natural justice since two decades had elapsed since the date of the search. [S.68, 132(4)] 2039
Dismissing the appeal of Revenue the Court held that the assessee explained the amount with reference to the entries in the books of account of the sales made during the year and the stock position. In other words, the Assessing Officer did not find that the cash seized represented amounts not emanating from sales but some other source. The fact that the assessee may have retracted his statement belatedly did not relieve the Assessing Officer from examining the explanation offered by the assessee with reference to the books of account produced before him. The assessee had an explanation for not retracting the statement earlier. He also furnished an explanation for the cash that was found in the hands of his employee and this was verifiable from the books of account. In the circumstances, it was unsafe for the Assessing Officer to proceed to make additions solely on the basis of the statement made under section 132(4) which was subsequently retracted. Court also held that the basis for making the addition of ₹ 1,38,41,971 was the statement of the proprietor of the Bombay concern. He had

furnished various details which were incriminating as far as the assessee was concerned. It was incumbent on the Assessing Officer, in those circumstances, to have afforded the assessee an opportunity of cross-examination of the proprietor. The Tribunal also noted that the assessee could not be said to have not co-operated at all in the assessment proceedings. The court would not remand the matter to comply with natural justice since two decades had elapsed since the date of the search. There must be some finality to proceedings that seek to cover a block period beginning April 1, 1986. BP. 1-4-1996 to 20-6-2015)

CIT v. Sunil Aggarwal (2015) 379 ITR 367 / (2016) 237 taxman 512 (Delhi)(HC)

2040 **S.158BC : Block assessment – Undisclosed income – Presumption – Addition was held to be justified. [S. 132(4A), 158BH]**

Dismissing the appeal of assessee the Court held that there was no illegality or infirmity on the part of the Assessing Officer to have taken into account the sworn statements of the witnesses taken on oath. Each and every circumstance pointed out by the assessee during the course of the arguments was considered by the Tribunal and it had found that the evidence recorded by the Assessing Officer during the course of the search was corroborative in nature and, therefore, were acceptable in law. The Tribunal had also found that the amount recovered from the premises of A was proved to belong to the assessee and this conclusion was corroborated by the evidence taken on oath. So also, the Tribunal had found that the slips recovered from the office premises were not explained by the assessee and having regard to the quantum of contract work undertaken by the assessee, it would be reasonable to presume that the amounts noted in the seized materials represented amounts in lakhs. The Tribunal was justified in upholding the order of the Assessing Officer.

Bhagheeratha Engineering Ltd. v. ACIT (2015) 379 ITR 244 (Ker.)(HC)

2041 **S.158BC : Block assessment – Survey – Assessment was held to be bad in law. [S. 132, 133]**

Assessee firm was engaged in business of civil construction and developments. A survey operation was conducted at premises of assessee and there was no search operation under section 132. Material used for framing assessment under section 158BC was collected. In appeal Commissioner (Appeals) reduced the addition. On appeal to Tribunal the Tribunal quashed the proceedings. On appeal by Revenue dismissing the appeal the Court held that the OMM Tribunal had rightly quashed and set aside assessment order passed under section 158 BC.

CIT v. Parmar Builders & Developers (2015) 234 Taxman 378 (Guj.)(HC)

2042 **S.158BC : Block assessment – Undisclosed income – Jewellery – Statement was not retracted – Interest loan – Cash system of accounting – Assessable as undisclosed income. [S.132]**

Dismissing the appeals the Court held that the letter dated November 30, 1996, addressed to the Additional Director of Income-tax did not indicate that the assessees were retracting the earlier statements made on oath. Further, it did not state that the statements made on October 12, 1996, and November 14, 1996, were incorrect or even make an attempt to explain away the categorical statements on oath. There was also

no allegation of any ill treatment which led the assessees to make the statements on October 12, 1996, and November 14, 1996, which were contrary to the facts. Therefore, the communication dated November 30, 1996, could not supersede or replace the statements made on October 12, 1996, and November 14, 1996. The Tribunal was right in holding that the seized jewellery represented unaccounted income of the assessees.
Court also held that both the authorities had rendered a finding of fact that the agreement indicated that the borrower would pay the assessee interest at 4 per cent per annum from the date of loan till its repayment. The Tribunal clearly recorded a finding of fact that the assessees did not maintain regular books of account. Consequently, no occasion to claim the benefit of cash system of accounting could arise as there was no method of accounting followed by the assessees. The assessees also did not choose to produce the borrowers as their witnesses or any evidence from them indicating that no interest was paid by them. The addition of interest to the income was justified.
Paras Shantilal Shah v. Dy. CIT (2015) 378 ITR 41 / 127 DTR 345 / (2016) 282 CTR 291 (Bom.) (HC)
Pragna R. Shahv. Dy. CIT (2015) 378 ITR 41 /127 DTR 345 / (2016) 282 CTR 291 (Bom.)(HC)
Priti Parash Shah v. Dy. CIT (2015) 378 ITR 41 / 127 DTR 345 / (2016) 282 CTR 291 (Bom.)(HC)
Rajendra Shantilal Shah v. Dy. CIT (2015) 378 ITR 41 / 127 DTR 345 / (2016) 282 CTR 291 (Bom.)(HC)

S.158BC : Block assessment – Undisclosed income – Surplus disclosed in the books of account cannot be considered as 'undisclosed income' under Chapter XIV-B. [S. 10(22), 10(23C) 139, 158BB] 2043
There was search action on the assessee, an educational institution. Assessing Officer examined its books of accounts and found that the receipts and payments account reflected a surplus in several years within the block period. Accordingly, he treated the surplus as undisclosed income and made an addition.
On appeal, the CIT(A) reduced the quantum of addition by allowing depreciation allowance. The Tribunal accepted the contention of the assessee that it was not required to file a return of income as its income was exempt u/s. 10(22) and therefore, allowed the assessee's appeal principally on the ground that surpluses disclosed by the assessee in the books of account, maintained in the regular course could not be considered as 'undisclosed income' of the assessee under Chapter XIV-B.
The High Court held that the expression 'undisclosed income' would have to be given a schematic interpretation. The provisions regarding search and seizure and assessing undisclosed income are draconian provisions the assessment and penalties that follow the discovery of undisclosed income are also harsh. Thus, the expression 'undisclosed income' would have to be viewed from the standpoint of an Assessee and unless it is manifest from the conduct of the assessee that he consciously intended to conceal his income, which he otherwise believed to be 'taxable' the same would not be liable to be treated as undisclosed income of an assessee. Therefore, as the assessment order made by the AO u/s. 158BC was not sustainable as in the absence of any undisclosed income, the question of framing a block assessment did not arise. (AY. 1998-99 to 1999-2000)
DIT(E) v. All India Personality Enhancement & Cultural Centre for Scholars (AIPECCS) Society (2015) 62 taxmann.com 92 / 379 ITR 464 / 281 CTR 1 / 126 DTR 353 (Delhi)(HC)

2044 **S.158BC : Block assessment – Undisclosed income – Amounts shown in second set of account books – Second set of account books not legal – Addition of amount justified – No proper explanation regarding source of particular payment – Addition of such amount justified. [S. 132]**

Dismissing the appeal of assessee the Court held that no law permits maintenance of two sets of accounts, i.e., one unaccounted and the other accounted. Such scheme of maintaining two different sets of accounts is totally forbidden in law and no credential value can be given to such illegal accounts maintained by the assessee. The addition of ₹ 1,64,158 was justified. Court also held that, the Tribunal had arrived at a conclusion that the assessee had failed to explain the source of the amount of ₹ 2,50,000 paid to E. These were pure questions of fact and the findings given on these factual aspects could not be interfered with in this appeal. The addition of ₹ 2,50,000 was justified.

Quality Liquor Agencies v. ACIT (2015) 377 ITR 528 / 64 taxmann.com 368 (Karn.)(HC)

2045 **S.158BC : Block assessment – Association of persons – Addition made in the assessment of individual was deleted.**

Assessee carrying on lottery business as karta of Hindu undivided family and finance business as an association of persons. Notice was issued under section 158BC in name of association of persons and return was also filed in status of association of persons. Assessing Officer held that the income to be assessed in the name of individual. On appeal the Tribunal held that the undisclosed income was to be assessed in the hands of the Hindu undivided family, in so far as the lottery business was concerned and in so far as the finance business was concerned, it was to be assessed as an association of persons and not under the name of the assessee in his individual capacity. On appeal by revenue, dismissing the appeal the Court held that Tribunal was justified in the facts of the case in holding that the amount was to be assessed in the hands of the Hindu undivided family in the circumstances and not in the hands of the assessee in his individual capacity and also in the hands of Association of Persons.

CIT v. Manish Kumar Pajwani (2015) 376 ITR 292 / 63 taxmann.com 93 (Karn.)(HC)

2046 **S.158BC : Block assessment – Telescoping – Peak credit of earlier year to be taken into account in determining income of subsequent year.**

Dismissing the appeal of Revenue, the Court held that where certain intangible additions were made in the earlier years, they would constitute the source of the credit entry in a subsequent year hence the Tribunal was correct in holding that the higher undisclosed income would take care of lower peak credit of the previous year.

CIT v. Saraf Trading Co. (2015) 376 ITR 534 (All.)(HC)

2047 **S.158BC : Block assessment – Valuation – Amounts of investment not fully disclosed in books of account – Addition cannot be made on the basis of report of District valuation officer. [S. 69B]**

During search no material was collected with respect to undervaluation of property and it was during post-search block assessment proceedings, Assessing Officer doubting valuation referred matter to valuation cell and on basis of valuation report of District Valuation Officer made addition. Dismissing the appeal of Revenue the Court held that

such addition could not sustain as it was not made on basis of material collected during search.
Dy. CIT v. Ravi Builders (2015) 231 Taxman 62 (Guj.)(HC)

S.158BC : Block assessment – Undisclosed income – Unexplained investment – Burden on assessee to prove source of income – No satisfactory explanation regarding investment – Addition of value of investment in total income of assessee – Justified. [S. 69, 132] 2048
Held, that undoubtedly the investment having been found to be in the name of the assessee and the assessee alone, that too in the course of search and seizure under section 132, the presumption could only be that they formed part of the unaccounted income of the assessee and the mere fact of producing an affidavit by the wife or mother of the assessee may not be treated by the Assessing Officer as sufficient explanation and neither the Assessing Officer nor the Tribunal had found them to establish the genuineness of the two transactions. The findings were purely findings of fact. The findings were not perverse. The additions were justified. (AY.1994-95, 1995-96)
Hemant Kumar Ghosh v. ACIT (2015) 375 ITR 79 / 281 CTR 356 / 232 Taxman 778 / 126 DTR 396 (Patna)(HC)

S.158BC : Block assessment – Undisclosed income – Participation by assessee in proceedings – Not a bar to challenging jurisdiction – Warrant of authorisation not containing name of assessee – Block assessment pursuant thereto not valid. [S. 132, 292CC] 2049
On appeals:
Held, dismissing the appeals, (i) that participation by the assessee in the earlier round of litigation either before the Assessing Officer or before the Tribunal or consequently before the Assessing Officer could not operate as a bar to the assessee to challenge the jurisdictional authority of the Assessing Officer under section 158BC.
(ii) That in the initial order the Tribunal permitted the additional ground raised by the assessee which was unchallenged by the Revenue. The Revenue only sought rectification of the reasons recorded but not of any additional ground or the ultimate order for permitting the additional ground and the admission of such ground. The Revenue could not agitate such question on the aspects of availability of the additional ground before the Tribunal, which was so permitted. The Tribunal had considered the panchnama prepared by the Revenue. The contents of the panchnama including non-appearance of the name of the assessee in the authorisation or requisition, remained undisputed. Therefore, it could not be said that the Tribunal did not give any opportunity to the Revenue to meet the additional ground. If the condition precedent for block assessment under section 158BC is not satisfied, such would go to the root of the matter and the jurisdiction, which has not been expressly conferred by the statute, cannot be invested with the Assessing Officer for the block assessment. On the facts, admittedly, there was no warrant of authorisation in the name of the assessee and, hence, the Tribunal had found the assessment as *ab initio* void, which called for no interference.
CIT v. Jolly Fantasy World Ltd. (2015) 373 ITR 530 / 231 Taxman 668 (Guj.)(HC)

2050 **S.158BC : Block assessment – Amalgamation – Assessment framed in name of non-existing company – Not a procedural irregularity – Order was held to be in valid. [S.292B, Companies Act, S. 391, 394]**

Dismissing the appeal of Revenue, the Court held that assessment on a company which had been dissolved by amalgamation under sections 391 and 394 of the Companies Act, 1956, was invalid. Once the assessment was framed in the name of non-existing entity, it was not a procedural irregularity of the nature which could be cured by invoking the provision of section 292B. (AY. 2003-04 to 2008-09)

CIT v. Micron Steels (P) Ltd. (2015) 372 ITR 386 / 233 Taxman 120 / 117 DTR 89 (Delhi) (HC)

CIT v. Steels (P) Ltd. (2015) 372 ITR 386 / 233 Taxman 120 / 117 DTR 89 (Delhi)(HC)

2051 **S.158BC : Block assessment – Search could be premises based – Search of bank and discovery of accounts in names of four individuals – All four individuals claiming that amounts belonged to political party to which they belonged – No returns filed for relevant period by individuals – Tribunal wrong in holding that amounts could not be considered "undisclosed" within meaning of Chapter XIV-B –Matter remanded to Tribunal. [S. 147, 158BB, 158BD]**

Allowing the appeal of Revenue the Court held that there was a fundamental fallacy in the reasoning given by the Tribunal to hold that no addition could have been made in the block assessment proceedings for want of undisclosed income. The Tribunal ignored the position that the four individual assessees had not filed returns of income and, therefore, section 158BB(1) clause (ca) of the Act would be attracted. Clause (ca) has to be harmoniously read with section 158B(b) of the Act. Further, statements of the four individual assessees were recorded on March 14, 1996, March 19, 1996, but they had claimed that the money lying in the savings bank accounts and fixed deposit accounts belonged to JMM and did not belong to them. Thus, the factum that the details of savings bank accounts and the fixed deposit accounts were made available would not make any difference. The search undertaken had revealed incriminating material relating to the opening and operation of bank accounts and on how the money was utilised, etc. These details were relevant to examine and consider the contention of the individual assessees that the money did not belong to them but to the political party, JMM. It would be, therefore, incorrect or improper to state that the search did not reveal or unearth relevant material or evidence relating to undisclosed income as defined under section 158B(b). In the case of JMM notice under section 158BD read with section 158BC of the Act was issued and there was also a search of the premises of AJ and A, chartered accountants and auditor of JMM where books of account and other documents were found and seized. Subsequently, during investigation, statements of different persons were recorded to ascertain and decipher whether the money deposited in the bank accounts had any connection or belonged to JMM or the money was undisclosed income of the individual assessees. Assessment in the hands of JMM was on a protective basis. The Tribunal had not considered or examined the evidence or gone into the question whether and if no addition could be made in the hands of the individual assessees, substantive addition on the basis of the evidence or material could be sustained in the hands of JMM. The

court remanded the matter to the Tribunal making it clear that it would be open to the revenue to argue and contend that before the Tribunal in case certain additions cannot be made in the block assessment proceedings, liberty should be granted to make the addition by recourse to section 147 of the Act or the question whether the additions could be made in accordance with law in the regular proceedings should be left open. (BP. 1-4-1986 to 27-9-1996)

CIT v. Jharkhand Mukti Morcha (2015) 372 ITR 257 / 273 CTR 252 (Delhi)(HC)
CIT v. Shailendra Mahto (2015) 372 ITR 257 / 273 CTR 252 (Delhi)(HC)
CIT v. Shibu Soren (2015) 372 ITR 257 / 273 CTR 252 (Delhi)(HC)
CIT v. Suraj Mandal (2015) 372 ITR 257 (Delhi)(HC)
CIT v. Simon Marandi (2015) 372 ITR 257 / 273 CTR 252 (Delhi)(HC)

Editorial: Order in Shibu Soren v. Asst. CIT [2011] 12 ITR 540 (Delhi) (Trib.) is reversed and set aside.

S.158BC : Block assessment – Undisclosed income – Amounts covered by search proceedings included in declaration under Scheme – No immunity – Voluntary Disclosure of Income Scheme, 1997 – Amounts subject matter of search liable to be dealt with Chapter XIV-B. [S. 132, Voluntary Disclosure of Income Scheme, 1997] 2052

Held, allowing the appeals of Revenue the Court held that the amount which was the subject matter of search was liable to be dealt with under Chapter XIV-B notwithstanding the fact that it was mentioned in the declaration filed under the Voluntary Disclosure of Income Scheme, 1997. The only difference would be that the assessees would be under obligation to pay the differential tax if any. The proceedings initiated under Chapter XIV-B do not get affected by the proceedings under the Scheme. When this is the disparity or complexity as to the understanding of the provisions of those enactments, the assessees could not be exposed to the obligation to pay penalty or interest.

CIT v. Anil Kumar (2015) 372 ITR 405 (T&AP)(HC)
CIT v. Kauslya Bai (Smt.) (2015) 372 ITR 405 (T&AP)(HC)
CIT v. Mahendra Kumar (2015) 372 ITR 405 (T&AP)(HC)
CIT v. Shankarlal (2015) 372 ITR 405 (T&AP)(HC)

S.158BC : Block assessment – Without any search warrant or requisition notice issued and addition was made as undisclosed income – Deletion of addition by Tribunal was held to be justified. [S. 132, 132A] 2053

Police recovered certain sum of money from three persons. Said persons stated that money belonged to assessee. Matter was referred to Income-tax department. Department issued a notice under section 158BC to assessee and made addition as undisclosed income. However assessee was neither searched nor assets were requisitioned from him under section 132A further, there was no warrant of authorization in name of assessee, section 158BC was not applicable in assessee's case. Tribunal held that addition of undisclosed income was not justified. On appeal by Revenue High Court dismissed the appeal of Revenue.

CIT v. Anil Kumar Chadha (2015) 374 ITR 10 / 275 CTR 407 / 230 Taxman 89 / 116 DTR 200 (All.)(HC)

2054 **S.158BC : Block assessment – Procedure – Validity of notice – Non-mentioning of block period in notice issued would not invalidate notice nor vitiate the proceedings.**
High Court by impugned Order held that non-mentioning of block period in notice issued under section 158BC would not invalidate notice nor would vitiate proceedings as one without jurisdiction.
Basant Kumar Patil v. Dy. CIT (2014) 49 taxmann.com 430 (Karn.)(HC)
Editorial: SLP was dismissed. Basant Kumar Patil v. Dy. CIT (2015) 230 Taxman 271 (SC)

2055 **S.158BC : Block assessment – Survey – Unaccounted stock was found – Same cannot be subject matter of search and block assessment. [S. 132, 133A]**
Where before commencement of search through survey, certain unaccounted stock was noticed, same could not be subject matter of a search again and consequently, could not be subject matter of block assessment proceedings. (AY. 2001-02)
CIT v. B. Sudheer Baliga (2015) 229 Taxman 185 (Karn.)(HC)

2056 **S.158BC : Block assessment – Survey – No incriminating material found during search – Incriminating material found during income-tax survey but no evidence that it related to assessee – Amounts based on income-tax survey not includible in block assessment.[S. 132, 133A]**
Held, dismissing the appeals, that on the basis of the incriminating material found in the course of survey mainly because the material was put to the assessee and his statement was recorded subsequent to the search, the material could not be held to be relatable to the assessee. Therefore, the appellate authorities were justified in holding that the material found in the course of survey can become the subject matter of regular assessment and it could not become the subject matter of block assessment. [BP 1-4-1996 to 12-9-2014)
CIT v. Sudheer Prasad Shetty (2015) 371 ITR 75 (Karn.)(HC)
CIT v. Yashoda Shetty (2015) 371 ITR 75 (Karn.)(HC)

2057 **S.158BC : Block assessment – Undisclosed income – Deletion of non-genuine gifts on ground amount already included-Benefit given to certain amount as past savings – Allowing certain value of jewellery as stridhan of assessee's wife-Deletion of addition for unexplained jewellery on ground jewellery belonged to some one else – Pure findings of fact.[S. 260A]**
A search was conducted in the assessee's business premises, his house and various banks. The Assessing Officer, in the block assessment for the years 1987-88 to 1997-98, after considering the various transactions, jewellery and other documents added substantial amounts to the income of the assessee. The Tribunal confirmed a major part of the assessment order but deleted the addition of ₹ 4,92,325 on account of non-genuine gifts, granted the benefit of ₹ 4 lakhs as past savings, allowed the value of 400 grams of jewellery as stridhan of the assessee's wife and deleted ₹ 8,29,936 added by the Assessing Officer on account of the unexplained jewellery holding that the jewellery belonged to one H. On appeal: The Court held that the Tribunal had, after appraising the affidavit and the statements, recorded a plausible finding. The Revenue was unable

to point out any misreading of evidence or perversity in the process of reasoning as would enable the court to interfere with the findings of fact recorded by the Tribunal. (BP. 1987 to 1997-98)
CIT v. Naresh Kumar Kohli (2015) 371 ITR 201 (P&H)(HC)

S.158BC : Block assessment – Undisclosed income – Statement on oath after one and half month after search – Block assessment was held to be not valid. [S. 132(4)] 2058
Dismissing the appeal of Revenue the Court held that the statement of managing partner of assessee recorded one-and-half months after search, cannot be brought under purview of section 132(4). Neither Assessing Officer nor Commissioner (Appeals) recording any finding that assessee suppressed sale of steel referable to discrepancy. Block assessment just on basis of surmises. Block assessment was held to be not valid. (BP. 29-10-2014)
CIT v. Balaji Steel Profiles (2015) 371 ITR 265 / 128 DTR 86 / 232 Taxman 806 (T&AP) (HC)

S.158BC : Block assessment – Undisclosed income – Retraction of statement – Assessee cannot disown statement – Block assessment not based exclusively upon statement but supported by other documents seized during search – Block assessment was held to be valid. [S. 132, 132(4)] 2059
Dismissing the appeal of the assessee the Court held that the relevant documents were shown to the assessee and he not only admitted the genuineness of those documents but also made it clear that the amount mentioned therein was unaccounted income. Assuming that the assessee hyphenated his statement with a plea that the contents thereof were subject to verification of the books of account, there was nothing on record to disclose that the amounts mentioned in the statement were explained in any other manner. Once the questions were put to the assessee, on the basis of the seized documents, which in turn were assigned separate numbers, the assessee could not disown them. Further, this was not a case, where the block assessment was based exclusively upon the statement. It was supported by the other documents seized during the course of search. Therefore, the block assessment made by the Assessing Officer was valid.
Y. Ramachandra Reddy v. Addl. CIT (2015) 370 ITR 557 (T&AP)(HC)

S.158BC : Block assessment – 'On-Money' received by a builder on sale of flats held as stock-in-trade is taxable only in the year of sale of the flats and not in the year of offer/disclosure. [S. 2(47), 132, 132(4), 269UA(f)] 2060
Pursuant to a search, the assessee admitted to having received 'on-money' of ₹ 3 crore for sale of flats. However, it claimed that as the assessee is engaged in the business of purchase of land and construction and the flats are shown as stock-in-trade, the said 'on money' was taxable only in the year in which the sale-deed or possession is handed over to the flat owners. The assessee placed reliance on *CIT v. Ashal and Corporation reported at 133 ITR 55(Guj.)* where it was held that unless the title of the assessee was extinguished, the title of the purchaser could not arise. Both could not be the exclusive owners of the same property at the same time. So long as the assessee continued to be the owner, it could not be said that his title was divested and that the sale had resulted in any profit to him. Reliance was also placed on the judgment of the Hon'ble Gujarat

High Court in *CIT v. Motilal C. Patel & Co. 173 ITR 666 (Guj.)* where it was held that the only right which the agreement for sale conferred was the right to obtain another document, namely, the sale deed. It was held that it was only on the completion of the sale that the amounts which the assessee had received in Samvat year 2027 and the balance of the sale price which it had received in Samvat year 2028 became the profit of the assessee. HELD by the Tribunal:

The assessee is engaged in the business of construction. The assessee has been showing the flats in question as stock-in-trade, therefore in view of the decision of the Co-ordinate Bench rendered in the case of *ITO v. Shri Siddharth S. Patel* in ITA Nos.1852 & 1853/Ahd/2003 (supra), the provisions of section 2(47) would not be applicable. The assessee has disclosed the 'on money' in the return of income in the year in which the sale-deed was executed. The Revenue has not rebutted this contention. Therefore, in the light of the judgment of Hon'ble Gujarat High Court rendered in the case of *CIT v. Motilal C. Patel and Co. reported at 173 ITR 666 (Guj.)*, such amount can be subjected to tax when sale-deed is actually executed. Since the Hon'ble Gujarat High Court has held that the amount would become for the assessment year in which the sale transaction is completed. In the case in hand, it is not disputed that sale deeds were executed in the year subsequent to the year under appeal. Therefore, in view of the binding precedent, we are of the considered view that the authorities below were not justified in taxing the amount including 'on money' during the year under appeal. Further, the assessee has submitted that it has offered for tax the amount including 'on money' in the year whenever sale-deed was executed. This fact is also not controverted by the Revenue by placing any contrary material on record. (AY. 1990-91 to 1999-2000 and period up to 29-10-1999)

DCIT v. Ohm Developers (Ahd.)(Trib.); www.itatonline.org
DCIT v. Ohm Organisers (Ahd.)(Trib.); www.itatonline.org

2061 **S.158BC : Block assessment – Undisclosed income – Assets were disclosed under Voluntary disclosure Scheme – No incriminating material was fond – Addition was held to be not justified. [S.132]**

Pursuant to a search in the premises of the assessee, certain documents were seized. In the block assessment proceedings, the Assessing Officer listed out the immovable properties purchased by the assessee and arrived at the value of undisclosed properties. On appeal CIT(A) deleted the addition. On appeal by Revenue the Tribunal held that; (i) Purchase of assets disclosed in declaration under Voluntary Disclosure Scheme and no evidence found in course of search of new information hence no addition permissible (ii) Depreciation – Valuation of vehicles – Where value taken at cost, depreciation to be allowed separately. Where value taken at written down value – depreciation deemed to be allowed (iii) Valuation of stock-Mistake pointed out by assessee in valuation cannot be ignored – No other material to contradict stock valuation shown by assessee – Addition to be deleted (iv) Computation--Investments in gold and silver articles declared in Voluntary Disclosure of Income Scheme – Value of gold and silver not includible in undisclosed income (v) Liability towards sundry creditors – Failure by Assessing Officer to produce material on record to disprove claim of assessee – Assessment was not justified.

ACIT v. Kandasamy Sah (2015) 38 ITR 392 (Chennai)(Trib.)

Section 158BD : Undisclosed income of any other person.

S.158BD : Block assessment – Undisclosed income of any other person – Satisfaction was recorded with in 3 ½ months – Period taken by him cannot be taken as unreasonable – Notice was held to be valid [S.158BC] 2062

Allowing the appeal of revenue the Court held that; where satisfaction under section 158BD was recorded by Assessing Officer of searched person after 3½ months, in view of fact that Assessing Officer had to take action against 70 persons on basis of search proceedings, aforesaid time period taken by him could not be regarded as unreasonable. All the appeals are accordingly allowed. The question of law is answered in favour of the Revenue.

CIT v. Mridula, Pro. Dhruv Fabrics (2015) 234 Taxman 245 / (2016) 131 DTR 308 / 284 CTR 293 (P&H)(HC)

CIT v. Arora Fabrics (P) Ltd. (2016) 131 DTR 308 / 284 CTR 293 (P&H)(HC)

CIT v. Calcutta Knitwears (2016) 131 DTR 308 / 284 CTR 293 (P&H)(HC)

CIT v. Raja Knit Fab.(P) Ltd. (2016) 131 DTR 308 / 284 CTR 293 (P&H)(HC)

S.158BD : Block assessment – Undisclosed income – Suppression of production of material – Assessing Officer ought not to have carried out functions of an authority under Central Excise Act determining exact production of material. [Central Excise Act, 1944] 2063

The assessee was manufacturer of manganese alloys. The Assessing Officer has made the addition as suppression of production based on excise records. Tribunal deleted the addition for alleged stock of finished products, however addition was upheld. On appeal by Revenue the Court held that Assessing Officer, in a way, had undertaken certain activity which a Superintendent of Excise Department would have hesitated to undertake. The occasion to levy income-tax would arise only when the product in question was found or alleged to have been sold and the sale proceeds constituting income were not reflected in the returns. It was not even alleged that the product shown in the form of discrepancies was sold at all. To analyse and understand the approach of the Assessing Officer, the Tribunal pointed out that the stock available on ground could not be compared or verified with reference to the RG-I register. By-products or waste materials such as slag were treated by the Assessing Officer as the main product or income-yielding material and the conclusions were arrived at only on the basis of assumptions. The findings recorded and the view expressed by the Tribunal were justified. The Assessing Officer was totally unsuited for undertaking the activity of determining the exact production of the material, which itself involves very complicated procedures. Appeal of assessee was also dismissed.

ACIT v. Girija Smelters Ltd. (2015) 378 ITR 487 230 taxman 28 (T&AP)(HC)

S.158BD : Block assessment – Undisclosed income of any other person – Recording of satisfaction is mandatory – Mere stating that in the course of search of third party certain cash belong to the assessee was found cannot be the ground to initiate proceedings without recording proper satisfaction.[S.158BC] 2064

Dismissing the appeal of Revenue, the Court held that the copy of the satisfaction recorded by the Assessing Officer, reads that in the course of search and seizure of

the house of one MM, some documents related to assessee were found and seized. Therefore, the jurisdiction over the assessee had been assigned by Commissioner and in view of provisions of section 158BD, notice under section 158BC issued. On perusal of the same, it is found that no satisfactory reasons were assigned by the Assessing Officer in order to issue a notice under section 158BD as held by the Tribunal. In addition, it is also seen that the Revenue did not show any reasons for non-production of the reasons recorded for the satisfaction of the Assessing Officer to issue notice under section 158BD before the Tribunal when time was granted for one year to the Revenue to produce the same. Even in this appeal, no explanation is offered except stating that reasons were recorded. When there is no explanation offered by the Revenue for non-production of the document before the Tribunal for more than a year and having held that reasons recorded would not constitute satisfactory reasons, it is to be held that there is no merit in this appeal.
CIT v. SSK Tulajabhavani Kalyan Mantap Kattd Samithi (2015) 232 Taxman 262 (Karn.) (HC)

2065 **S.158BD : Block assessment – Undisclosed income of any other person – Satisfaction – Even if the Assessing Officer is same, recording of satisfaction is mandatory. [S.132A, 158BC]**
Requirement of section 158BD, that Assessing Officer of person searched or against whom an order under section 132A has been passed, should be satisfied that any undisclosed income belongs to a third person, is statutory mandate and a jurisdictional prerequisite before proceedings under section 158BD are initiated and violation of said requisite and mandatory requirement would result in annulment of assessment under section 158BD read with section 158BC. Merely because Assessing Officer of person searched and Assessing Officer of assessee were same, this would not mean that Assessing Officer of person searched should not have recorded satisfaction before notice was issued under section 158BD read with section 158BC. In the instant case, no satisfaction note recorded by the Assessing Officer of the person searched is available. In these circumstances and in view of the decision of the Supreme Court in *CIT v. Calcutta Knitwears [2014] 362 ITR 673 (SC)* the block assessment proceedings initiated under section 158BD read with section 158BC were bad and contrary to law.
CIT v. Manju Finance Corporation (2015) 231 Taxman 44 (Delhi)(HC)

2066 **S.158BD : Block assessment – Undisclosed income of any other person – Specific recording of reason is a mandatory requirement.**
The Assessing Officer and the CIT(A) completed block assessment proceedings u/s. 158BD. On assessee's appeal, the Tribunal held that the Assessing Officer should record satisfaction. In the instant case, the communications available with the Assessing Officer show that certain facts with regard to question were communicated, but there is no specific recording of reasons for resort of block assessment. On Revenue's appeal to the High Court, it held that recording of reason is a mandatory requirement as contemplated u/s. 158BD and therefore, it didn't find any error in the Tribunal's Order.
ACIT v. J. B. Enterprises (2015) 117 DTR 254 / 281 CTR 238 (MP)(HC)

S.158BD : Block assessment – Undisclosed income of any other person – Warrant issued against the loacker same could be brought with in the amobit of section 158BC – Lack of jurisdiction was not raised at the time of assessment hence could not be raised in appeal. [S. 158BC] 2067

As a result of a search carried out on assessee's husband 'Y', a draft agreement to sell and carbon copy of a receipt were seized. Assessing Officer completed assessment and brought to tax certain amount in hands of assessee. In appeal, assessee contended that a search warrant as issued was limited to locker in her name which yielded nothing. No warrant was issued or panchnama was drawn in her name and hence entire assessment was without jurisdiction. It was found that panchnama drawn pursuant to warrant issued in respect of 'Y' concededly contained signature of assessee. Court held that since search warrant was issued in respect of assessee's locker same would bring her within ambit of section 158BC. Court also held that since assessee was informed of search and she had signed panchnama, impugned addition could not be considered unauthorized for not fulfilling conditions prescribed under section 158BD, further since question of lack of jurisdiction of Assessing Officer had never been agitated in first instance at time of assessment before Assessing Officer, that issue could not be raised later in appeal.
Niti Wadhawan v. Dy. CIT (2015) 231 Taxman 879 (Delhi)(HC)

S.158BD : Block assessment – Undisclosed income of any other person – Valid search – Addition on the basis of material found in the course of search was held to be valid. [S.132] 2068

Dismissing the appeal of assessee the Court held that since there is no such word/ language used in section 158BD that there must be a legal or valid search under section 132, contention raised by assessee that in absence of any valid search, impugned notice issued to him under section 158BD on basis of material with respect to undisclosed income found against other persons during course of said search proceedings was not maintainable, deserved to be rejected.
Gunjan Girishbhai Mehta v. DIT (2015) 231 Taxman 873 (Guj.)(HC)

S.158BD : Block assessment – Undisclosed income of any other person – Satisfaction – Order of Tribunal was set aside to decide on the issue of satisfaction and on merits. [S.254(2)] 2069

Tribunal by order, dated 29-12-2010 set aside assessment made under section 158BD in case of assessee on ground that no satisfaction under section 158BD was recorded by Assessing Officer of searched person in respect of assessee. While doing so Tribunal did not consider letter of Assessing Officer of searched person recording satisfaction of undisclosed income in case of assessee. On Revenue's rectification application, Tribunal recalled order dated 29-12-10 and placed matter before regular bench for consideration by making observation that jurisdictional requirement to proceed against assessee was satisfied. The assessee challenged the said order by filing Writ petition, the Court held that since there was an error apparent on record in Tribunal's order, dated 29-12-2010 as it did not consider communication recording satisfaction under section 158BD, Tribunal rightly recalled its order; however, while recalling its order it was impermissible for Tribunal to make observation on issue of jurisdiction and, therefore, such observation could not be upheld.
Gyan Construction Co. v. ITAT (2015) 231 Taxman 68 (Bom.)(HC)

2070 **S.158BD : Block assessment – Undisclosed income of any other person – Satisfaction can be recorded even after completion of block assessment.[S.158BC]**
Allowing the appeal of Revenue the Court held that the Assessing Officer can record his satisfaction for issuing notice under section 158BD in case of person other than searched person even after completion of block assessment in case of searched person.
CIT v. Raghubir Singh Garg (2015) 231 Taxman 673 (Delhi)(HC)

2071 **S.158BD : Block assessment – Undisclosed income of any other person – Limitation – Notice issued after lapse of enormous and unexplained delay – Proceedings initiated were vitiated.**
Where the authorities conducted the search on August 24, 1998, and concluded the search on October 23, 1998 but issued intimation under section 158BD of the Act, on October 4, 2005; Held, that the proceedings initiated were vitiated by enormous and unexplained delay.
CIT v. Apna Organics P. Ltd. (2015) 374 ITR 55 (Bom.)(HC)

2072 **S.158BD : Block assessment – Undisclosed income of any other person – Undisclosed income discovered during search – Notice under section 158BD was held to be valid. [S. 132, 158BC]**
A search was conducted under section 132 of the Act, in the case of the M group. The Assessing Officer formed an opinion that undisclosed income discovered during the search had been earned by and belonged to persons other than the person in respect of whom the search was conducted, which were persons other than those covered under section 132 of the Act and, therefore, he issued notices upon the respective assessees and others under section 158BD. On a writ petition to quash the notices:
Held, dismissing the petitions, that when the subjective satisfaction had been arrived at by the Assessing Officer for initiation of the proceedings under section 158BD on the basis of the material collected during the course of search/inquiry, it could not be said that the satisfaction arrived at by the Assessing Officer while initiating proceedings under section 158BD of the Act had been vitiated in any manner. There was ample material on record mentioned in the satisfaction note, against the respective assessees and others. The notices under section 158BD were valid.
Goyal Industries Ltd. v. ACIT (2015) 372 ITR 514 / 127 DTR 230 / (2016) 283 CTR 350 (Guj.)(HC)

2073 **S.158BD : Block assessment – Undisclosed income of any other person – Satisfaction note recorded five months after date of completion of searched person – Notice issued to assessee immediately after recording satisfaction note – Sufficient compliance – Matter remanded to Tribunal to decide on merits. [S. 132, 158BC]**
On December 17, 1999, the Department conducted search operations in the premises of VKN. Based upon the materials obtained, he was issued notice under section 158BC. Subsequently, after considering the return for the block period April 1, 1989, to December 17, 1999 filed by him, the block assessment was completed on December 31, 2001. A satisfaction note was recorded on May 30, 2002, in the case of the assessee to the effect that the search proceedings in respect of VKN revealed that the assessee had invested in various properties which were undisclosed. The Tribunal held that there was

inordinate delay in issuing the notice under section 158BD to the assessee. On appeal: Held, allowing the appeal partly, (i) that the satisfaction note in the assessee's case met the requirements of law.
(ii) That it could not be held that there was any delay in recording the satisfaction note. The assessment of VKN was completed on December 31, 2001. The satisfaction note was recorded on May 30, 2002, i.e., just about five months after the date of completion of the searched person. Notice was issued on June 3, 2002, immediately after the satisfaction note was recorded, to the assessee. Matter remanded to Tribunal to decide on merits.
CIT v. V. K. Narang HUF (2015) 372 ITR 333 (Delhi)(HC)

S.158BD : Block assessment – Undisclosed income of any other person – Satisfaction – Notice was issued after expiry of five months from satisfaction – Block assessment is valid. [S. 132, 158BC] 2074
Where notice under section 158BD was issued to assessee after expiry of five months from satisfaction recorded by Assessing Officer of person searched, it could not be concluded that there was unreasonable delay in issuing said notice and same was fatal to block assessment proceedings initiated against assessee.
CIT v. Sudhir Dhingra (2015) 373 ITR 555 / 230 Taxman 183 (Delhi)(HC)
CIT v. Renu Verma (2015) 373 ITR 555 (Delhi)(HC)

S.158BD : Block assessment – Undisclosed income of any other person – Assessing Officer satisfied that undisclosed income discovered during search belonged to third person – Notice under section 158BD to such third person – Valid. [S. 132, 158BC] 2075
Notice was issued to the assessees under section 158BC. The reason recorded was that during the course of search in the firm B, it was found that the firm was providing bogus accommodation for purchase of jewellery on commission basis. One such entry related to the transaction conducted by the assessees by receiving an amount of ₹ 21,07,861 from the firm B towards the sale consideration of jewellery. According to the Department, these amounts constituted undisclosed income of the assessees. On writ petitions to quash the notices:
Held, dismissing the petitions, that since entries were found in the books maintained by the firm where the search was conducted which even the assessees admitted in their writ petitions, the satisfaction of the Assessing Officer and the issuance of the notice were perfectly correct, and required no interference. (AY 1998-99)
Gyanendra Kumar Jain v. ACIT (2015) 371 ITR 244 / 231 Taxman 877 (All.)(HC)
Rama Jain (Smt) v. ACIT (2014) 50 taxmann.com 311 / (2015) 371 ITR 244 (All.)(HC)
Sharad Jain v. ACIT (2014) 50 taxmann.com 311 / (2015) 371 ITR 244 (All.)(HC)
Pallavi Jain v. ACIT (2014) 50 taxmann.com 311 / (2015) 371 ITR 244 (All.)(HC)
Mukesh Chand Jain v. ACIT (2014) 50 taxmann.com 311 / (2015) 371 ITR 244 (All.)(HC)
Manju Lata Jain (Smt) v. ACIT (2014) 50 taxmann.com 311 / (2015) 371 ITR 244 (All.)(HC)

2076 **S.158BD : Block assessment – Undisclosed income of any other person – Sale of gift articles to assessee by group companies reflected in their books of account – Not fictitious sales – Purchase of gift articles shown in assessee's books and return and accepted by Assessing Officer for relevant assessment – Block assessment treating cost of gift articles as undisclosed income of assessee – Not valid. [S.158BB]**

There was no search conducted against the assessee. Proceedings under Chapter XIV-B were initiated against the assessee on the basis of the discoveries in the course of a search conducted in the premises of the M group of companies. The books of account of those companies revealed that gift articles worth ₹ 49,90,175 were sold to the assessee during the assessment year 1992-93. Thereafter, block assessment for the block period 1987-88 to 1997-98 was completed treating the cost of the gift articles as undisclosed income of the assessee and taxing it at sixty per cent. The Tribunal held in favour of the assessee. On appeal:

Held, dismissing the appeal, that the finding that there was suppression of the sale of gift articles by the M group of companies itself was not well-founded. In their books of account, the transactions were very much reflected. An inference was drawn to the effect that the transaction was fictitious, only on the ground that the sale was accommodative in nature. The assessee had shown the purchase of the gift articles not only in its books of account but also in the return. On verification of the relevant records, the Assessing Officer had framed the assessment accepting the purchase of gift articles. Hence, there did not exist any occasion or basis for the Department to initiate block assessment proceedings against the assessee. (BP. 1987-88 to 1997-98)

CIT v. Sunny Liquors P. Ltd. (2015) 371 ITR 45 / 232 Taxman 264 (T&AP)(HC)

2077 **S.158BD : Block assessment – Undisclosed income of any other person – Limitation – Within two years as prescribed under the Act – Notice issued after limitation period was held to be bad in law. [S.158BC, 158BE, 263]**

The issue of notice u/s. 158BD to any person other than the person searched should be issued within the period of two years as prescribed under the Act to complete the Block Assessment. Hence notice issued u/s. 158BD after the limit prescribed u/s. 158BE is void *ab-initio*. (AY. 1991-92 to 2001-02)

CIT v. V. D. Muralidharan (2015) 373 ITR 445 / 274 CTR 142 / 53 taxmann.com 140 / 113 DTR 124 (Mad.)(HC).

CIT v. K. Venugopal (2015) 373 ITR 445 / 274 CTR 142 / 53 taxmann.com 140 / 113 DTR 124 (Mad.)(HC)

CIT v. V.P. Ullas (2015) 373 ITR 445 / 274 CTR 142 / 53 taxmann.com 140 / 113 DTR 124 (Mad.)(HC)

2078 **S.158BD : Block assessment – Undisclosed income of any other person – Limitation – Notice to be issued immediately after completion of assessment of persons in respect of whom search conducted – Notice issued to third person more than a year after completion of assessments of persons in respect of whom search conducted – Notice was held to be not valid. [S. 132, 158BC]**

Dismissing the appeal of Revenue the Court held that; the Revenue has to be vigilant in issuing notice to the third party under section 158BD, immediately after the completion of assessment of the person in respect of whom search was conducted.

The assessees were third parties, who were issued notices under section 158BD pursuant to search proceedings in respect of the M group. In all those cases, the search proceedings were conducted on August 3, 2000. Thereafter, notices were issued to them for block assessment calling upon them to file returns for the previous years in question. The assessment proceedings were completed on August 29, 2002. Thereafter, the notices were issued to the assessees under section 158BD. In each of the cases the satisfaction note was recorded almost or just short of or more than a year after the completion of assessment of the M group. Held, that the notices were not issued in conformity with the requirements of section 158BD and were unduly delayed. Ratio in *CIT v. Calcutta Knitwers (2014) 362 ITR 673(SC)* is applied, the Court observed that "wherein it was indicated that the revenue has to be vigilant in issuing notice to the third party under section 158BD, immediately after the completion of assessment of the searched person, this court is of the opinion that a delay ranging between 10 months of one and half years cannot be considered contemporaneous to assessment proceedings. We are of the opinion that notices were not issued in conformity with the requirements of section 158BD and were unduly delayed. The appeals of revenue accordingly fail and dismissed.
CIT v. Bharat Bhushan Jain (2015) 370 ITR 695 (Delhi)(HC)

S.158BD : Block assessment – Undisclosed income of any other person – Assessing Officer of person in respect of whom search conducted must record his satisfaction that undisclosed income belonged to such third person – Failure to record reasons – Notice under section 158BD not valid. [S.132, 132A, 158BC] 2079
Dismissing the appeal of Revenue the Court held that in order to make a block assessment under section 158BC, in relation to a third person, whenever search has been conducted under section 132 or the documents have been requisitioned under section 132A, the Assessing Officer of the person in respect of whom search was conducted needs to record his satisfaction that undisclosed income belongs to the person other than the person with respect to whom search was carried out under section 132. Held, dismissing the appeal, that since recording of reasons in the assessee's case was absent, the notice under section 158BD was not valid.
CIT v. Champakbhai Mohanbhai Patel (2015) 370 ITR 700 (Guj.)(HC)

S.158BD : Block assessment – Undisclosed income of any other person – Satisfaction of Assessing Officer of person searched that undisclosed income discovered during search belonged to third person – Opinion not formed in terms of section 158BB – Block assessment was held to be not valid. [S.132, 158BB, 158BC] 2080
The Revenue preferred an appeal to the Supreme Court. The Supreme Court remitted the matter directing the High Court to examine the limited question whether opinion was formed in terms of section 158BB and the time within which it had to be recorded was complied with: Dismissing the appeal of Revenue the Court held that; after discussing the communication dated July 15, 2003, by the Assessing Officer of the searched person, who wrote to the Assessing Officer of the assessees, affirmed the findings of the Tribunal that the opinion formed in the letter dated July 15, 2003 was

not tenable for the purpose of section 158BB. Followed *CIT v. Radhe Shyam Bansal (2011) 337 ITR 217 (Delhi)(HC)*
CIT v. Manoj Bansal (2015) 370 ITR 704 (Delhi)(HC)
CIT v. Radhey Shyam Bansal (2015) 370 ITR 704 (Delhi)(HC)
CIT v. Sukesh Kumar Gupta (2015) 370 ITR 704 (Delhi)(HC)

Section 158BE : Time limit for completion of block assessment.

2081 **S.158BE : Block assessment – Time limit – Panchanama – The search ends, and the period of limitation begins, only on the drawing up of the formal panchnama to record the ending of the search. The argument that the search is concluded on the date of the search itself if nothing is seized thereafter is not acceptable – Period of limitation has to be reckoned from 31st January, 2000 – Appeal was dismissed. [S.132, 132(3), 132 (8A), 158BC, Code of Criminal Procedure. S.70]**
Dismissing the appeal of assessee the Court held that The argument that the search is concluded on the date of the search itself if nothing is seized thereafter is not acceptable. Period of limitation has to be reckoned from 31st January, 2000 accordingly the appeal was dismissed. (BP. 1990-91 to 2000-01)
Navin Kumar Agarwal v. CIT (2015) 375 ITR 541 / 278 CTR 206 (Cal.)(HC)

Section 158BFA : Levy of interest and penalty in certain cases.

2082 **S.158BFA : Block assessment – Penalty – Estimation – Leviable on all manner of determination of income, including an estimation.**
The assessee during search proceedings admitted that it earned income from share transactions as well as commission from providing accommodation entries. Tribunal had determined the income from commission on accommodating entries at 0.6% of the total turnover of the assessee. Penalty was levied by the AO. The HC held that penalty was levyable on all manners of determination of income, including an estimation or voluntary declared by the assessee.
JRD Stock Brokers (P) Ltd. v. CIT (2015) 375 ITR 600 / 276 CTR 362 / 117 DTR 241 (Delhi) (HC)

2083 **S.158BFA : Block assessment – Penalty – Tax paid along with interest – Deletion of penalty was held to be justified. [Ss. 132, 158BC]**
Search was conducted in case of assessee under section 132. Thereupon, a notice was issued to him under section 158BC. Assessee filed its block return of income and his undisclosed income was computed. Assessing Officer found that assessee did not pay full amount of tax due and, thus, he passed penalty order under section 158BFA(2). Tribunal, deleted same on ground that assessee had paid balance amount of tax subsequently along with interest. On appeal by Revenue, the Court held that the Tribunal was right in law in deleting penalty imposed on assessee under section 158BFA(2).
ACIT v. Natubhai M. Makwana (2015) 230 Taxman 637 (Guj.)(HC)

S.158BFA : Block assessment – Interest – Delay in supplying the copies of seized documents – No interest could be levied. [S.158BC] 2084

There was delay in filing return as Revenue had taken time to supply copies of seized documents, on basis of which return was to be filed. Since there was no delay on part of assessee, no interest could be levied on assessee.

CIT v. Gobind Ram (2015) 229 Taxman 491 (P&H)(HC)

S.158BFA : Block assessment – Interest – Penalty – A notice to assessee is a must before any penalty is imposed. [S. 158BC] 2085

The assessee filed returns in response to a notice under section 158BC admitting certain undisclosed income. However, block assessment was made on higher income and a penalty under section 158BFA was also imposed on assessee. On appeal, the Commissioner (Appeals) cancelled the penalty on the ground that the assessee had not been given reasonable opportunity of being heard as mandated by section 158BFA(3). The Tribunal upheld the order passed by the Commissioner (Appeals). On Revenue's appeal to High Court:

The proviso to section 158BFA mandates that no order imposing penalty shall be made in respect of a person, if he satisfies the condition mentioned in the said proviso. Therefore, imposition of penalty is not automatic. If the assessee files returns declaring the undisclosed income and pays tax thereon and if the Assessing Authority accepts the said undisclosed income, then the question of imposing any penalty would not arise. Imposition of penalty would arise only if the undisclosed income determined by the assessing authority is in excess of the amount of undisclosed income shown in the returns filed by the assessee. Even then, sub-section (3) mandates that no order imposing penalty under sub-section (2) shall be made unless an assessee has been given a reasonable opportunity of being heard and a period of limitation is prescribed for imposition of such penalty under the said sub-section. Therefore, if the Assessing Authority intends to impose penalty under sub-section (2), he has to hear the assessee. It necessarily follows that a notice demanding the penalty or a notice calling upon the assessee to show-cause why penalty should not be imposed is to be issued. Then, sufficient opportunity should be given to the assessee to reply to such notice. It is only after hearing, the Assessing Authority can proceed to impose any penalty. Penalty proceedings are penal in nature and the said penalty being not automatic and the orders in such penalty proceedings is to be passed within the time stimulating in sub-section (3) of section 158BFA and in absence of any express provision stating that no such notice is not required, it necessarily follows that a notice to the assessee is a must before any penalty is imposed under sub-section (3). The said letter is also not available on record. Therefore, in the facts of the case, the contention of the assessee that he has not been heard, no opportunity was provided to him and therefore, the mandatory requirements of sub-section (3) of section 158BFA are not complied with is fully justified. Both the Appellate Authorities were justified in setting aside the order of penalty.

CIT v. H.E. Distillery (P.) Ltd. (2015) 229 Taxman 447 (Karn.)(HC)

2086 **S.158BFA : Block assessment – Penalty – Sufficient time was not provided to the assessee to file the return – Levy of penalty was held to be not justified. [S. 132, 158BC, 158BFA(2)]**

The Assessee was director in various companies. The said companies were subjected to search action on 13-2-2013 under section 132 of the Act. During the search Assessing Officer found certain incriminating materials. On the basis of seized documents the Assessing Officer made addition on account of undisclosed income without providing sufficient opportunity to the assessee to file its return of income. The Assessing Officer also levied penalty under section 158BFA(2) of the Act. Appellate Tribunal deleted the penalty holding that the Assessing Officer completed the penalty proceedings in haste manner without providing proper opportunity of being heard to the assessee and as such, the discretion cannot be said to have been exercised judiciously. (BP. 1-4-1996 to 31-2-2003)

Kulwanat Rai Bansal v. DCIT (2015) 44 ITR 11 (Delhi)(Trib.)

2087 **S.158BFA : Block assessment – Penalty – Investment in shares duly recorded in regular books of account – Levy of penalty not automatic – Penalty was deleted. [S. 139(4), 158BB(1)(c)]**

Dismissing the appeal of revenue, the Tribunal held that, even though the assessee failed to file the return before the due date, the transfer of shares was recorded in the unaudited balance sheet and profit and loss account. The sale proceeds were deposited in the declared bank account and the investment in shares was found to be duly recorded in the regular books of account. These facts would not call for imposition of penalty under section 158BFA(2) of the Act. The assessee might be waiting for the requisite details of shares sold and this may be the genuine reason for its not being able to file the return by the due date, but the fact remained that it filed the return within the time allowed under section 139(4) of the Act. The Commissioner (Appeals) rightly deleted the penalty. (BP. 1-4-1989 to 13-1-2000)

Dy. CIT v. Mehrotra Invofin India P. Ltd. (2015) 41 ITR 655 (Delhi)(Trib.)

Section 164 : Charge of tax where share of beneficiaries unknown.

2088 **S.164 : Representative assessee – Trustee – Assessment – Specific trust and discretionary trust – Some beneficiaries of specific trust being discretionary trusts – Trustee to be assessee under section 161 in respect of specific trust and under section 164 in respect of beneficiary discretionary trust – Whether or not a particular income is real income of the assessee under the terms and conditions of agreement is essentially question of fact. [S.161, Indian Trusts Act, 1882]**

The Court observed that the scheme of the Indian Trusts Act, 1882, shows that the creation of trust is recognized and the provisions of made for rights and liabilities of trustees and beneficiaries shows that there is a jural relation for enforcement of such rights and liabilities between trustees of any trust and the beneficiaries of trust. Breach of trust by the trustees in respect any properties of the trust can be enforced by the beneficiaries against the trustees. Under the Income tax Act 1961, if section 161 is read with section 164 of the Act, it appears that in a case where the individual share receivable by the beneficiary is indeterminable or unknown the charge of tax shall

be at maximum marginal rate under section 164 but if the share of the beneficiary is determinable or affixed specific share on each beneficiary is provided, section 161 would be applicable and the tax chargeable would be at the normal rate provided.
Held, that the Tribunal after considering the terms of the agreement had recorded the finding of fact that as per the agreement, the income which had already accrued in favour of the assessee-trust during the completion of the accounting year could not be treated as no income merely because the respective societies sent notices after many years demanding refund of the amount. There was no evidence the agreement expressly provided for the refund of the amount already paid by way of remuneration nor was there any adjudication by any authority that the assessee was under obligation to refund the amount. Under these circumstances, when the Tribunal had recorded the ultimate finding of fact, the amount was assessable.
Neo Trust v. ITO (2015) 372 ITR 546m/ 275 CTR 270 (Guj.)(HC)

S.164 : Representative assessees – Charge of tax – Beneficiaries unknown – Rate applicable to highest slab rate. 2089
Allowing the appeal of Revenue the Court held that; income of trust could not be assessed otherwise than by uniform application of maximum marginal rate as contemplated in Explanation 2 to section 164 which means rate applicable in relation to highest slab of income provided for AOP in relevant Finance Act.
CIT v. Kantilal Harilal Family Trust (2015) 230 Taxman 317 (Guj.)(HC)

S.164 : Representative assesse – Charge of tax – Beneficiaries unknown – Interest in foreign Bank – Specific order from CBDT – Cannot be assessed an AOP. 2090
The assessee trust was formed jointly by the Government of India and Government of France based on the principle of reciprocity and parity, for research in India. Assessee suffered a loss, however, Assessing Officer held that interest in foreign bank account would be taxable at maximum marginal rate. Because of said finding, benefit of carry forward of loss to next assessment year was denied Tribunal has allowed the claim. On appeal by revenue; dismissing the appeal the Court held that once it was found that exemption granted by specific order of CBDT in assessee's case would apply, section 164(2) would not be applicable so as to tax assessee as an AOP. (AY. 2008-09, 2009-10)
DIT v. Indo French Centre (2015) 229 Taxman 311 (Delhi)(HC)

S.164 : Representative assessee – Trust – Identification of beneficiaries – Determination of shares – Shares capable of being determined sufficient – The beneficiaries were identifiable and the shares of the beneficiaries were determinable and hence, section 164 of the Act was not applicable – Income cannot be taxed at maximum marginal rate – Test for an AOP was not satisfied. [S. 2(31)(v), 161] 2091
On appeal : Held, dismissing the appeal that in the Central Board of Direct Taxes Circular No. 281 dated September 22, 1980 ([1981] 131 ITR (St.) 4), the provisions of Explanation 1 to section 164 of the Act regarding identification of beneficiaries was explained to the effect that for identification of beneficiaries it was not necessary that the beneficiary should be actually named in the order of the court or the instrument of trust or wakf deed. All that was necessary was that the beneficiary should be identifiable with reference to the order of the court or the instrument of trust or

wakf deed on the date of such order, instrument or deed. The trust deed laid down that the beneficiaries meant the persons, each of whom had made or agreed to make contributions to the trust in accordance with the contribution agreement. That clause in the trust deed was sufficient to identify the beneficiaries. The trust deed specified the detailed share of each beneficiary. It was not the requirement of law that the trust deed should actually prescribe the percentage share of the beneficiary in order for the trust to be determinate. It was enough if the shares were capable of being determined based on the provisions of the trust deed. Therefore, in the assessee's case, the beneficiaries were identifiable and the shares of the beneficiaries were determinable and hence, section 164 of the Act was not applicable. Income cannot be taxed at maximum marginal rate - Test for an AOP was not satisfied. (AY. 2008-09, 2009-10)
ITO v. India Advantage Fund-I (2015) 39 ITR 360 (Bang.)(Trib.)
Dy. CIT v. ICICI Econet Internet and Technology Fund (2015) 39 ITR 360 (Bang.)(Trib.)
Dy. CIT v. ICICI Emerging Sectors Fund (2015) 39 ITR 360 (Bang.)(Trib.)

Section 170 : Succession to business otherwise than on death.

2092 **S.170 : Succession to business otherwise than on death – Appeal – Merger – Jurisdiction – Subsequent to merger company was assessed at Gurgaon – Order was passed by the Assessing Officer at Bangalore – Bangalore Tribunal deciding the appeal – Appeal was filed at Punjab and Haryana High Court – No jurisdiction to adjudicate upon LIS over an order passed by Assessing Officer at Bangalore. [S.260A]**
For relevant assessment year, original company MIEPL was assessed at Bangalore on 27-3-2006. In meantime, it merged with respondent assessee (which was assessed at Gurgaon) with effect from 1-4-2005, which filed appeals against assessment order before Commissioner (Appeals) and Tribunal at Bangalore. Tribunal decided in favour of assessee. Revenue filed appeal before Punjab and Haryana High Court against order of Tribunal. Dismissing the appeal of Revenue the Court held that) once assessment of MIEPL was at Bangalore, subsequent merger of that company would not give right to assessing authorities who had jurisdiction over successor company and only Assessing Officer of predecessor company would have jurisdiction which was at Bangalore, therefore, Punjab and Haryana High Court had no territorial jurisdiction to adjudicate upon lis over an order passed by Assessing Officer at Bangalore. (AY. 2003-04)
CIT v. Motorola Solutions India (P.) Ltd. (2015) 232 Taxman 608 (P&H)(HC)

2093 **S.170 : Succession to business otherwise than on death – Amalgamation – Completion of assessment in name of non-existent amalgamated company would render it null and void.[S.153C, 292B, Companies Act, S. 391, 394]**
Assessment u/s. 153C was completed by the AO on the original assessee company though he was intimated that the company had amalgamated with another company. On appeal, the High Court held that completion of assessment in the name of a non-existent company would render it null and void. Section 292B is not applicable to the facts of the present case. A jurisdictional defect such as nullity shakes the entire proceedings and does not render the order a mere irregularity. (AY. 2003-04 to 2008-09)
CIT v. Micron Steels (P) Ltd. (2015) 372 ITR 386 / 233 Taxman 120 / 117 DTR 89 (Delhi)(HC)
CIT v. Steels (P) Ltd. (2015) 372 ITR 386 / 233 Taxman 120 / 117 DTR 89 (Delhi)(HC)

Section 171 : Assessment after partition of a Hindu undivided family.

S.171 : Partition – Assessment – Hindu Undivided Family – Family arrangement – Disposition in favour of six minor daughters of karta in form of fixed deposits – Interest cannot thereafter be treated as part of wealth of Hindu undivided family – Not taxable in hands of Hindu Undivided Family. [Transfer of Property Act, 1882, The Sale of Goods Act, 1932] 2094

The family arrangement of the assessee-Hindu Undivided Family provided for the allotment of a sum of ₹ 1,25,000, to each of the six minor daughters of the karta in the form of fixed deposits. The assessee, for the assessment year 1991-92, claimed deduction of the interest that accrued on the fixed deposit receipts. The Assessing Officer held that the document did not amount to partial partition and though it was a family arrangement, it did not have the effect of taking away the corresponding wealth from the purview of the Hindu Undivided Family, and, accordingly, he treated the interest as the income of the Hindu Undivided Family. The Commissioner (Appeals) allowed the claim of the assessee. The Tribunal set aside the order of the Commissioner (Appeals).

On appeals:

Held, allowing the appeals,

(i) that the family arrangement, wherever it exists and is proved, is a *sui generis*, i.e., a class by itself, with full legal enforceability, *de hors* the fact that it is not dealt with under any specific provision of an enactment. The settlement had to be given full effect and the legal consequences flowing therefrom could not be ignored, on the ground that they did not fit into any specific provision of law.

(ii) that once the Hindu Undivided Family had settled a sum of ₹ 1,25,000, each, in favour of six minor daughters of the karta, the corresponding amount ceased to be the wealth or the assets of the Hindu Undivided Family. The amount could not be treated as part of the wealth of the Hindu Undivided Family even thereafter. The returns filed by the Hindu Undivided Family was not the avenue to examine the question as to how the amount so settled must be treated in the hands of the person on whom it was settled.

The Court also observed that the family arrangement is a typical legal phenomena that does not fit into those which are specifically recognised under law. Transfer of immovable or movable property, as the case may be, does take place under the arrangement but it is substantially different from the one that is contemplated under the Transfer of Property Act, 1882, or the Sale of Goods Act, 1932. No formal registered document is executed and the nature of consideration is not amenable to any legal analysis.

In the ordinary course of things, once an assessee which incidentally may be a Hindu undivided family, parts with a portion of its wealth towards another and the wealth is found to be true, that part of the wealth cannot be treated as continuing to be with the assessee. The mere fact that the transfer or settlement of such portion was in favour of one of the members of the Hindu Undivided Family, does not make much of difference. On being parted in favour of other persons, in a manner recognised under law, the corresponding amount ceases to be part of the wealth of the assessee. (AY.1991-92 to 1996-97)

P. Shankiaraiah Yadav (HUF) v. ITO (2015) 371 ITR 386 / 232 Taxman 757 (T&AP)(HC)

Editorial : Order in ITO v. P. Shankaraiah Yadav [2005] 273 ITR 103 (AT)(Hyd.) is reversed.

Section 172 : Shipping business of non-residents.

2095 **S.172 : Shipping business – Non-residents – Demurrage charges- Referred to Full Bench. [S.40(a)(ia)]**

Law laid down in *CIT v. Orient (Goa)(P) Ltd. (2010) 325 ITR 554* does not appear to be correct and issue is referred to Full Bench.

CIT v. V.S. Dempo and Company Pvt. Ltd. (2015) 378 ITR 323 / (2016) 131 DTR 211 (Bom.)(HC)

2096 **S.172 : Shipping business – Non-residents – Limitation benefits – Where the income is not remitted to, or received in Singapore – On facts entire freight income of assessee which is only from operation of ships in international traffic is taxable only in Singapore-DTAA-India-Singapore [Art. 24]**

The assessee, i.e., GAC Shipping India Pvt. Ltd., filed a return in respect of MT Alabra, which is owned by Alabra Shipping Pte. Ltd. of Singapore (ASPL-S, in short) and the ASPL-S is freight beneficiary in respect of the same, as an agent of ASPL-S and under section 172(3) of the Act. The assessee claimed benefit of the India Singapore Double Taxation Avoidance Agreement, the funds were remitted to freight beneficiary's account with The Bank of Nova Scotia in London UK. The AO held that as the freight was remitted to a country other than Singapore and remittance to Singapore is a *sine qua non* for availing the benefits of the Indo-Singapore tax treaty, the assessee was not entitled to the benefits of the benefits of the India Singapore tax treaty in view of Article 24 thereof. The CIT(A) confirmed the same by relying on *Abacus International Pvt. Ltd. v. DDIT* [ITA No. 1045/Mum/2008; order dated 31st May 2013 now reported as (2013) 34 taxmann.com 21 (Mumbai – Trib.)]. On appeal by the assessee to the Tribunal HELD allowing the appeal:

(a) As a plain reading of Article 24(1) would show, this LOB clauses comes into play when (i) income sourced in a contracting state is exempt from tax in that source state or is subject to tax at a reduced rate in that source state, (ii) the said income (i.e., income sourced in the contracting state) is subject to tax by reference to the amount remitted to, or received in, the other contracting state, rather than with reference to full amount of such income; and (iii) in such a situation, the treaty protection will be restricted to the amount which is taxed in that other contracting state. In simple words, the benefit of treaty protection is restricted to the amount of income which is eventually subject matter of taxation in the source country. This is all the more relevant for the reason that in a situation in which territorial method of taxation is followed by a tax jurisdiction and the taxability for income from activities carried out outside the home jurisdiction is restricted to the income repatriated to such tax jurisdiction, as in the case of Singapore, the treaty protection must remain confined to the amount which is actually subjected to tax. Any other approach could result in a situation in which an income, which is not subject matter of taxation in the residence jurisdiction, will anyway be available for treaty protection in the source country. It is in this background that the scope of LOB provision in Article 24 needs to be appreciated;

(b) On facts, there is no dispute that the business is being carried on by the assessee in Singapore and that the assessee is tax resident of Singapore. By letter dated 31st December 2013 (Reference no. 200716495G), Inland Revenue Authority of Singapore has confirmed that, in the case of Albara Shipping Pte Ltd, "freight income has been regarded as Singapore sourced income and brought to tax on an accrual basis (and not remittance basis) in the year of assessment". The assessee has also filed a confirmation dated 4th December 2013 from its public accountant that the freight of US $ 6,71,366 earned on MT Albara's sailing from Sikka port has been included in the global income offered to tax by the company in Singapore. On these facts, the provisions of Article 24 cannot be put into service as this provision can only be triggered when twin conditions of treaty protection, by low or no taxability, in the source jurisdiction and taxability on receipt basis, in the residence jurisdiction, are fulfilled. There is nothing on the record to even vaguely suggest that the freight receipts of ASPL-S were taxation only on receipt basis in Singapore. Quite to the contrary, there is reasonable evidence to demonstrate that such an income was taxable, on accrual basis, in the hands of the assessee.

(c) As regards reliance of the authorities below on the decision of this Tribunal, in the case of Abacus International (supra), suffice to say that it was in the context of interest income of the assessee and there was nothing on record to suggest that such an income was to be taxed in Singapore on accrual basis, rather than on receipt basis. The Assessing Officer thus derives no advantage from this decision. Having said that we may add that we are in complete agreement with the Co-ordinate Bench that, in order to come out of the mischief of Article 24, the onus is on the assessee to show that the amount is remitted to, or received in Singapore, but then such an onus is confined to the cases in which income in question is taxable in Singapore on limited receipt basis rather than on comprehensive accrual basis. However, in a case in which it can be demonstrated, as has been demonstrated in the case before us, that the related income is taxable in Singapore on accrual basis and not on remittance basis, such an onus does not get triggered. (AY. 2011-12)

Alabra Shipping Pte. Ltd. v. ITO (2016) 129 DTR 43 / 175 TTJ 359 (Rajkot)(Trib.)

Section 179 : Liability of directors of private company in liquidation.

S.179 : Private company – Liability of directors – Company was a public company and merely on basis of mentioning of wrong code number in return, company could not be treated as private company and, consequently, order under section 179 was invalid. [S. 139] 2097

Recovery proceeding was initiated against petitioner in respect of tax due of company in which petitioner was a past director. Revenue treated company as a private company on basis of Code Number 13 mentioned in return of income as such code applied to private company. However, it was found that it was incorporated as a public limited company with Registrar of Companies and, further, it came out with its public issue of equity shares. Allowing the petition the Court held that company was a public company and merely on basis of mentioning of wrong code number in return, company could not

be treated as private company and, consequently, order under section 179 was invalid. (AY. 1996-97)
Dhaval N. Patel v. CIT (2015) 231 Taxman 500 (Guj.)(HC)

2098 **S.179 : Private company – Liability of directors – Public company – No material to show attempt was made to pierce corporate veil – No notice to company regarding such investigation – Recovery proceedings against director was held to be not valid.**
Action u/s. 179 can be taken against the directors of a public limited company by lifting the corporate veil. Held, that it was an undisputed position that the company was a limited company and not a private limited company. There was no attempt to lift the corporate veil. The order passed based on the lifting of the corporate veil even if it had taken place would be in breach of the principles of natural justice and, hence, could not be sustained. The order was liable to be quashed.
Ajay S. Patel v. ITO (2015) 375 ITR 72 / 231 Taxman 64 (Guj.)(HC)

2099 **S.179 : Private company – Liability of directors – Unless it was shown that it was not possible to recover tax due from said company, no liability could be fixed on assessee – Director of said company to pay due tax – Matter remanded.**
The Petitioners, who were directors of a Private Company were directed to pay the tax due relating to the said company. The Petitioners submitted that the impugned orders are contrary to section 179 inasmuch as no finding was recorded by Income-tax officer that the tax due could not be recovered from the company. On Writ Petition.
Section 179 imposes a personal liability on the Directors of a Private Company in respect of the tax due from the company in the circumstances referred to therein. As could be seen from the impugned orders, nowhere Income-tax officer has referred to any of the proceedings initiated against the company to show that it is not possible to recover the tax due from the company. In the absence of such a finding, no liability could be fixed on the Directors under section 179 to pay the tax due. Hence, the impugned orders and the consequent demand notices are liable to be set aside and are accordingly set aside. The matter is remitted to Income-tax officer for reconsideration in accordance with law after affording an opportunity of hearing to the petitioners.
A.S. Chinnaswamy Raju v. UOI (2015) 230 Taxman 177 (Karn.)(HC)

2100 **S.179 : Private company – Liability of directors – Recovery of tax from directors – Recovery proceedings on ground of non-filing of returns by company – Order was held to be not valid.**
The first requirement to attract liability of the director of a private limited company u/s. 179(1) is that the tax cannot be recovered from the company itself. However, such liability can be avoided if it is proved that the non-recovery cannot be attributed to the three factors of gross negligence, misfeasance or breach of duty on the part of the directors. The lack of gross negligence, misfeasance or breach of duty on the part of the directors is to be viewed in the context of non-recovery of the tax dues of the company. In other words, as long as the director establishes that the non-recovery of the tax cannot be attributed to his gross neglect, etc., his liability under section 179(1) of the Act would not arise. Here again the Legislature advisedly used the word "gross" neglect and not a mere neglect on his part.

Held, allowing the petition, that the sole ground on the basis of which the order under section 179 had been passed was that the directors were responsible for the non-filing of return of income and that the demand had been raised due to the inaction on the part of the directors. Clearly, therefore, the entire focus and discussion of the Income-tax Officer in the order was in respect of the directors' neglect in the functioning of the company when the company was functional. On a plain reading of the order, it was apparent that nothing had been stated therein regarding any gross negligence, misfeasance or breach of duty on the part of the directors due to which the tax dues of the company could not be recovered. The order under section 179 was not valid. (AY.2003-04)
Ram Prakash Singeshwar Rungta v. ITO (2015) 370 ITR 641 (Guj.)(HC)

Section 185 : Assessment when section 184 not complied with.

S.185 : Firm – Registration – Deduction of interest – Salary – Instrument of change in partnership was filed in the course of assessment. [S.184] 2101
The assessee-firm did not file certified copy of instrument of change in partnership deed along with return but same was duly produced before the Assessing Officer at the time of assessment. The Assessing Officer disallowed remuneration paid by the assessee to the partners holding that as per section 184(4) the assessee was required to submit certified copy of the partnership deed along with the return. On appeal, the Commissioner (Appeals) deleted the disallowance holding that mere omission to file the partnership deed with the return cannot and should not be treated as fatal, which was upheld by the Tribunal. On appeal by Revenue, dismissing the appeal held that the Tribunal rightly held that omission to file certified copy of the instrument of change in the partnership deed along with the return was not fatal and, therefore, did not attract the consequences laid down in section 185.
CIT v. S.R. Batliboi & Associates (2015) 230 Taxman 438 (Cal.)(HC)

Section 189 : Firm dissolved or business discontinued.

S.189 : Firm – Dissolved – Discontinued – No addition under section 69 of the Act can be made on the basis of document found from the third party for the period after the dissolution of the firm. [S. 69] 2102
The assesse firm was dissolved on 31-3-2002 and all necessary formalities for closure were completed. During course of search and seizure action carried on a third party, some documents were seized which revealed that a sum of ₹ 1.5 crore was paid to a party by assessee in month of December, 2003. The Assessing Officer made the addition on the basis of said document found. On appeal the Appellate Tribunal held that there is no evidence to suggest that the transaction allegedly noted on loose paper with name analogous to the name of the assessee firm pertains to the year in which the assessee firm was in existence. Hence, no addition can be made as unexplained investment in the hands of the assessee. (AY. 2004-05)
Mantri Developers v. ITO (2015) 168 TTJ 372 / 114 DTR 361 (Pune)(Trib.)

Section 192 : Salary.

2103 **S.192 : Deduction at source – Salary – Doctors working in hospital – Different terms and conditions under which various doctors rendered services – Terms and conditions must be examined in each case to determine character of payment received – Doctors were not employees but independent professionals – Amounts paid to them did not amount to salary – Not liable to deduct tax at source. [S. 15, 16, 17, 201(1), 201(IA)]**

In the case of doctors working for hospitals, no absolute rule or general principle can be laid down to determine whether the payment received constitutes salary. In each case depending upon the attending facts and circumstances, the terms and conditions of the engagement, a finding can be arrived at as to whether there is a master-servant or an employer-employee relationship. It can be arrived at in case, where it is found by the income-tax authorities that though there is not a regular process of recruitment and appointment, the contract would indicate that the doctor/professional was appointed as an employee and on a regular basis.

Held, (i) that in the case of doctors with fixed pay and tenure there was no dispute. The amount paid to them constituted salaries.

(ii) That in relation to the second category of doctors drawing fixed plus variable pay with written contracts the terms and conditions had been referred to and the Tribunal concluded that neither of the doctors was entitled to provident fund or any terminal benefits. Both were free to carry on their private practice at their own clinic or outside hospitals but beyond the hospital timings. Both doctors treated their private patients from the hospitals premises. All of these could be seen as indicators that they were not employees but independent professionals. The amounts paid to them did not amount to salary. (AY. 2008-09)

CIT (TDS) v. Grant Medical Foundation (Ruby Hall Clinic) (2015) 375 ITR 49 / 275 CTR 253 (Bom.)(HC)

2104 **S.192 : Deduction at source – Salary – Remuneration to employees – Remuneration for professional services – Meaning of "employment" and "profession" – Assessee providing health services – Doctors working for assessee – Agreement that doctors would not work elsewhere – Not conclusive – Doctors were not employees of assessee – Not liable to deduct tax at source as salary. [S.194I, 194J]**

In order to decide the relationship of employer and employee whether the contract entered into between the parties is a "contract for service" or a "contract of service" has to be examined. There are multiple factor tests to decide this question. The independence test, control test, intention test are some of the tests normally adopted to distinguish between "contract for service" and "contract of service". Finally, it depends on the provisions of the contract. Intention also pays a role in deciding the factor of contract. The intention of the parties is also important.

Held, (i) that the terms of the contract *ipso facto* proved that the contract between the assessee-company and the doctors was of "contract for service" not a "contract of service". The remuneration paid to the doctors depended on the treatment of the patients. Consultancy charges were paid to the doctors towards rendering their professional skill and expertise which are purely in the nature of professional charges. The assessee-company had no control over the doctors engaged by them with regard

to treatment of patients. The non-competition clause in the agreement would not invalidate the nature of the profession. It would not alter the nature of professional service rendered by the doctors. The Tribunal also found that none of the doctors were entitled to gratuity, provident fund, leave travel allowance or other terminal benefits. The doctors had filed their returns of income for the relevant assessment years showing the income received from the assessee-company as professional income and this had been accepted by the Department. Section 192 was not applicable. Section 194J was applicable. (AY. 2006-07, 2007-08)
CIT v. Manipal Health Systems P. Ltd. (2015) 375 ITR 509 / 231 Taxman 518 / 279 CTR 153 (Karn.)(HC)

S.192 : Deduction at source – Salary – Tax is required to be deducted at source on salary/pension paid by Government to teachers/members of a religious congregation. [Ss. 4, 15] 2105
The High Court observed that salary/pension paid to members of a religious congregation was their income and subsequent diversion of that income to the congregation was only a case of diversion of that income. The High Court held that the department was correct in holding that the person responsible for making the payments to the members was required to deduct tax at source on such payments.
Fr. Sunny Jose v. UOI (2015) 233 Taxman 454 / 276 CTR 512 / 118 DTR 41 (Ker.)(HC)
Fr. Sabu P. Thomas v. UOI (2015) 375 ITR 352 (Ker.)(HC)

S.192 : Deduction at source – Salary – Perquisite – Uniform allowance paid to its employees could not be regarded as additional salary in form of allowance within meaning of section 17(1)(iv) – Not liable to deduct tax at source. [S.17(1)(iv)] 2106
Court held that uniform allowance paid to its employees could not be regarded as additional salary in form of allowance within meaning of section 17(1)(iv) hence the assessee is not liable to deduct tax at source.
CIT v. Oil & Natural Gas Corpn. Ltd. (2015) 229 Taxman 415 (Guj.)(HC)

S.192 : Deduction at source – Salary – Housing loan in joint name – Employer not considering the interest while deducting the tax at source – Writ was held to be not maintainable. [S.80C(2)(xviii)] 2107
Assessee, an employee of 'T' Ltd., availed loan from bank for construction of house. Assessee's employer deducted tax at source on entire amount paid to him by way of salary because eligibility of assessee to claim deduction in terms of section 80C(2)(xviii) was held to be doubtful in view of fact that house constructed using loan was in joint names of assessee and his wife. Assessee thus filed instant Writ Petition seeking *inter alia* a direction to respondents to assess him for tax only after deducting monthly instalments recovered from salary towards housing loan repayment.
On facts, even if any amount had been deducted at source in excess from payments effected to assessee, he was not seriously aggrieved because he would get credit of same in his assessment under Act, therefore, relief sought in petition could not be granted.
K.S. Venugopalan, Operator, Travancore Cochin Chemicals Ltd. v. ITO (2015) 229 Taxman 222 (Ker.)(HC)

2108 **S.192 : Deduction at source – Salary – Fees for professional or technical services – Tests to determine whether there is an employer-employee relationship – Tax was to be deducted as fees for technical services and not as salary. [S.194J]**
Dismissing the appeal of Revenue the Tribunal held that in our opinion, the agreement between the assessee and the doctors is one for providing professional services, and there is no element of employer and employee relationship existing. Therefore, in our opinion, tax has to be deducted under section 194J of the Act as fee for professional services and not as salary. (ITA No. 4718/Del/2013, dated 15-5-2015) (AY. 2009-10)
DCIT v. Artemis Medicare Service Ltd. (Delhi)(Trib.); www.itatonline.org

2109 **S.192 : Deduction at source – Salary – Consultant doctors employed on contract basis – No employer and employee relationship – Payments to doctors not salary – No liability to deduct tax at source – Orders treating assessee as in default and levying interest is not justified.[S.201(1); (201IA)]**
The assessee was engaged in the business of providing tele-radiology services to hospitals and imaging and diagnostic centres. The assessee engaged doctors under contract for medical consultation for clients of the assessee. The Assessing Officer treated the payments to the doctors as salary and passed orders under section 201(1) and (1A) of the Act. The Commissioner (Appeals) set aside the order of the Assessing Officer. On appeal by the Department:
Held, dismissing the appeal, that there was no employer and employee relationship between the assessee and the doctors. The assessee was not liable to deduct tax at source under section 192 of the Act considering the payment as salary and interest under section 201 and 201(1A) of the Act was not attracted. (AY. 2012-13)
Teleradiology Solutions P. Ltd. v. ITO(TDS) (2015) 39 ITR 649 (Bang.)(Trib.)

2110 **S.192 : Deduction at source – Salary – Commission Payment to non-executive directors – No employer-employee relationship – No pecuniary benefits – Payment not salary – Commission could not be categorized as salary. S. 194J [S. 194J]**
The assessee paid commission duly approved by the board of directors to its non-executive directors. The Assessing Officer held that those directors were actually employees of the assessee and salary was shown as commission to avoid withholding tax. The Commissioner (Appeals) held that payment of commission to those directors could not be categorised as salary. On appeal: Held, that the non-executive directors did not have an employer-employee relationship and did not receive pecuniary benefits. Therefore, the payment of commission to them could not be categorised as salary.
Dy. CIT (TDS) v. Zee Entertainment Enterprises Ltd. (2015) 38 ITR 636 (Mum.)(Trib.)

Section 193 : Interest on securities.

2111 **S.193 : Deduction at source – Interest – Notional gain – Conversion of FCCBs into shares – Capital gain arising from the conversion of bonds into shares – Not liable to deduct tax at source. [S.47(X)]**
The Tribunal held that Assessing Officer was not justified in fastening the liability of TDS on the assessee in respect of notional gain worked out by him on conversion of FCCBs. The CIT(A) noted that the scheme of taxation expressly forbids the taxation

of any capital gain arising from the conversion of bonds into shares. (AY. 2006-07 to 2013-14)
Dy. CIT v. Jai Prakash Associates Ltd. (2015) 172 TTJ 83 (Luck)(Trib.)

Section 194A : Interest other than "Interest on securities".

S.194A : Deduction at source – Interest – Chit fund – Amount paid by chit fund to its subscribers – Not interest – Tax is not deductible at source on such interest. [S.2(28A)] 2112
The assessee ran a chit fund. The assessee had several chit groups which were formed by having 25 to 40 customers to make one chit group. The customers subscribed an equal amount, which depended upon the value of chits. There were two types of chits. One was the lottery system and the other was the auction system. In the lottery system the lucky winner got the chit amount and in the auction system the highest bidder got the chit amount. Under the scheme, the unsuccessful members in the auction chit would earn dividend and the successful bidders would be entitled to retain the face value till the stipulated period under the scheme. The Revenue took the view that when the successful bidder in an auction took the face value or the prize money earlier to the period to which he was entitled, he was liable to pay an amount to others who contributed to the prize money which was termed as interest and that this interest amount, which had been paid by the assessee to its members was liable for deduction of tax under section 2(28A) and section 194A.
Held, the amount paid by way of dividend could not be treated as interest. Further, section 194A of the Act had no application to such dividends and, therefore, there was no obligation on the part of the assessee to make any deduction under section 194A of the Act before such dividend was paid to its subscribers of the chit. (AY 2004-05 to 2006-07)
CIT v. Avenue Super Chits P. Ltd. (2015) 375 ITR 76 / 232 Taxman 332 (Karn.)(HC)
CIT v. Panchajanya Chits P. Ltd. (2015) 375 ITR 76 / 232 Taxman 592 (Karn.)(HC)

S.194A : Deduction at source – Interest other than interest on securities – Payment of interest to notified institutions – With the issuance of notification u/s. 194A(3)(iii)(f) by the Central Government, provisions of S. 194A (1) automatically become inapplicable. [S. 201(1), 201(IA)] 2113
The Revenue had initiated S. 201 (1)/201(1A) proceedings against the assessee company for non-deduction of tax while making interest disbursement for deposits made by certain societies. These societies were wholly financed and controlled establishments of the Government. The Revenue's contention was that the assessee was required to apply for exemption from the Authorities under the Act in order to avail the benefit of S. 194A(3)(iii)(f) for non-deduction of tax. The Appellate authority noted that by virtue of sub. S. (3)(iii)(f), the provisions of 194A(1) for deduction of tax do not apply to societies notified by the Central Government in the Official Gazette. In terms of S. 194A, Central Government had issued a notification covering "any undertaking or body including a Society registered under the Societies Registration Act, 1860 financed wholly by the Government." Since the said societies were wholly financed by the Government, they were covered under the said notification and, accordingly, the Appellate authority held that no default was found on the assessee's part. On appeal by Revenue, the High Court

held that, once a notification stands issued, it is not the requirement of the Act for the assessee to either apply or seek exemption from the Authorities under the Act or the Central Government. With the issuance of notification u/s. 194A(3)(iii)(f) by the Central Government, provisions of S. 194A(1) automatically become inapplicable. (AY 2009-10)
CIT v. State Bank of Patiala (2015) 119 DTR 110 / 277 CTR 406 (HP)(HC)

2114 **S. 194A : Deduction at source – Interest other than interest on securities – Interest paid to custodian – As per the order of Special Court assessee cannot be held to be liable to deduct tax at source.**
Assessee took loan from one 'FFSL' against pledge of shares. FFSL illegally sold a part of shares and sub pledged rest. Government promulgated Special Court Order and a custodian was appointed for FFSL. Thereafter, assessee paid interest to custodian. Where Special Court conclusively held that provisions of TDS do not apply to alleged liability to pay interest to custodian by assessee, assessee would not be liable to deduct TDS. (AY. 1996-97)
Ethnic Holdings (P.) Ltd. v. ITO (2015) 230 Taxman 77 (Guj.)(HC)

2115 **S.194A : Deduction at source – Interest other than interest on securities – Bills discounting – Agent – Not liable to deduct tax at source. [S.2(28A), 40(a)ia)]**
Assessee's bills were discounted by a party. Assessee claimed factoring charges but it showed it under head interest in its books of account. AO treated same as payment of interest and disallowed same under section 40(a)(ia) on account of non-deduction of TDS under section 194A. On appeal by revenue dismissing the appeal the Court held that discounting charges of Bill of Exchange or factoring charges of sale could not be termed as interest, further, since assessee was acting as an agent, it was not liable to deduct TDS. Before any amount paid is construed as interest, it has to be established that same is payable in respect of any money borrowed or debt incurred. (AY. 2007-08)
CIT v. MKJ Enterprises Ltd. (2015) 228 Taxman 61 (Mag.)(Cal.)(HC)

2116 **S.194A : Deduction at source Interest other than interest on securities – Payment of interest on FDR – Below ₹ 5000 – Not liable to deduct tax at source.**
Tribunal held that interest paid by assessee is below ₹ 5000/-, no TDS was required to be deducted by the assessee. (AY. 2006-07 to 2013-14)
Dy. CIT v. Jai Prakash Associates Ltd. (2015) 172 TTJ 83 / 122 DTR 193 (Lucknow)(Trib.)

Section 194B : Winnings from lottery or crossword puzzle.

2117 **S.194B : Deduction at source – Winning from lottery – Cross word puzzle – Income – Horses races – Stake money – Club was not required to deduct tax at source under section 194B while paying stake money to horse owners. [2(24)(ix), 194BB, 201]**
Assessee-club was engaged in activities of organising horse races. It paid certain amount as prize money or 'stake money' to horse owners whose horses won in a race. Court held that the stake money so paid to race horse owners did not form genus of words 'and other game of any sort' as found in Explanation (ii) to section 2(24)(ix),therefore,

assessee-club was not required to deduct tax at source under section 194B while paying stake money to horse owners. (AY. 2006-07 to 2011-12)
Bangalore Turf Club Ltd. v. UOI (2015) 228 Taxman 234 / 118 DTR 361 / 277 CTR 221 (Karn.)(HC)
Karnatka Race Horse Owners Association v. CIT (2015) 228 Taxman 234 / 118 DTR 361 / 227 CTR 221 (Karn.)(HC)
Mysore Race Club Ltd v. UOI (2015) 228 Taxman 234 / 118 DTR 361 / 227 CTR 221 (Karn.)(HC)

Section 194C : Payments to contractors.

S.194C : Deduction at source – Contract – Sub-contract – Payment was made on regular basis – Considered as oral contract and held liable to deduct tax at source. [S.40(a)(ia)] 2118
Assessee having treated itself as a broker, was earning brokerage per truck. He made payments to owners of goods carrying vehicles such as loading charges, hire charges and repairs and maintenance charges, etc. He claimed deduction for aforesaid expenses Assessing Officer rejected assessee's claim under section 40(a)(ia) opining that it was a case of simply hiring of vehicles on contract basis and thus, assessee was required to deduct tax at source under section 194C. Tribunal, however, deleted said disallowance on ground of non-existence of any contract oral/written, payments in question could not be regarded as one made to sub-contractors. On appeal by Revenue allowing the appeal the Court held that; where repeatedly huge amount has been paid in cash by assessee to different parties as vehicle running expenses, it was itself an evidence of oral contract between assessee and related parties and, therefore, TDS under section 194C ought to have deducted by assessee, therefore impugned order of Tribunal was to be set aside and disallowance made by authorities below was to be confirmed. (AY.2009-10)
CIT v. Md. Tabarak (2015) 234 Taxman 115 / (2016) 136 DTR 16 (Jharkhand)(HC)

S.194C : Deduction at source – Contract – Sub-contract – Principal to principal basis – Not liable to deduct tax at source. 2119
Dismissing the appeal of Revenue the Court held that Assessee, who was a merchant in footwear, made certain purchases of shoes from manufacturers and paid sales tax, excise duty, etc., transaction was on principal to principal basis and did not fall within purview of section 194C. (AY. 2004-05)
CIT v. Khadim Shoes (P.) Ltd. (2015) 234 Taxman 297 / (2016) 131 DTR 315 (Cal.)(HC)

S.194C : Deduction at source – Contract – Sub-contract – Hospital engaged two ladies to facilitate and mange its drugs store, drug handling charges paid to ladies would be liable to deduction at source under section 194C and not under section 194H. [S. 194H] 2120
Assessee-hospital had a drug store of its own which it found difficult to manage and, therefore, to faciliate administration and management of same, it engaged two ladies who were to ensure availability of drugs in store. To enable them to procure drugs and supply same to drug store payment was made by assessee to manufacturers.

During relevant assessment year assessee paid drug handling charges to said ladies and deducted tax therefrom under section 194C. Assessing Officer held that TDS was to be deducted under section 194H. Tribunal held that provision of section 194C will apply and not section 194H. On appeal by Revenue dismissing the appeal of revenue the Court held that on facts no commission or brokerage had been paid and, therefore, section 194H was not attracted. (AY. 2006-07)
CIT v. Jaslok Hospital & Research Centre (2015) 377 ITR 138 / 232 Taxman 538 (Bom.) (HC)

2121 **S.194C : Deduction at source – Contract – Sub-contract – Even if the supply contract is an integral part of a composite contract on single sale responsible basis, there is no obligation to deduct TDS – Service contracts, not being professional services, are not covered by S. 194J – Not liable to deduct tax at source. [S.194J]**
The issue before the High Court was if on payment made against the supply of materials included in composite contracts for executing turnkey Projects, provisions under section 194C would attract or not. Dismissing the appeals of Revenue the Court held that: (i) The clauses of the contract make it clear that three separate contracts have been entered into, but all the separate contracts were integral parts of a composite contract on single sale responsible basis. The invoices raised on the basis of the said composite contract separately mentioning the value of the material supplied, no deduction is permissible under section 194C of the Act. Section 194C of the Act cannot be pressed into service to deduct tax at source. The whole object of introduction of that Section is to deduct tax in respect of payments made for works contract. No division is, therefore, permissible in respect of a contract for supply of materials for carrying out the work. It is in a case of distinct contracts. The contract for supply of material being a separate and distinct contract, no division is permissible under section 194C of the Act. Section 194C has suffered an amendment also with effect from October 1, 2009 and the provision has been made very clear without any ambiguity.
(ii) Thus, we can conclude safely that if a person executing the work, purchases the materials from a person other than the customer, the same would not fall within the definition of 'work' under section 194C of the Act.
(iii) As regards the issue whether the provisions of section 194J or section 194C would apply in respect of payments made by an assessee towards Bill Management Services, the services rendered by the agencies engaged by the assessees at Hospet, Bellary and Raichur are not professional services, and, therefore, Section 194J is not attracted. The demand towards the alleged short deduction of tax deducted at source and interest, therefore, was improper. The contract was rightly held to be a service contract by the Tribunal which should be covered under section 194C of the Act.
CIT v. Executive Engineer (2015) 234 Taxman 267 / 127 DTR 190 / (2016) 282 CTR 318 (Karn.)(HC)

2122 **S.194C : Deduction at source – Contractor – Sub-contract – Manufacture and sell certain pharmaceutical and contact lens care products on a principal to principal basis – Contract for sale – Not liable to deduct tax at source. [Ss.201(1), 201(IA)]**
Assessee was engaged in business of trading of ophthalmic products. It had entered into an agreement with PHL under which PHL had agreed to manufacture and sell

to assessee certain pharmaceutical and contact lens care products on a principal to principal basis. Specifications had been given, according to which PHL had to manufacture and supply products. Property in goods passed on to assessee only on delivery. Raw materials required in manufacture of product were purchased by PHL itself and not from assessee. Dismissing the appeal of Revenue the Court held that on facts, contract entered into by assessee was contract of sale and not a contract for carrying on any work within meaning of section 194C.(AY. 2009-10 to 2011-12)
CIT v. Allergan India (P.) Ltd. (2015) 231 Taxman 438 / (2016) 132 DTR 114 (Karn.)(HC)

S.194C : Deduction at source – Contractor – Sub-contract – Operator of tourist taxis – Hiring of cabs from owners to carry on business – Hire charges paid to owners – Tax deductible – Matter remanded.[S.40(a)(ia)] 2123
The assessee was engaged in the business of operation of tourist taxies. It hired taxies from the owners to carry on its business. It could be said that there was a contract to carry out work and, accordingly, the hire charges paid, were covered under the provisions of section 194C. Tribunal was not correct in holding that the assessee was not bound to deduct tax at source on the ground that the provision was not attracted as no agreement was entered in to by the assessee with other operators. The matter was remitted to the assessing authority to find out whether the tax deducted at source payment was with in time and the assessee was entitled to the deduction in accordance with law. (AY. 2005-06)
CIT v. Janani Tours and Resorts (P) Ltd. (2015) 372 ITR 437 (Karn.)(HC)

S. 194C : Deduction at source – Contract – Sub-contract – Providing busses for giving pick-up and drop facilities – Rightly deducted tax at source as contractor – Payment cannot be termed as rent hence provisions of section 194I cannot be applicable.[S.194I] 2124
Assessee-company entered into contract with transporters for providing buses for giving pick-up and drop facilities to its employees. In terms of contract, possession of buses remained with transporters. Further, transporters were contractually obliged to maintain buses in proper condition and drivers and conductors were also to be provided by them. Assessee deducted tax at source under section 194C whereas revenue authorities opined that tax was to be deducted under section 194-I while making payments to transporters. On facts, agreement between assessee and transporters was not akin to taking of any 'plant' or 'machinery' on lease or any other similar arrangement and, therefore, assessee had correctly deducted tax at source under section 194C. (AY. 2008-09, 2009-10)
CIT v. Bharat Electronics Ltd. (2015) 230 Taxman 651 (All.)(HC)

S.194C : Deduction at source – Contractor – Sub-contract – Exhibition of films – Distribution of movies – Not liable to deduct tax at source. [S.201(1), (201(IA)] 2125
The assessee-firm had an agreement with the distributor of certain movies for exhibiting films in the theatre owned by it. The distributor was to get part of the amount collected by the assessee by way of sale of tickets for those movies.
The Assessing Officer held that said payment would require deduction of tax at source as per section 194C. Since the same was not deducted it was treated to be in default of sections 201(1) and 201(1A).

On appeal, the Commissioner (Appeals) held that since the ownership of the print never rests with the exhibitor it cannot be considered as 'any work' as stipulated in section 194C and thereby set aside the orders.
On appeal, the Tribunal held that no work was carried out by the distributor and set aside the order of Assessing Officer.
On appeal before the High Court:
Considering the facts and circumstances of the case, the Tribunal is justified in coming to the conclusion that the exhibition of film in the theatre has not been described in the Explanation, of 194C therefore, there is no case of the revenue, by which it can be held that the assessee was required to deduct tax at source from the payments made by it to the distributor of films. The Tribunal has rightly considered the agreement/ arrangement between the parties and in detail discussed the same. Decision cited by Senior Counsel appearing for the revenue, however, the same shall not be applicable on the facts of the present case inasmuch as the distributor gets his share because he has acquired rights of the distribution of the films in the particular area and as no work is carried out by the distributor for which the payment is made. The finding of facts by the Tribunal was concurred.
Thus, the Tribunal has rightly reversed the findings given by Commissioner (Appeals) which was not borne out from the facts of the case and the decision of the Tribunal being correct interpretation of the provisions of Act. The question therefore which was framed is to be answered in the affirmative i.e. the Appellate Tribunal was right in law in holding that cinecasting/distribution of movies would be outside the purview of section 194C requiring tax deduction at source.
In view of the above, the question raised in the present appeals is answered in favour of the assessee and against the revenue.(AY. 2002-03 to 2004-05)
CIT v. City Gold Entertainment (P.) Ltd. (2015) 229 Taxman 215 / 118 DTR 139 / 276 CTR 539 (Guj.)(HC)

2126 **S.194C : Deduction at source – Contract – Sub-contractor – Rent – Vehicles were hired by assessee for fixed tenure and for its exclusive usage – Tax rightly deducted as contract – Not liable to be deducted as rent. [S.194I]**
Where buses/vehicles were hired by assessee for fixed tenure and for its exclusive usage, TDS on payment of hire charges would be deducted under section 194C and not under section 194-I. (AY. 2008-09)
CIT v. Freescale Semiconductor India (P.) Ltd. (2015) 229 Taxman 245 (All.)(HC)

2127 **S.194C : Deduction at source – Contractor – Sub-contractor – Interest – Extra cost – Delay in completion of work – Not liable to deduct tax at source. [S.40(a)(ia)]**
Assessing Officer made addition on account of non-deduction of TDS by assessee sub-contractors on interest payment made to main contractor, namely, Unitech. Commissioner (Appeals) as well as Tribunal deleted addition by recording concurrent finding of fact that amount paid was not in nature of interest but it was on account of extra cost that Unitech had to incur due to delay in completion of work taken by assessee on sub-contract. In the absence of any perversity being pointed out in finding recorded by Tribunal, deletion of disallowance was to be upheld. (AY. 2005-06)
CIT v. Karnavati Infrastructure (P.) Ltd. (2015) 229 Taxman 241 (Guj.)(HC)

S.194C : Deduction at source – Contractor – Sub-contractor – Distinction between works contract and sale – Assessee purchasing chassis and entrusting agency for building bus – Building bus bodies needs lot of expertise, experience and technical know-how – Activity undertaken by assessee not a works contract – No tax deduction at source is required. 2128

The assessee purchased chassis suitable for its use from various manufacturers. Thereafter, the bodies of buses were built on the chassis. The process was not uniform. Buses of different varieties, such as deluxe, express and ordinary, were thus procured. Tenders were invited from eligible agencies duly indicating the specifications of buses. On finalising of the contract, the successful fabricator was handed over the chassis, with an understanding that after the body was built thereon, the bus, in its finished form was delivered to the assessee. The Assessing Officer treated it as a works contract and deduction of tax at source had to be effected. The Commissioner (Appeals) upholding the order passed by the Assessing Officer directed further verification of facts. The Tribunal held that section 194C had no application to the facts of the case. On appeal :

Held, dismissing the appeal, that building bus bodies needed lot of expertise, experience and technical know-how. Thus, the activity entrusted by the assessee to fabricators of a bus, amounted not to a work or works contract but was a sale and section 194C had no application. (AY. 1995-96, 1996-97)

CIT v. A.P. State Road Transport Corporation (2015) 370 ITR 621 / 122 DTR 178 / 235 Taxman 159 / (T&AP)(HC)

S.194C : Deduction at source – Contractor – Sub-contractor – State Government undertaking to pay wages to leader of group of workmen – Leader of group whether contractor – Matter remanded. 2129

The assessee, a State Government undertaking, took up rural development construction works directly by eliminating middlemen. It transferred the amounts earmarked for the projects to the account of the engineer who was in charge of such project, and was also an employee of the assessee. The engineer at the spot engaged the services of the workers. The responsibility was given to a person called a group leader who brought the labour force. He was also one among the workers who was engaged in executing the works. The payment was made to the group leader who in turn disbursed the amount to his co-employees. The Assessing Officer held that the group leaders were contractors. The nature and activity of the contractor were similar to that of the group leaders and, therefore, the provisions of section 194C were attracted. The Appellate Commissioner held that section 194C was not applicable but the Tribunal upheld the order of the Assessing Officer. On appeal to the High Court:

Held, that merely because the amount was calculated on the basis of the cubic metre, running metre and square metre on fixed price according to the Special Rules of the Public Works Department, no inference could be drawn that the relationship was that of an employer and a contractor. It was purely a question of fact and it could be seen from the order that the assessee had failed to produce evidence and, therefore, the assessing authority had drawn such an inference. It would be appropriate to send the matter back to the assessing authority reserving liberty to the assessee to produce such documents to substantiate its claim. The assessing authority, after taking into consideration all the material produced by the assessee, should record a finding whether the agreement with

the workers was in the nature of a contract or the payments were made individually to the workers. Depending on the finding, application of section 194C to the case should be decided. Matter remanded. (AY. 2009-10, 2010-11, 2011-12)
Karnataka Rural Infrastructure Development Ltd. v. ITO (2015) 370 ITR 222 / 51 taxmann. com 497 (Karn.)(HC)

2130 **S.194C : Deduction at source – Contractors – Mobile technology services – Not required to deduct tax at source either under section 194C or under section 194-I [S.194I]**
Where assessee, rendering mobile telephony services, paid roaming charges to other telecom operators for providing roaming facility to its subscribers, assessee was not required to deduct tax at source under section 194J or section 194C or section 194I, while making said payments. (AY. 2009-10, 2010-11)
Vodafone East Ltd v. Add. CIT (2015) 43 ITR 551 / (2016) 156 ITD 337 (Kol.)(Trib.)

2131 **S.194C : Deduction at source – Contractor – Sub-contractor – Advertising agency – Hording charges – Liable to deduct tax at source u/s. 194C and not u/s. 194-I. [S. 194I]**
Allowing the appeal of assessee the Tribunal held that assessee, an advertising agency, made payments of hoarding charges to different parties, it was required to deduct tax at source u/s. 194C and not u/s. 194-I (AY.2010-11, 2011-12)
Ogilvy & Mather (P.) Ltd. v. ITO (2015) 155 ITD 475 (Mum.)(Trib.)

2132 **S.194C : Deduction at source – Contractor – Sub-contractor – Provision for site restoration expenses – Not liable to deduct tax at source.**
The assessee is in business of taking premises from other landlords on long-term lease for installing telecom equipment such as towers. The assessee made provision for expenses to be incurred on restoration of the site to its original condition after termination of the lease period. The payment was not made to anyone and it is not credited to the account of any party or individual. In these circumstances the provision which requires deduction of tax at source fails. Hence, the assessee cannot be faulted for non-deduction of tax at source while making a payment. (AY. 2007-08 to 2011-12)
Dishnet Wireless Ltd. v. Dy. CIT (2015) 154 ITD 827 / 172 TTJ 394 / (2016) 45 ITR 430 (Chennai)(Trib.)

2133 **S.194C : Deduction at source – Contractor – Sub-contractor – Year end provision for estimated expenditure – Payees were available and amount payable could be quantified – Liable to deduct tax at source. [S. 201(1), 201(1A)]**
The Tribunal held that if the payee is identified and the quantum of payment is also ascertainable on the last day of the relevant financial year, assessee has to be necessarily deduct TDS. Since, the details are not available on record, the orders of the lower authorities are set aside and the issue is remitted back to the Assessing Officer. (A.Y. 2007-08 to 2011-12)
Dishnet Wireless Ltd. v. Dy. CIT (2015) 154 ITD 827 / 172 TTJ 394 / (2016) 45 ITR 430 (Chennai)(Trib.)

S.194C : Deduction of tax at source – Contractor – Sub-contractor – Payments to transporter – Being a contractor, was required to deduct TDS while making payments to truck owners/sub-contractors. 2134

Assessee firm was engaged in business of transportation of goods. Since assessee did not own trucks, it received freight and credited same to profit & loss account. Trucks were hired from open market and freight was paid to said transporters at a lesser rate resulting in profits. Since record of assessee itself showed that it acted as contractor and made entries in books of account in respect of freight received and freight paid, it could not be allowed to take a plea of acting only as commission agent. Assessee was required to deduct TDS u/s. 194C while making payments to transporters/sub-contractors. (AY. 2006-07)

Northern Trailor Service v. ITO (2015) 154 ITD 739 / 174 TTJ 403 (Chd.)(Trib.)

S.194C : Deduction at source – Contractor – Sub-contractor – Publicity of brand or logo – Payments for Advertisement or subsidy – Liable to deduct tax at source. [S. 201(1), 271C] 2135

The assessee (Sahara India Commercial Corporation Ltd.) was engaged in the business of real estate development, construction and media activities etc. It had entered into a business arrangement with Sahara Airlines Ltd. (SAL) for publicizing its business. As per the agreement SAL was required to display the logo of the assessee on both sides of the aircraft, tickets, boarding passes, baggage tags, newspapers, hoardings, etc. and that the brochures of the assessee provided by them would be distributed by SAL with its tickets. The assessee made payment for such publicity to SAL without deduction of tax at source.

The Assessing Officer contended that the act of publicizing assessee's business would come under the preview of advertisement and, therefore, payment made for the same was to be subjected to TDS under section 194C. Consequently, the Assessing Officer treated assessee as an assessee-in-default under section 201(1) and levied penalty on it under section 271C.

On appeal, the Commissioner (Appeals) re-examined the issue in the light of various Circulars, relevant provisions, judgments referred to by the assessee and formed a view that 'advertisement' and 'publicity' are not the same and the payments made are not for the advertisement. Therefore, the assessee was not in default in respect of short/non-deduction of tax. On appeal to Tribunal it was held that:

From a careful perusal of the aforesaid judgments and the interpretation given in various dictionaries, it is evident that the 'advertisement' includes publicity, but vice versa may not be possible. But whenever publicity of a brand or logo brings commercial benefit either apparent or hidden, it will assume the character of 'advertisement'. It is unacceptable that a businessman would publicize his logo or brand without visualizing any commercial benefit out of it. In the instant case, if the agreement is read carefully, it is found that the parties to the agreement have agreed that it was executed to give extensive publicity to the activities of the assessee in order to promote their business and area of operation and for doing so SAL was required to display the logo of the assessee-company on both sides of the aircraft, tickets, boarding passes, baggage tags, newspapers, hoardings etc. Therefore, the only inference can be drawn

from the agreement and the revised agreement that it was executed for the purpose of 'advertisement' of the logo of the assessee-company. This inference is also fortified by the treatment given by the assessee in its books of account. Therefore, it is evident that the assessee has agreed for advertisement of its logo for which it is required to deduct TDS under section 194C. (AY. 2003-04 to 2007-08)
DCIT v. Sahara India Commercial Corporation Ltd. (2015) 67 SOT 318 / 169 TTJ 292 / 117 DTR 59 (Luck.)(Trib.)

2136 **S.194C : Deduction at source – Contractor – Sub-contractor – Only payments "in pursuance of a contract" are subject to TDS. Payments made under a legal obligation are not covered. [S. 201(1), 201(IA)]**
The appellant has made payments to Punjab Water Supply and Sewerage Board for execution of work relating to sewerage pipelines and for treatment of polluted water of the city. However, such payments are out of legal obligations rather than contractual arrangements. It is only when payments are made "in pursuance of a contract" that the provisions of section 194C come into play. The contract may be oral or written, express or implied but there must be a contract nevertheless. In the present case, the payment is on account of legal obligation under section 24(1) of the Punjab Water Supply and Sewerage Board Act, 1976. Accordingly, the provisions of section 194C did not come into play on the facts of this case. Therefore, the impugned demands under sections 201(1) and 201(1A) r.w.s. 194C are wholly devoid of any legally sustainable merits. (AY. 2007-08 to 2010-11)
Executive Officer, Jalandhar Improvement Trust v. ITO (2015) 171 TTJ 406 / 69 SOT 380 (Asr.)(Trib.)

2137 **S.194C : Deduction at source – Contractor – Sub-contractor – Professional fees – Payment to contractors – Payments for carriage to cable operators, production house, event management and hire charges – Work – Definition – Includes broadcasting and telecasting including production of programmes – Hire contract part of production of programme – Notification including event management within scope of professional service under section 194J prospective – Not applicable to assessee – Assessee not in default. S. 194J [S. 194J, 201(1)]**
The assessee made payments deducting tax at source under section 194C of the Income-tax Act, 1961 for services of a cable operator, for purchasing programmes from production houses, for event management and for hiring equipment, labour and operators for the production unit. According to the Assessing Officer, the assessee should have deducted tax at source under section 194J of the Act, as the payment made by the assessee was not for the work as defined in section 194C of the Act and therefore, the assessee committed a default under section 201(1) of the Act. The Commissioner (Appeals) held that as the assessee already deducted the tax under section 194C, the assessee was not in default under section 201(1) of the Act. On appeal :
Held, dismissing the appeal, that "work" in section 194C of the Act, included broadcasting, telecasting and production of programmes. The payment made by the assessee under hire contract was part of production of programmes. Therefore, for the payment of carriage fees to cable operators, production house and hire charges, tax could be deducted under section 194C of the Act. The Department relied on the Board notification dated August 21, 2008 for

holding that tax at source on fee for event management was to be deducted under section 194J of the Act. The notification was prospective and it would not cover the payments made prior to the issue of notification and therefore, in the assessee's case, the tax at source could be deducted under section 194C of the Act. Therefore, the assessee was not in default under section 201(1) of the Act.
Dy. CIT (TDS) v. Zee Entertainment Enterprises Ltd. (2015) 38 ITR 636 (Mum.)(Trib.)

Section 194H : Commission or brokerage.

S.194H : Deduction at source – Commission – Discount allowed by assessee to distributors in respect of sale of starter packs and recharge coupons for its prepaid service constitute commission – Assessee is a person "responsible for paying" – Assessee is liable to deduct tax at source on such commission. 2138
Held, the terms and conditions left no doubt that the relationship between the service provider and the assessee from the agreement was that of an agent and principal. The service provider had been employed to act on behalf of the assessee for the purpose of feeding the retailers and through them to sell the services to the consumers. The dealings and transactions between the assessee and the service provider were not on principal to principal basis. The assessee was a person responsible for paying commission and, therefore, the provisions of section 194H were attracted. (AY. 2004-05)
Hutchison Telecom East Ltd. v. CIT (2015) 375 ITR 566 / 127 DTR 74 / 232 Taxman 665 (Cal.)(HC)

S.194H : Deduction at source – Commission or brokerage – 'Commission' to bank on payments received from customers who had made purchases through credit cards is not liable to TDS. [S. 40(a)(ia)] 2139
The assessee was engaged in the business of trading in readymade garments and paid "commission" to bank on payments received from customers who had made purchases through credit cards. The AO held that the amount earned by the acquiring bank, was in the nature of "commission" and same was subjected to TDS u/s.194H and hence, disallowed amount u/s. 40(a)(ia). The CIT(A) confirmed the findings of the AO. The Tribunal, however, allowed the appeal.
Dismissing the departmental appeal, the High Court held that Section 194H would not be attracted in present case, as bank was not acting as an agent of the assessee. It further held that the amount retained by the bank is a fee charged by them for having rendered the banking services and cannot be treated as a commission or brokerage paid in course of use of any services by a person acting on behalf of another for buying or selling of goods.(AY. 2009-10)
CIT v. JDS Apparels (P.) Ltd. (2015) 370 ITR 454 / 53 taxmann.com 139 / 113 DTR 137 / 273 CTR 1(Delhi)(HC)

S.194H : Deduction at source – Commission or brokerage – Trade discounts – Sale of SIM cards – Not liable to deduct tax at source. 2140
The assessee was a Public Limited Company engaged in the business of telecom operations. In the course of its business, the assessee appointed distributors to purchase

starter packs (SIM cards), refill packs (refill/re-charge slips, refill/recharge cards, etopup, etc.,), etc., in bulk and then, sold them to sub-dealers or retailers. After considering the terms and conditions stipulated in the agreement entered into between the assessee and the distributors, the assessing authority was of the view that the said agreement establishes a principal and agent relationship between the two parties and, therefore, any discount/commission made to such parties was liable for deduction of tax at source under section 194H. On appeal Court held that, Service can only be rendered and not sold, however, right to service can be sold. Sale of SIM by service provider to distributor involves sale of right to services, therefore, relationship between assessee and distributor would be that of principal and principal and not principal and agent, since SIM cards and prepaid recharge coupons were sold by assessee Telecom operators to distributors at discounted MRP, there was no payment of commission or brokerage to distributor, hence, TDS under section 194H was not attracted.
Bharti Airtel Ltd. v. CIT (2015) 372 ITR 33 / 114 DTR 253 / 228 Taxman 219 (Mag.) / 274 CTR 213 (Karn.)(HC)
Vodafone Essar South Ltd. v. DCIT (2015) 372 ITR 33 / 114 DTR 253 / 228 Taxman 219 (Mag.) / 274 CTR 213 (Karn.)(HC)
Tata Teleservices Ltd. v. DCIT (2015) 372 ITR 33 / 114 DTR 253 / 228 Taxman 219 (Mag.)/ 274 CTR 213 (Karn.)(HC)

2141 **S.194H : Deduction at source – Reimbursement of commission – Reimbursement not in nature of income – Tax deducted at source on commission – Deduction of tax at source on reimbursement results in double taxation. [S. 201(1)]**
The assessee made reimbursements of dealer commission to Z, without deducting tax at source. The Assessing Officer held that the payment fell within the ambit of section 194H of the Act and since the assessee failed to deduct tax at source, the assessee committed default under section 201(1) of the Act. The Commissioner (Appeals) held that no tax was required to be deducted for reimbursement. On appeal :
Held, that since the reimbursements were not in the nature of income in the hands of Z, no tax was required to be deducted. Further, while paying the commission to its dealers and distributors, Z had deducted tax at source on the commission paid which was in turn reimbursed by the assessee. Deduction of tax at source again on the reimbursement would result in double taxation and therefore, the assessee was not a defaulter under section 201(1) of the Act.
Dy. CIT (TDS) v. Zee Entertainment Enterprises Ltd. (2015) 38 ITR 636 (Mum.)(Trib.)

2142 **S.194H : Deduction at source – Commission or brokerage – Commission or discount to distributors of SIM cards – Principal to principal – Does not constitute commission – Not liable to deduct tax at source. [S.201(1), 201(IA)]**
Tribunal held that relationship between assessee and distributor of prepaid SIM cards is that of principal to principal, hence, discount given by assessee to distributor on SIM cards does not constitute commission so as to attract TDS under section 194H and action under sections 201(1) and 201(1A). (AY. 2009-10)
Bharti Hexacom Ltd. v. ITO (2015) 174 TTJ 45 (Jaipur)(Trib.)

S.194H : Deduction of tax at source – Commission or brokerage – Trade discount – Del credere agent – Not liable to deduct tax at source. 2143

Assessee, a manufacturer of beer, paid trade discount to retail dealers through its del credere agents. Assessee contended that since the payment of discount had been made on principal to principal basis, said payment could not be considered as commission payment requiring to deduct tax at source. Assessing Officer as well as CIT(A) opined that the assessee was liable to deduct tax at source u/s. 194H. Allowing the appeal of assessee the Tribunal held that del credere agents acted only as conduits and payment of discount was actually made to retail dealers in form of sales promotion expenses, it would not fall under category of commission requiring deduction of TDS (AY. 2008-09 to 2010-11).

United Breweries Ltd. v. ITO (2015) 155 ITD 482 / (2016) 131 DTR 127 / 173 TTJ 470 (Visakhapatanam)(Trib.)

Section 194I : Rent

S.194I : Deduction at source – Rent – Charges for landing and take-off services as well as parking charges aircraft paid by airlines to AAI are surcharges for various services and facilities hence such charges cannot be treated as rent – Not liable to deduct tax at source. [S.194C, 201(1)] 2144

Allowing the appeal of assessee the Court held that The charges which are fixed by the AAI for landing and take-off services as well as for parking of aircraft are not for the 'use of the land'. That would be too simplistic an approach, ignoring other relevant details which would amply demonstrate that these charges are for services and facilities offered in connection with the aircraft operation at the airport. There are various international protocols which mandate all such authorities manning and managing these airports to construct the airports of desired standards which are stipulated in the protocols. The services which are required to be provided by these authorities, like AAI, are aimed at passengers' safety as well as on safe landing and parking of the aircraft. Therefore, it is not mere 'use of the land'. On the contrary, it is the facilities, that are to be compulsorily offered by the AAI in tune with the requirements of the protocol, which is the primary focus;

When the airlines pay for these charges, treating such charges as charges for 'use of land' would be adopting a totally naïve and simplistic approach which is far away from the reality. We have to keep in mind the substance behind such charges. When matter is looked into from this angle, keeping in view the full and larger picture in mind, it becomes very clear that the charges are not for use of land *per se* and, therefore, it cannot be treated as 'rent' within the meaning of Section 194I of the Act;

However, the reason given by the Madras High Court that the words 'any other agreement or arrangement for the use of any land or any building' have to be read *ejusdem generic* and it should take its colour from the earlier portion of the definition namely "lease, sub-lease and tenancy" and to thereby, limit the ambit of words 'any other agreement or arrangement' is clearly fallacious. A bare reading of the definition of 'rent' contained in explanation to Section 194I would make it clear that in the first place, the payment, by whatever name called, under any lease, sub-lease, tenancy

which is to be treated as 'rent'. That is rent in traditional sense. However, second part is independent of the first part which gives much wider scope to the term 'rent'. As per this whenever payment is made for use of any land or any building by any other agreement or arrangement, that is also to be treated as 'rent'. Once such a payment is made for use of land or building under any other agreement or arrangement, such agreement or arrangement gives the definition of rent of very wide connotation. To that extent, High Court of Delhi appears to be correct that the scope of definition of rent under this definition is very wide and not limited to what is understood as rent in common parlance. It is a different matter that the High Court of Delhi did not apply this definition correctly to the present case as it failed to notice that in substance the charges paid by these airlines are not for 'use of land' but for other facilities and services wherein use of the land was only minor and insignificant aspect. Thus it did not correctly appreciate the nature of charges that are paid by the airlines for landing and parking charges which is not, in substance, for use of land but for various other facilities extended by the AAI to the airlines. Use of land, in the process, become incidental. Once it is held that these charges are not covered by Section 194-I of the Act, it is not necessary to go into the scope of Section 194-C of the Act. (AY. 1997-98 to 1999-2000)

Japan Airlines Co. Ltd. v. CIT (2015) 377 ITR 372 / 279 CTR 1 / 234 Taxman 175 / 123 DTR 103 (SC)

CIT v. Singapore Airlines Ltd. (2015) 377 ITR 372 / 234 Taxman 175 / 123 DTR 103 (SC)

Editorial: Observation in CIT v. Japan Airlines Co. Ltd. (2010) 325 ITR 298 (Delhi) (HC) is approved. CIT v. Singapore Air Lines Ltd. (2013) 358 ITR 237 (Mad.)(HC), is disapproved.

2145 **S.194I : Deduction at source – Rent – Equipment hire charges – Prior to 13-7-2006, section 194I was not applicable in case of any payment in relation to use of any equipment- Subsequent years question of law was admitted. [S.194J, 260A.SS]**

Prior to 13-7-2006, section 194-I was not applicable in case of any payment in relation to use of any equipment. Up to assessment year 2005-06 no substantial question of law arise. However following question of law was admitted. Whether on the facts and in the circumstances and in law, the Hon'ble ITAT was justified in confirming the order of the CIT(A) in holding that the assessee was not an assessee in default u/s. 201 in respect of the amount of tax which has not been deducted from provisions created in respect of "Doctors" fees payable. (AY. 2006-07)

CIT v. Jaslok Hospital & Research Centre (2015) 377 ITR 138 / 232 Taxman 538 (Bom.) (HC)

2146 **S.194I : Deduction at source – Rent – Providing medical services – Agreement vesting assessee with powers of management of premises used as hospital – Annual sum and payment of interest on loan taken by lessor and liability to repay loan – Annual sum amounted to rent – Tax deductible at source on such amount – Liability to pay interest and repay loan did not amount to rent – Not liable to deduct tax at source on such payment.**

Held, the words "any other mode" and "whatever name called" occurring in section 194I and the definition of "rent" in the Explanation thereto, if applied to the present case,

the consideration paid by the assessee in terms of the agreements dated April 1, 2005, and April 29, 2006, was in the nature of rent and the provisions of section 194-I were squarely attracted. The agreement dated April 1, 2005, executed between the parties was amended by the agreement dated April 29, 2006. By virtue of the amendment to clause 2.1(b), the assessee-company was not liable to deduct tax at source on the interest and principal paid in respect of the loan outstanding from MRS to various banks and financial institutions for the assessment year 2007-08. However, the amount of ₹ 5 crores paid per annum to MRS squarely fell under section 194-I of the Act and the assessee-company was liable to discharge the liability for deduction of tax at source for both the assessment years 2006-07 and 2007-08. (AY. 2006-07, 2007-08)
CIT v. Manipal Health Systems P. Ltd. (2015) 375 ITR 509 / s. 231 Taxman 518 / 279 CTR 153 (Karn.)(HC)

S.194I : Deduction at source – Rent – Fees for technical services – Transmission & wheeling charges paid by electricity company is neither rent nor fees for technical services – Not liable to deduct tax at source – It will not be permissible for either the revenue or the assessee to take up the issues which were not raised before the Tribunal. [S.9(1)(vii), 194J, 201, 201(IA), 260A] 2147

Dismissing the appeal of revenue the Court held that Transmission & wheeling charges paid by electricity company is neither rent nor fees for technical services hence not liable to deduct tax at source
CIT (TDS) v. Maharashtra State Electricity Distribution Co. Ltd. (2015) 375 ITR 23 / 277 CTR 376 / 119 DTR 278 / 232 Taxman 373 (Bom.)(HC)

S.194I : Deduction at source – Rent – Use of plant and machinery on monthly production basis – Not liable to deduct tax at source. 2148

Assessee-company entered into an agreement with a factory to carry on re-rolling work. It paid to said factory an amount of ₹ 200 per ton on manufacturing of steel items. Assessing Officer treated said payment as rent for use of factory premises and disallowed same on account of non-deduction of TDS. From agreement, it was found that assessee made payment for use of plant and machinery on monthly production basis. On facts, assessee was not liable to deduct TDS under section 194-I. (AY. 1998-99)
CIT v. R.H.L. Profiles Ltd. (2015) 229 Taxman 180 (All.)(HC)

S.194-I : Deduction at source – Rent – Lease premium – Provision applies only to amounts paid for "use" of the land and not for amounts paid to "acquire" the rights – Distinction between "lease premium" and "rent" explained. 2149

The revenue claimed that payment of lease premium by the assessee to MMRDA is in the nature of advance rent for 80 years and definition of the term "rent" u/s. 194-I of the Act was wide enough to include such payments made. It was contended by the revenue that even after the execution of the lease deed the rights of the lessor did not extinguish in view of the provisions of obtaining the additional premium from the assessee in case time limit for its commercial development was not adhered to. According to the revenue premium paid in the case of the assessee came within the purview of section 194-I of the Act. HELD by the Tribunal rejecting the plea:

(i) The terms of the lease deed leaves no manner of doubt that the lease premium of ₹ 1041.42 crores was for acquisition of rights in the lease hold property rather than use of land. Therefore the provisions of section 194-I of the Act are not applicable in the case of the assessee. The purport of section 194-I of the Act is not to bring in its purview payments of any or every kind. Only those payments which are in the nature of "use" of land come within the ambit of section 194-I of the Act. The word "use" is therefore of prime importance for transactions where the consideration paid for the property would be termed as "rent". The term "use" "according to us has to be interpreted keeping in mind the relationship between the landlord and the tenant. The same cannot be extended to bring within its purview exploitation of any kind with reference to the property by changing its identity for its own benefit and thereafter selling it for profit. If that be so and the word 'use' is given an extended meaning, there would be no difference between a sale transaction and a transaction between the landlord and the tenant. This would render the intention of the legislature in importing the word 'use' in section 194-I of the Act otiose. Landlord-tenant relationship does not contemplate such right being given to the tenant. However, there may be transactions of lease that may be identical to the transactions between a landlord and tenant and that is why the definition of the rent includes lease, sub-lease etc.

(ii) The amount paid by the assessee for lease premium has no connection with the market rent of the property leased to the assessee. Furthermore the term of lease deed is for a considerable period of 80 years which further supports the case of the assessee that the payment made was for the acquisition of rights in the land along with the right of possession, right of exploitation of property, its long-term enjoyment, to mortgage the property, to sell the property etc. Also the entire lease premium of ₹ 1041.42 crores has been paid before the execution of the lease deed and not after. (AY. 2008-09)

ITO v. Earnest Tower (P) Ltd., (2015) 155 ITD 372 / 171 TTJ 319 (Kol.)(Trib.)

2150 **S. 194I : Deduction at source – Rent – Power distribution – Billing and transmission of electricity could not be considered as rent – Not liable to deduct tax at source. [S. 201, 201(IA)]**

The assessee-company, incorporated under provisions of the Electricity Act, 2003, purchased power from various sources and distributed and sold to the consumers. The power from the generation point to the customers was transmitted through the transmission network of Maharashtra State Electricity Transmission Company Ltd (MSETCL) and Power Grid Corporation of India Ltd. (PGCIL). The AO held that whelling and transmission charges paid to MSETCL and PGCIL were liable to TDS under section 194-I and accordingly disallowed payment for failure to deduct TDS. The CIT(A) allowed appeal of the assessee holding that payments made for use of transmission lines or other infrastructure i.e. plant and machinery could not be termed as rent and further holding that transmission charges could not be considered as rent under the provision of section 194-I. On appeal by revenue it was contended that transmission charges should be considered as rent. The Tribunal held that billing and transmission charges paid to

MSETCL and PGCIL for transmission of electricity could not be considered as rent under provision of section 194-I. (AY. 2006-07 to 2009-10)
ACIT v. Maharashtra State Electricity Distribution Co. Ltd. (2014) 51 taxmann.com 151 / (2015) 67 SOT 108 (Mum.)(Trib.)

Section 194J : Fees for professional or technical services.

S.194J : Deduction at source – Fees for professional or technical services – Contractors – There is no liability of deduction of TDS on payment of transmission charges. [S.194C, 201(1)] 2151
On commissioning of the new transmission system assessee was to pay "the provisional transmission tariff" as wheeling charges. Assessee deducted tax at source at 2% under Section 194C of the Act on the said payment. After a survey u/s. 133A of the Act, the AO considered wheeling charges as Fees for Technical Services liable for TDS at 10% u/s. 194J. The AO treated the assessee as defaulter u/s. 201(1) for short deduction of tax. Aggrieved by the AO's order, assessee filed an appeal before the CIT(A). CIT(A) confirmed the said order of the AO in the absence of sufficient legal precedent on the subject.
The assessee then carried the matter further in appeal to the ITAT. ITAT agreed with the assessee that what had been availed by it was not a technical service. Reliance was placed on the Division Bench of the Bombay High Court in *CIT v. Maharashtra State Electricity Distribution Co. Ltd. [2015] 375 ITR 23 (Bom.)* which held that wheeling charges would not amount to payment of fees for technical services.
CIT-II v. Delhi Transco Ltd. (2015) 124 DTR 170 / 234 Taxman 779 / 280 CTR 50 / (2016) 380 ITR 398 (Delhi)(HC)

S.194J : Deduction at source – Fees for professional or technical services – Doctors receiving fixed or variable remuneration, with or without written contracts, are professionals and cannot be treated as employees as per their terms and conditions. [S. 192] 2152
Payments were made by the Assessee, a charitable trust managing a hospital, to doctors. The payments were either fixed or variable, with or without written contract. The AO alleged that such doctors were employees of the assessee and tax ought to be deducted u/s. 192 and not u/s 194J. It was held by the HC that the terms and conditions of the doctors would be crucial and material. The doctors drawing fixed or variable remuneration could not be treated as regular employees since benefits like provident fund, retirement benefit, etc. were not paid to them. They could not be considered to be employees merely because they were required to spend a fixed time at hospital, treat fixed number of patients or attend them as indoor patients and out patients. The doctors were free to carry on their private practice but beyond hospital timings. (AY. 2008-09)
CIT v. Grant Medical Foundation(Rubby Hall Clinic) (2015) 375 ITR 49 / 275 CTR 253 / 116 DTR 45 (Bom.)(HC)

2153 **S.194J : Deduction at source – Fees for professional or technical services – Stokists – Assessee received amount of sale price at rate fixed under agreement but had neither paid nor credited any amount to stockist, question of invoking section 194J against assessee did not arise.**

Assessee-company was engaged in manufacture and distribution of drugs. It appointed one 'Z' as its superstockist. In terms of agreement, assessee sold its manufactured drugs to 'Z' for its onward distribution in open market .Assessing Officer concluded that 'Z' was manager of assessee and, therefore, assessee was liable to deduct tax under section 194J. Dismissing the appeal of revenue the Court held that ;since assessee had received amount of sale price at rate fixed under agreement but had neither paid nor credited any amount to stockist, question of invoking section 194J against assessee did not arise. (AY. 2007-08 to 2011-12)

CIT v. Piramal Healthcare Ltd. (2015) 230 Taxman 505 (Bom.)(HC)

2154 **S.194J : Deduction at source – Fees for professional or technical services – Independent personal services Work of agency – Liaisoning – Not liable to deduct tax at source – DTAA-India-UAE.[S. 9(1)(vii), 40(a)(i), 90, 195, Articles 3,14, 22]**

Dismissing the appeal of revenue the Court held that payment made as independent personal services work of agency as Liaisoning is not liable to deduct tax at source.(AY. 2004-05)

CIT v. Grup ISM P. Ltd. (2015) 378 ITR 205 / 278 CTR 194 / 232 taxman 846 (Delhi)(HC)

2155 **S.194J : Deduction at source – Fees for professional or technical services – Royalty – Income deemed to accrue or arise in India – Payment made for live telecast of horse races not royalty as per Explanation 2 to section 9(1)(vi), hence no TDS was attracted. [S.9(1)(vi), 40(a)(ia)]**

The assessee was engaged in the business of conducting horse races and had made payment to other clubs/centres on account of live telecast of races. The AO made a disallowance u/s. 40(a)(ia) on account of 'royalty paid to other centres' and on account of 'live telecast royalty' being royalties covered by section 194J as TDS was not deducted on said expenses. The CIT(A) upheld the assessment order however the Tribunal deleted the same.

On appeal by revenue, High Court observed that the in provision (v) the words 'in respect of any copyright in literary, artistic or scientific work' were read to, inter alia, hold that 'royalty' is payable only on 'transfer of all or any rights (including granting of licence) in respect of any copyright in literary, artistic or scientific work including films or video tapes for use in connection with television or tapes were used in connection with radio broadcasting but not including consideration for the sale, distribution or exhibition of cinematographic films'. The High Court held that the even by stretching the meaning, it is difficult to include a live broadcast within 'scientific work'. It further held that revenue contention that the live telecast, in this case, was accompanied by commentary, analysis etc is an issue of fact, which cannot be gone into or raised at this stage. and hence appeal filed is dismissed. (AY. 2007-08. 2009-10).

CIT v. Delhi Race Club (1940) Ltd. (2015) 113 DTR 420 / 228 taxman 185 / 273 CTR 503 (Delhi)(HC)

S.194J : Deduction at source – Fees for professional or technical services – Providing assistance, coordination, supervision and facilitating working of co-operative sugar factories – Matter remanded. [S. 40(a)(ia)] 2156

Assessee, a co-operative sugar Federation, was providing assistance, coordination, supervision and facilitating working of co-operative sugar factories. It received subscription from each factory to meet expenses on basis of sugar production but did not deduct TDS from said subscription. AO was of view that assessee provided financial advice and other services which were technical services under section 194J and, accordingly, made a disallowance under section 40(a)(ia) on ground that tax was not deducted at source CIT(A) had deleted disallowance. Court held that since no independent evaluation was carried out by CIT(A) as to whether said services were technical services or professional services, matter needed re-consideration. Matter remanded (AY. 2006-07)

CIT v. Kisan Sahkari Chini Mill Ltd. (2015) 229 Taxman 81 (All.)(HC)

S.194J : Deduction at source – Fees for professional or technical services – Roaming charges does not constitute technical services – Not liable to deduct tax at source. 2157

The Tribunal held that roaming charges paid by assessee cellular service provider to other cellular service providers does not constitute fee for technical services so as to attract TDS under section 194J. (AY. 2009-10)

Bharti Hexacom Ltd. v. ITO (2015) 174 TTJ 45 (Jaipur)(Trib.)

S.194J : Deduction of tax at source – Fees for professional or technical services – Transmission charges – Not liable to deduct tax at source. [S.9(1)(vii)] 2158

Allowing the appeal of assessee the Tribunal held that; where assessee paid wheeling, scheduling and transmission charges to State power utility for using its distribution network to sell energy generated by assessee to end consumers and same did not involve any human element, assessee was not required to deduct TDS under section 194J. (AY.2012-13)

Auro Mira Biopower India (P.) Ltd. v. ITO (2015) 68 SOT 188 (URO) (Chennai)(Trib.)

S.194J : Deduction of tax at source – Fees for professional or technical services – Brand fee – Brand fee being royalty, tax to be deducted as per the provision of section 194J. [S. 194C] 2159

Assessee sold beer manufactured by it under its own name by using brand name of main line companies. It deducted the TDS by treating the same as contract by applying the provisions of section 194C. Dismissing the appeal of assesse the Tribunal held that; it was required to deduct TDS u/s. 194 J while making payment of brand fee. (AY.2009-09, 2010-11)

United Breweries Ltd. v. ITO (2015) 155 ITD 482 / (2016) 175 TTJ 470 (Visakhapatnam) (Trib.)

2160 **S.194J : Deduction at source – Fees for professional or technical services – Advertising agency – Payment for creative consultancy – tax is to be deducted u/s. 194J and not u/s. 192. [S.192]**
Assessee's business of advertising and marketing communication services, availed services of creative consultants, it has deducted tax at source u/s. 194J. Assessing Officer held that the tax was to be deducted at source u/s. 192. On appeal allowing the appeal of assesse the Tribunal held that the payment to creative consultancy tax is to be deducted u/s. 194J and not u/s. 192 of the Act. (AY. 2010-11, 2011-12)
Ogilvy & Mather (P) Ltd. v. ITO (2015) 155 ITD 475 (Mum.)(Trib.)

2161 **S.194J : Deduction at source – Fees for professional or technical services – Consultancy agreement – Principle of consistency. [S. 192, 201(IA)]**
Personal perquisites and other benefits absent in consultancy agreement. Payment treated as professional fees in earlier assessment years. Principle of consistency applicable. Assessee cannot be held to be liable for interest. (AY. 2009-10)
Dy. CIT v. Artemis Medicare Service Ltd. (2015) 41 ITR 361 (Delhi)(Trib.)

2162 **S.194J : Deduction at source – Fees for professional or technical services – Payment of roaming charges – Not liable to deduct tax at source.**
The Tribunal held that no technical service is availed by the assessee in providing roaming facility to its subscribers. Therefore, TDS is not required to be deducted from the roaming charges paid by the assessee to other service providers. *CIT v. Bharti Cellular Ltd. (2011) 330 ITR 239 (SC)* followed by the Tribunal. (AY. 2007-08 to 2011-12)
Dishnet Wireless Ltd. v. Dy. CIT (2015) 154 ITD 827 / 172 TTJ 394 / 45 ITR 430 (Chennai)(Trib.)

2163 **S.194J : Deduction of tax at source – Fees for professional or technical services – Data Link Charges – Transmission of data via gadgets without any human intervention will not amount to technical services – Not liable to deduct tax at source.**
Assessee-software company paid data link charges for utilizing standard facilities which were provided by telecom service providers by way of technical gadgets and there was no human intervention for transmitting data through such data links, same did not involve technical services. It was held that assessee was not liable for tax deduction at source under section 194J.(AY. 2007-08 to 2010-11)
iGATE Computer Systems Ltd. v. DCIT (2015) 67 SOT 296 (Pune)(Trib.)

2164 **S.194J : Deduction at source – Fees for professional or technical services – Income – Deemed to accrue or arise in India – Royalty – Cinematographic films – Satellite rights of a film – Outside purview of section 194J. [S. 9(1)(v), 201, OECD Model Convention Article 12]**
Payment made by assessee to producers for acquiring satellite rights was towards outright sale, distribution or exhibition of cinematographic films, which were

specifically excluded under clause (v) of Explanation 2 of section 9(1) from being treated as consideration paid towards royalty, payment was outside purview of section 194J. (AY. 2008-09)
ACIT v. Aishwaraya Arts Creations (P.) Ltd. (2015) 67 SOT 245 (Hyd.)(Trib.)

S.194J : Deduction at source – Fees for professional or technical services – Access charges – Rent – Rectification order passed by the AO cancelling the original demand – Appeal of revenue being academic the said appeals were dismissed.[S.9(1)(vii), 194I, 201(1)] 2165
AO held that the "access charges" payment made by assessee to RCOM is for technical services falling under section 194J of the Act. As the assessee failed to deduct tax at source was treated as assessee in default under section 201(1) of the Act. In appeal the CIT (A) held that the payment is nether fees for technical services nor rent hence the assesse was held not liable to deduct tax at source either under section 194J or under section 194I. Revenue has filed the against the said order of CIT (A). Before Tribunal the assesse contended that the AO has passed the rectification order u/s 154 read with section 201(1) wherein the demand raised by the AO was cancelled. Tribunal held that the appeal of revenue being academic the appeal of revenue was dismissed. (AY. 2007-08 to 2010-11)
DCIT v. Reliance Communication Infrastructure Ltd. (2015) 120 DTR 329 / 171 TTJ 274 (Mum.)(Trib.)

Section 194LA : Payment of compensation on acquisition of certain immovable property

S.194LA : Deduction at source – Compensation on acquisition of certain immoveable property – Exchange -Provisions will apply only when payment is made by cash, cheques etc and not to a case of exchange such as of land for Certificate of Development Rights (CDR/TDR) – S.194LA does not apply to case where there is no compulsory acquisition. 2166
(i) A bare reading of the said Section would make it clear that it would be applicable only in case of payment of any sum of money as consideration on account of compulsory acquisition of any immovable property, for which payment is made in cash, cheque, demand draft or any other mode. In the present case, neither there is compulsory acquisition of the land, nor there is any process adopted for quantification or determination of value of land acquired by BBMP which is voluntarily surrendered by the land owner, for which CDRs were given to the land owner. As such, provisions of Section 194LA of I.T. Act would not be attracted in the present case.
(ii) Even otherwise, the Tribunal has rightly observed that the provisions of deducting tax at source and paying it over to the Government on behalf of the recipient of payment, is in the nature of vicarious liability. When there is neither quantification of the sum payable in terms of money nor any actual payment is made in monetary terms, it would not be fair to burden a

person with the obligation of deducting tax at source and exposing him to the consequence of such default;

(iii) The concept of tax deduction at source (TDS) and depositing the same with the Revenue is where payment is made by cash, cheque, demand draft or any other similar mode. When such payment in terms of money is made, the deduction is to be made by the person responsible to pay, and is to deposit the same with the Income Tax Department, which would be adjusted and credited to the account of the person on whose behalf such amount is paid to the Income Tax Department, and in such a case, such person, who would then be an assessee before the Department, would be entitled to adjustment of the amount so deducted as TDS on behalf of the said assessee. When no payment is made by BBMP to the land owner in terms of money, such deduction is neither possible nor is conceived under Section 194LA)

CIT v. Bruhat Bangalore Mahanagar Palike (2016) 129 DTR 415 (Karn.) (HC); www.itatonline.org

2167 **S.194LA : Deduction at source – Compensation on acquisition of certain immoveable property – Provisions of section 194LA apply only when there is compulsory acquisition under law and compensation is fixed by statute – Matter remanded. [S. 201(IA)]**

The assessee, a State Government undertaking was subject to a survey proceeding under the Act. During the course of survey proceedings, it was noticed that the assessee had acquired certain pieces of land from non-agricultural land owners and effected payment without deducting tax at source, as required under Section 194LA. The revenue authorities treated the assessee as 'one in default' and also held liable for interest under section 201(1A). On appeal to Tribunal, it was held for application of Section 194LA, there should be compulsory acquisition under law for which the compensation was fixed in accordance with section 29(2) of the Karnataka Industrial Areas Development Act, 1966 and there is no room for negotiation. Thus, if the compensation paid by the assessee for acquisition of land were all through agreements then these would not fall within the definition of compulsory acquisition. The orders of the authorities below are set aside and the issue is remitted back to the file of the Assessing Officer for verifying the agreements in accordance with section 29(2) of the Karnataka Industrial Areas Development Act, to reach a conclusion whether acquisitions fell under 'compulsory acquisition' or not. (AY. 2011-12)

Karnataka Industrial Area Development Board v. ITO (2015) 44 ITR 647 / 155 ITD 1009 (Bang.)(Trib.)

Section 195 : Other sums.

S.195 : Deduction at source – Non-resident – Purchase contract – Not liable to deduct tax at source. [S. 201(1), 201(IA)] 2168

Assessee-company entered into an agreement for purchase of certain items with a Dubai based company. The Assessing Officer found that assessee had not deducted TDS for various purchases made from Dubai based company and treated assessee as assessee-in-default under section 201(1) and section 201(1A). On appeals, the Commissioner (Appeals) as well as the Tribunal held that assessee was not liable to deduct TDS. Dismissing the appeal of revenue the Court held that; since agreement entered into by assessee with foreign company was for simple purchase contract and not a composite contract, provisions of section 195(2) would not be applied.

CIT v. Prism Cement Unit (2015) 234 Taxman 172 (MP)(HC)

S.195 : Deduction at source – Non-resident – Training and manpower development – Matter remanded. 2169

Court held that for the assessment year 1996-97, the Tribunal noted its decision dated February 12, 2002, but omitted to say that it was following the decision and was, therefore, sustaining the addition. The Tribunal had indeed abruptly ended its discussion after extracting a passage from its order and had not rendered any opinion. Apart from the fact that the order of the Tribunal, was found not to have addressed certain important aspects, the issues highlighted by the Commissioner (Appeals). For, e.g., the fact that no payment was made to CML and that tax was deducted by the assessee while making payment to JPT was not dealt with by the Tribunal. Further, the insertion of an Explanation below section 9(2) with retrospective effect from June 1, 1976, making the place of rendering services redundant, had not been considered. Again, it was necessary for the Tribunal to consider, in the context of the agreement with HFTL and article 13(4)(c) of the Double Taxation Avoidance Agreement between India and the United Kingdom, whether any technology was "made available" to the assessee and whether there was payment for such services. Therefore, the issue of payment for payment for training and manpower development for the financial years 1994-95 to 1998-99 and the assessment year 1996-97 was remanded to the Tribunal for a fresh decision in accordance with law. (AY. 1995-96 to 1999-2000)

CIT v. Jet Lite (India) Ltd. (2015) 379 ITR 185 / (2016) 236 Taxman 453 / 282 CTR 113 (Delhi)(HC)

S.195 : Deduction at source – Non-resident – Royalty credited in accounts of Indian company – Indian company finding that Indian Government did not permit payment of such royalty – Credit entries reversed – Holding company not claiming receipt of royalty – No obligation by Indian company to pay royalty – Tax not deductible at source on royalty. 2170

Dismissing the appeal, the Court held that the assessee had denied any obligation for payment of royalty to its holding company in respect of a period prior to September 8, 2000 (i.e., the date of issuance of Press Note (2000 series) by the Government of India). The entries passed by the assessee in its books of account were indisputably reversed

and consequently its effect nullified. The assessee had also not charged the amount of royalty for the relevant period as an expense in its books. This was in conformity with the assessee's view that no amount was payable to its holding company during the period in question. There was also no allegation that this position asserted by the assessee was not bona fide ; it was not the case of the Revenue that nullifying the entries passed by the assessee was a subterfuge to avoid any obligation. The assessee neither paid royalty during the period nor reflected the royalty as payable. It was also not disputed that the holding company had not claimed royalty payable from the assessee and, concededly, no royalty for the period had been paid. In the absence of any income chargeable to tax arising on account of royalty in the hands of the holding company at the material time, the question of withholding tax at source would not arise. (AY. 1999-2000)

DIT v. Ericsson Communications Ltd. (2015) 378 ITR 395 / 234 Taxman 89 / (2016) 284 CTR 230 (Delhi)(HC)

2171 **S.195 : Deduction at source – Non-resident – Other sums – Transaction not resulting in liability to tax – Tax is not deductible at source. [S. 201]**

The Tribunal held that whether or not the non-resident company suffered a loss or gain on the sale of shares, a duty was cast on the assessee to deduct the tax whenever it made payment to the non-resident and that the assessee was not only liable to deduct the tax at source, but it also had to pay the tax so collected to the exchequer. On appeal to the High Court held that, in the present transaction admittedly there was no liability to tax. As a result, the question of deducting tax at source and the assessee violating the provisions of section 195 did not arise and, therefore, the assessee could not be treated as an assessee in default. (AY. 2002-03)

Anusha Investments Ltd. v. ITO (IT) (2015) 378 ITR 621 (Mad.)(HC)

2172 **S.195 : Deduction at source – Non-resident – Business connection – Foreign company is not chargeable to tax in India – Not liable to deduct tax at source – DTAA-India-USA [Ss.9(1)(i), 201(1), 201(IA) Articles 5, 7]**

Dismissing the appeal of revenue the Court held that; where recipient of income, a foreign company, is not chargeable to tax in India, then question of deduction of tax at source by payer-assessee would not arise.(AY. 1999-2000, 2000-01)

CIT v. ITC Hotels Ltd. (2015) 233 Taxman 302 (Karn.)(HC)

2173 **S.195 : Deduction at source – Non-resident – Retrospective amendments seeking to tax income of non-residents does not affect the "source rule". The amendment makes no any difference to the non-taxability of payments made to foreign companies if the income accrues abroad – Not liable to deduct tax at source. [S.9(1)(vii)(b), 201(1A)]**

AO held that the payment made by the assessee was fees for technical services as defined in Explanation 2 to section 9(1)(vii)(b) of the Act and therefore chargeable to tax on which tax should have been deducted u/s. 195(1). AO rejected the assessee's plea that the payments for repairs were incurred for earning income from sources outside India and therefore the case fell within the exclusion clause of section 9(1)(vii)(b). The AO also rejected the plea of the assessee that the business of aircraft leasing

was carried on out side India. On appeal the Tribunal decided the issue in favour of assessee. Against the order of Tribunal on appeal by revenue dismissing the appeal the Court held that

(i) It is evident that Parliamentary endeavor – through the retrospective amendment (explanation to Section 9(2) was inserted by the Finance Act, 2007 with retrospective effect from 1.6.1976 and The Finance Act, 2010 substituted the same explanation with effect from 1.6.1976), was to target income of non-residents. But importantly, the condition spelt out for this purpose was explicit: "where income is deemed to accrue or arise in India under clauses (v), (vi) and (vii) of sub- section (1), such income shall be included in the total income of the non-resident… whether or not,- (ii) the non-resident has rendered services in India." The revenue urges that the fiction created by the said amendment is to do away with the requirement of the non-resident having a place of business, or business connection, irrespective of whether "..the non-resident has rendered services in India." Did this amendment make any difference to payments made to such companies – even in relation to income accruing abroad? The revenue grounds its arguments in the assumption that the later, 2010 retrospective amendment, overrides the effect of Section 9 (1) (vii) (b) exclusion. While no doubt, the explanation is deemed to be clarificatory and for a good measure retrospective at that, nevertheless there is nothing in its wording which overrides the exclusion of payments made under Section 9(1)(vii)(b). The Supreme Court clarified this in *GVK Industries Ltd. v. ITO 371 ITR 453* Thus, it is evident that the "source" rule, i.e the purpose of the expenditure incurred, i.e for earning the income from a source in India, is applicable;

(ii) The source of income from wet-leasing aircraft to non-resident companies is outside India. Secondly, leasing revenue was received in convertible foreign exchange directly from foreign charterers through wired transfer in assessee's account denominated in foreign currency but maintained in India with the permission of the RBI and that the remittances to the foreign company for repairs had a direct nexus with the income. Payments to Technik for maintenance and repairs were essential and crucial for earnings from the wet-leasing activity. Articles 2 and 3 of the contract with LCAG clearly state that only when the latter informed the assessee in writing that it did not require a certain capacity for a particular period, that the assessee could wet-lease the aircraft to others for that period. In all other periods, the assessee is committed to wet-lease the aircraft to LCAG, and the assessee's failure to do so would imply that LCAG was obliged to pay the rent for the minimum guaranteed block hours. The ITAT held that the overwhelming or predominant nature of the assessee's activity was to wet-lease the aircraft to LCAG, a foreign company. The operations were abroad, and the expenses towards maintenance and repairs payments were for the purpose of earning abroad. In these circumstances, the ITAT's factual findings cannot be faulted. (FY. 1998-99 to 1999-2000)

DIT v. Lufthansa Cargo India (2015) 375 ITR 85 / 233 Taxman 218 / 278 CTR 1 (Delhi) (HC)

2174 **S.195 : Deduction at source – Non-resident – Business connection – Royalty – Down linking charges paid to foreign party could not be treated as royalty and, thus, same could not be liable to deduction of TDS. [S.9(1)(i)]**

Down linking charges paid to foreign party could not be treated as royalty and, thus, same could not be liable to deduction of TDS(AY. 2001-02)

CIT v. Infosys Technologies Ltd. (2015) 229 Taxman 335 (Karn.)(HC)

2175 **S.195 : Deduction at source – Non-resident – Business connection – Interest payment – Not liable to deduct tax at source. [S.9(1)(i)]**

Interest payment made by Indian branch of assessee to its head office abroad was to be allowed as deduction in computing profits of assessee's branch in India. Assessee was not liable to pay any tax on said payment under section 195. (AY. 1995-96)

Bank of Tokyo Mitsubishi Ltd. v. DIT (2015) 228 Taxman 337 (Mag.)(Cal.)(HC)

2176 **S.195 : Deduction at source – Non-resident – Settlement fund – Damages on account of alleged fraud – Authority of Advance Ruling determined that said amount was taxable in India and deducted tax at source prior to payment to beneficiaries – Authority had rendered its ruling based upon wrong premise that petitioner had accepted said receipts to be in nature of revenue receipts, ruling was to be set aside – Matter remanded. [S.9(1)(i)]**

Certain shareholders of American Depository shares had filed suits against 'S' (Indian company) as well as against 'P' and 'P' LLP, USA claiming damages on account of the alleged admitted fraud in the representations to the Authority governing the Stock exchange under the Securities Exchange Act, 1934 and the Securities Act of 1933 (both USA Acts).

In those suits, a settlement was arrived at whereby said companies was required to pay damages to said shareholders. Shortly, after the settlement was arrived at as a condition of the settlement, an Advance Ruling was invited from the Authority for Advance Rulings with regard to the taxes to be with held in respect of the transfer of funds from India to USA.

While the matter was pending before the Authority for Advance Rulings, the entire funds available in the Segregated Account were transferred to the Initial Escrow Account in New York. However, thereafter the Authority for Advance Rulings determined that the said amount was taxable in India and, therefore, tax was to be deducted at source prior to the payment to the beneficiaries. Consequently, 30 per cent of the funds which had been transferred from the Segregated Account to the Initial Escrow Account were returned to India and they continue to be deposited with the revenue authorities.

On writ :The Court held that, The Authority for Advance Rulings has rendered its ruling based upon the wrong premise that the petitioner had accepted the receipts to be in the nature of revenue receipts. Thus, the Ruling cannot stand. Consequently, the Ruling is set aside and remit the matter to the Authority for Advance Rulings to examine the position, first of all, in the light of whether the receipts were in the nature of capital receipts or revenue receipts and thereafter to determine as to whether those receipts were chargeable to income tax in India.

Bernstein Litowitz Berger And Grossmann LLP v. UOI (2015) 228 Taxman 334 (Mag.) (Delhi)(HC)

S.195 : Deduction at source – Non–resident – Once chargeability is admitted, tax is liable to be deducted – DTAA-India-Singapore [S.9(1)(i), Art. 11] 2177

Dismissing the appeal of assessee the Tribunal held that; once chargeability of sum in question to tax is admitted, then second part of section 195(1) comes into operation and accrual of income in hands of non-resident or year of chargeability of income in hands of non-resident becomes irrelevant; person making payment to non-resident has to deduct tax at source, he cannot be heard to say that non-resident is liable to tax only when interest income is received by him and therefore only on receipt of interest income by non-resident, tax at source should be deducted by person making payment (AY. 2007-08)

Broadcom India Research (P.) Ltd. v. Dy. CIT (2015) 68 SOT 138 (URO) (Bang.)(Trib.)

S.195 : Deduction at source – Non-resident – Income deemed to accrue or arise in India – Interest – Payment to head office tax was not required to be deducted at source on principles of mutuality. [S.9(1)(v), 40(a)(i)] 2178

Interest paid by Indian branch to Head Office/overseas branches was not taxable in India on principles of mutuality and, therefore, tax was not required to be deducted at source while making said payments.(AY. 2004-05)

Credit Agricole Corporate & Investment Bank v. ACIT, (IT) (2015) 67 SOT 208 (URO) (Mum.)(Trib.)

S.195 : Deduction at source – Non-resident – Income from immovable property – Capital gain was invested in another property – Not liable to deduction of tax at source. [S. 45,54, 201(IA), OECD Model Convention, Art. 6] 2179

Assessee purchased a property from a non-resident, since assessee was aware of fact that capital gain arising from sale of said property was not taxable in hands of vendor as he had already invested amount in purchase of another residential property within time period prescribed under section 54, assessee was not required to deduct tax at source while making payment of sales consideration to non-resident vendor. (AY. 2012-13)

A. Mohiuddin v. ADIT (2015) 171 TTJ 138 / 67 SOT 251 (Bang.)(Trib.)

S.195 : Deduction at source – Non-resident – Supervision charges – Fees for technical charges – Make available – If a sum cannot be assessed as "fees for technical services" under the "make available" clause of Article 13, it can still be assessed as "Independent personal services" under Article 15 – DTAA-India-Finland – Duration of stay of such individuals was not available the matter was set aside to the CIT(A). [S.4, 5, 9(1)(vii), 40(a)(i),90, Article 13, 15] 2180

(i) The expression 'make available' in the context of 'fees for technical services' contemplates that the technical services should be of such a nature that the payer of the services comes to possess the technical knowledge so provided which enables it to utilize the same thereafter. The Hon'ble Karnatka High Court in the case of *CIT & Ors. v. De Beers India Minerals Pvt. Ltd. [2012 (346 ITR 467) (Karn)]* has dealt with the concept of 'make available' in the context of fees for technical services. It has been held that : "The expression 'make available' only means that the recipient of the service should be in a position to derive an enduring benefit

and be in a position to utilise the knowledge or know-how in future on his own. By making available the technical skills or know- how, the recipient of the same will get equipped with that knowledge or expertise and be able to make use of it in future, independent of the service provider …….". From the above enunciation of law by the Hon'ble Karnataka High Court, it is palpable that the technical knowledge will be considered as `made available' when the person acquiring such knowledge is possessed of the same enabling him to apply it in future at his own. If the services are consumed in the provision without leaving anything tangible with the payer for use in future, then it will not be characterized as `making available' of the technical services, notwithstanding the fact that its benefit flowed directly and solely to the payer of the services,. The Special bench of the tribunal in *Mahindra & Mahindra Ltd. v. DCIT (2009) 122 TTJ (MUM)(SB) 577* has discussed the concept of 'make available'. In that case, the lead managers had rendered technical, managerial or consultancy services in the GDR issue, which services were not made available to the assessee inasmuch as the payer only derived the benefit from the technical services provided by the lead managers without getting any technical knowledge, experience or skill in its possession for use in future. In that view of the mater, it was held that the `management and selling commission' could not be taxed in India as per the DTAA because nothing was made available to the payer. It follows that in order to be covered within the expression 'make available', what is necessary is that the service provider should transmit the technical knowledge etc. to the payer so that the payer may use such technical knowledge in future without involvement of the service provider.

(ii) On facts, the technical services provided by the non-resident are simply in the nature of supervisory services by the engineers for erection, commissioning of the plant of M/s. Sterlite in Tuticorin. By rendering such services, nothing has been made available by the payee to the assessee/Sterlite, which could be used in future without involvement of such residents of Finland. Once the plant is erected and commissioned, the supervisory engineering services rendered by the Finland residents during the course of such erection and commissioning get consumed in the process and there remains nothing capable of any use in future. Going by the scope of Article 13 vis-à-vis the nature of actual services provided by the payees, it is manifested that such technical services do not fall within the purview of the definition of 'fees for technical services' as given in para 4 of this Article, as nothing has been `made available' by the rendition of technical services for any future use. If the provisions of Article 13 of DTAA are exhausted and it is not the case of the AO that the amount be considered under any other Article of the DTAA, it would mean that albeit the amount is chargeable to tax in the hands of the non-residents as per section 9(1)(vii) read with section 5(2) of the Act, but, the chargeability will be waived because of the inapplicability of Article 13 of the DTAA, which is a more beneficial provision than section 9 read with section 5 of the Act. In that view of the matter, the assessment order considering payment of ₹ 1.92 crore to M/s IPS Finland for technical services as violating the provisions of section 195, thereby resulting into disallowance u/s. 40(a)(i), cannot be countenanced.

(iii) The assessee's contention that since the services contracted for the by the assessee with non-residents fall within the meaning of Article 13 but get excluded because of not 'making available' any technical knowledge etc., then such services cannot be once again considered under Article 15 is not acceptable. The precise question is that which of the two Articles, namely, 13 or 15, should have primacy in the facts and circumstances as are instantly prevailing? In our considered opinion, the answer to this question is not too far to seek. Relevant part of Para 5 of Article 13, as reproduced above, unambiguously states that the definition of fees for technical services in paragraph 4 shall not include amounts paid '….. (e) to any individual …. for professional services as defined in Article 15'. When we read para 5 of Article 13 in conjunction with Article 15, there remains absolutely no doubt that the amount payable by the assessee to certain individual residents from Finland is covered only under Article 15 and not Article 13 of the DTAA.

(iv) Delving into the mandate of para 1 of Article 15 of the DTAA, we find that the income derived by a resident of Finland in respect of professional services or other independent activities of a similar character performed in India can be taxed in India if he is present in India for a period or periods aggregating to 90 days or more in the relevant fiscal year or has a fixed base regularly available to him in India for the purpose of performing his activities. It is noticed that the CIT(A) has computed the period of 90 days by considering the presence of these persons in India from 24.11.2008 to 24.4.2009. The AR contended that the CIT(A) has considered total period of stay of all the five persons taken together without considering it on individual basis. We find force in the submission of the ld. AR in this regard. Once it is held that five individuals from Finland were not representing IPS and, in fact, there was no valid agreement between the assessee and IPS, then, what remains to be examined is such five residents of Finland on individual basis. The amounts payable to each of such five persons satisfying the duration test on individual basis would enable the ultimate triggering of Article 15 of the DTAA. In other words, only those Finland residents out of such five persons who independently and individually satisfy the condition about their presence in India for a period of 90 days or more in the relevant fiscal year or having a fixed place regularly available to them in India for the purpose of performing the supervisory functions, can be brought within the purview of Article 15. If, however, this condition is found wanting qua some individuals, then the amount payable to such individual residents of Finland, would cease to be chargeable to tax in terms of Article 15 of the DTAA notwithstanding its taxability under section 9(1)(vii) read with section 5 of the Act.(AY. 2009-10)

Outotec India Pvt. Ltd. v. ACIT (2015) 172 TTJ 186/ 41 ITR 449 / 69 SOT 449 (Delhi)(Trib.)

S.195 : Deduction at source – Non-resident – OECD Model Tax convention – Usance charges paid to a non resident through an intermediatory bank – Liable to deduct tax at source. [S.2(28A), 5(2)(b), 9(1)(v)(b), 10(15(iv)(c), 40(a)(ia) 2181

Assessee was engaged in manufacture of wooden doors, frames, furniture etc. Assessee paid usance charges on import purchase. AO viewed that the usance charges incurred by the assessee was the income arising to the non-resident reckoning within the meaning

of provisions of s 5(2)(b) r.w.s. 9(1)(v)(b) and therefore the Assessee was liable to deduct TDS in accordance with the provisions of Sec. 195. Since the Assessee had not deducted the TDS, therefore, disallowances was made by the AO u/s. 40(a)(ia) on account of non deduction of tax at source u/s 195(1) on usance charges paid to a non resident through an intermediatory bank. The CIT (A) deleted the addition relying on the explanation to s 10(15)(iv)(c). The Tribunal held that in the case *CIT v. Vijay Ship Breaking Corporation (Guj.High Court)* had clearly held that usance interest paid by the Assessee was not any part of the purchase price and was interest within the meaning of the definition of the term 'interest' u/s. 2(28A). The Supreme Court had not reversed the decision in the case of *CIT v. Vijay Ship Breaking Corporation* on the finding that the usance charges were not interest u/s. 2(28A) except where an undertaking was engaged in the business of ship breaking in view of explanation (2) to s 10(15)(iv)(c) inserted by the Taxation Laws (Amendment) Act, 2003 with retrospective effect. The decision of the Gujarat High Court had impliedly been approved by the Supreme Court in respect of Assessees who were engaged in the business of ship breaking, the order of CIT (A) set aside and revenue's appeal was allowed. (AY. 2008-09, 2009-10, 2010-11)

ACIT v. Indian Furniture Products Ltd. (2015) 167 TTJ 668 / 114 DTR 25 / 67 SOT 433 / 38 ITR 174 / 53 taxmann.com 440 (Panaji)(Trib.)

2182 **S.195 : Deduction at source – Non-resident – Commission paid to the foreign agent on export sales – Not fall within definition of fee or Technical Services – no need to deduct tax at source while making payment.[(S.9(1)(i) 49(a)(ia), Article 7 & 12 of Model OECD convention)**

The Hon'ble Appellate Tribunal held that the Commission paid by Assessee to its foreign agent on export sales made by it does not fall within definition of 'fee for technical services' and therefore, the Assessee is not liable to deduct tax at source under section 195 of the IT Act while making payment. Thus, disallowance made under section 40(a)(ia) of the Act is deleted. (AY. 2009-10)

ACIT v. Track Shoes (P.) Ltd. (2014) 52 taxmann.com 353 / (2015) 67 SOT 172 (URO) (Chennai) (Trib.)

2183 **S.195 : Deduction at source – Non-resident – If recipient of income has no tax liability as per assessment framed u/s. 143(3) due to losses, then section 201 cannot be made applicable to assessee payee for non-deduction/delay in deposit of TDS. [Ss. 143(3), 197(1), 201(1), 201(IA)]**

The assessee had entered into contracts for development of National Highway with Korean company. The deductee Korean company, obtained orders u/s. 197(1) from it's AO which entitled the deductee to receive payment from the assessee after being subjected to TDS provisions u/s. 195(1) at a marginal rate. The assessee had made certain payments to the deductee in pursuance of four contracts awarded by it to the deductee and withheld tax at lower rate on the payments by virtue of certificate for lower deduction. The assessee was subjected to provisions of section 201(1) and 201(1A). The income was determined at a loss. Thus, it is clear that recipient of income from the assessee is not required to pay any tax in view of its losses for current year. Once it is held that there is no tax liability on the recipient of income in respect of its

entire income including the income paid by the assessee, there is no reason to treat the assessee in default under section 201(1) in respect of said payment. There was no reason to treat assessee as assessee-in-default for non-deduction of TDS in respect of said payment and, consequently, interest being charged under section 201(1A) for delay in payment of tax was inconsequential. Appeal of assessee was allowed. (AY. 2009-10)
National Highways Authority of India v. ACIT (2013) 158 TTJ 54 / (2015) 152 ITD 348 (Jabalpur)(Trib.)

S.195 : Deduction at source – Non-resident – Reimbursement of expenditure under cost-sharing agreement does not constitute "income" and there is no obligation to deduct TDS. [S.9(1)(vii), 40 (a)(i)] 2184

A perusal of the decision of the Supreme Court in Tejaji Farasram Kharawalla Limited (1967) 67 ITR 95 (SC) clearly shows that Supreme Court has categorically held that the reimbursement of the actual expenses would not be taxable in the hands of the person receiving the reimbursements. The Karnataka High Court in a recent judgment in the case of *DIT v. Sun Microsystems India P. Ltd. (2014) 369 ITR 63 (Karn.)* exactly on the similar issue interpreting Article 7 of the DTAA between India and Singapore, which is identically worded to Article 7 of DTAA between India and Austria held that the parent company has not made available to the assessee the technology or the technological services which was required to provide the distribution, management and logistic services. We further noticed that in the said order the Tribunal has taken into consideration the decision of the Hon'ble Jurisdictional High Court in the case of *CIT v. Dunlop Rubber Co. Limited (1983) 142 ITR 493 (Cal.)* and in the similar circumstances that of the assessee to hold that the reimbursement of the expenditure does not generate any income in the hands of the recipient and consequently there was no requirement of deduction of TDS and consequently the provisions of section 40(a)(ia) could not be invoked. (AY.2005-06)
AT & S India Pvt. Ltd. v. DCIT (2015) 118 DTR 171(Kol.)(Trib.)

S.195 : Deduction at source – Non-resident – Consultancy service – Service rendered outside India – Not liable to deduct tax at source. [S. 9(1)(i), 40(a)(i)] 2185

Assessee, providing consultancy services, made payment pertained to some support services rendered by non-resident in Qatar *qua* its Nigerian projects. Since fees was paid to non-resident abroad for services utilized in business carried outside India, same was not liable for any deduction of tax at source. (AY. 2003-04)
Dy. CIT v. Hofincons Infotech & Industrial Services (P.) Ltd. (2015) 152 ITD 249 (Chennai) (Trib.)

S.195 : Deduction at source – Non resident – Commission – Not liable to deduct tax at source. [S.9(1)(vii)] 2186

Assessee made payment of commission to a non-resident foreign agent to procure orders from foreign buyers for assessee and same was not in nature of managerial services, payment was not taxable in India under section 9(1)(vii) and therefore, there was no requirement of TDS out of payment of commission. (AY. 2004-05)
ACIT v. Karmin International (2015) 152 ITD 276 (Luck.)(Trib.)

2187 **S.195 : Deduction at source – Non-resident – Retrospective amendment – Liability to deduct tax at source cannot be fastened on the basis of retrospective amendment with effect from 1-04-1961. [S.40(a)(ia)]**

The assessee made payment to a US company for utilizing telecom voice services in USA and it claimed that the said payment did not constitute fee for technical services but was in the nature of business income of the non-resident. Since the non-resident did not have a Permanent Establishment in India, said income was not chargeable to tax in the hands of the non-resident in India and, therefore, there was no obligation on the part of the assessee to deduct tax at source. The AO however, took the view that the said payment was in nature of fee for technical services and was, therefore, chargeable to tax in India in the hands of the non-resident. Since the assessee did not deduct TDS, the AO invoked the provisions of section 40(a)(i). On appeal, the CIT (A) deleted said addition. On appeal by revenue the Tribunal held that, payment made by assessee, an Indian company to a US company for utilizing telecom services in USA did not constitute fee for technical services as said payments were for use of bandwidth provided for down linking signals in US; and said payments were not in nature of managerial, consultancy or technical services nor was it for use of or right to use industrial, commercial or a scientific equipment. Order of CIT(A) was confirmed. Revenue relied rely upon the Explanation inserted as Explanation 2 to section 195 by the Finance Act of 2002 with retrospective effect from 1-4-1961. The aforesaid amendment lays down that even if the payment by a resident in India to a non-resident constitutes business income in the hands of the non-resident then irrespective of the existence or non-existence of a permanent establishment of the non-resident in India, tax is liable to be deducted at source by the resident in India making payment to non-resident. Admittedly, for the assessment year 2010-11, such provision did not exist. At the time when the assessee made payments to the non-resident, such a provision did not exist. It is not possible for the assessee to foresee an obligation to deduct tax at source by a retrospective amendment to the law. The amendment brought in by the Finance Act to section 195 with retrospective effect, which was passed in the year subsequent to the year under consideration, should not be considered for penalizing the assessee by way of disallowance under section 40(a)(i). (AY. 2010-11)

ITO v. Clear Water Technology Services (P.)Ltd. (2015) 67 SOT 15 (URO) 36 ITR 528 (Bang.)(Trib.)

Section 197 : Certificate for deduction at lower rate.

2188 **S.197 : Deduction at source – Certificate for lower rate – Rejection in proposal for issuance of exemption was held to be not justified when there had been no change in nature of interest earned on funds provided by State Government. [S. 264, Constitution of India, Art. 289]**

Allowing the petition the Court held that the impugned order in question did not show any application of mind as no reasons had been assigned for rejecting proposal for issuance of exemption certificate u/s. 197. On proper consideration of direction of Court in similar writ application, CIT (TDS) passed earlier order that was well reasoned order after noting *prima facie* satisfaction of Court. If at all, Respondent-Authorities

were of view that they could take different stand in fresh assessment order, there being admittedly no question of *res judicata* in assessment of income for different assessment years, they were still required to do so acting properly in matter by giving good reasons for disagreeing with earlier order. Apparently, there had been no change in nature of interest earned on funds provided by State Government which had gone in Bank and it was not open to Department to come to different conclusion in view of overriding effect of provisions of Article 289 of Constitution. Impugned letter communicating decision of CIT (TDS) was quashed. Respondents are directed to issue exemption certificate to the assessee.
Bihar Industrial Area Development Authority v. ACIT (2015) 122 DTR 405 / 279 CTR 165 (Pat.)(HC)

S.197 : Deduction at source – Certificate for lower rate – Reimbursement – Not liable to deduct tax at source. [S.40(a)(ia)] 2189
Assessee obtaining certificate of no deduction from Assessing Officer, the assessee is not required to deduct tax at source for reimbursement. Disallowance was expenditure was held to be not justified. (AY. 2004-05, 2005-06)
ACIT v. Boots Piramal Health Care Ltd. (2015) 43 ITR 355 (Mum.)(Trib.)

Section 198 : Tax deducted is income received.

S.198 : Deduction at source – Tax deducted is deemed income – Amount deducted at source not capable of being adjusted or counted towards tax payable – Amount is assessable as income. [S. 56, 145] 2190
The assessee had given loans to two companies, AP and AT. The latter paid interest on the amount advanced by him regularly, whereas the former showed the accumulated interest in its account books without making actual payment. It was his case that even while showing the interest payable to him in the account books, AP deducted tax at source on the amount of interest payable and issued certificates, in relation thereto. In the returns filed by him, the assessee adopted a hybrid procedure. While in respect of his transaction with AP, he adopted the cash system, as regards the transaction with AT, he adopted the mercantile system. The result was that he did not pay the tax on the interest payable to him by AP, even while he enjoyed the entire benefit of tax deducted at source made in that behalf. There was no dispute about the interest paid by AT since the assessee had shown it as income and paid tax thereon. The Assessing Officer took objection to this and passed an order of assessment treating the interest payable by AP on transfer basis as income and levied tax. This was upheld by the Commissioner (Appeals) and the Tribunal. On appeal to the High Court: Held, that since the assessee had adopted the cash system and he did not receive the interest regarding which the tax was deducted at source, the tax deducted at source deserved to be treated as income in his hands. Whenever an amount deducted as tax at source becomes incapable of being adjusted or counted towards tax payable, it acquires the character of income. In such an event, it partakes of the character of any other income and is liable to be dealt with accordingly, in the order of assessment.
Y. Rathiesh v. CIT (2014) 227 Taxman 202 (Mag.) / (2015) 372 ITR 73 / 124 DTR 283 (T&AP)(HC)

Section 199 : Credit for tax deducted.

2191 **S.199 : Deduction at source – Credit for tax deducted – Certificate was issued in the name of assessee – Denial of credit was held to be not justified.**
Vendor billed assessee's sister company REPL for work but had mistakenly mentioned assessee's PAN in TDS certificate and, thus, inadvertently crediting assessee's TDS account in 26AS statement, which was PAN based. Assessee claimed credit of all TDS certificates, including that related to REPL stating that benefit of TDS certificates mistakenly issued in its PAN name had not been availed by REPL. Assessing Officer rejected assessee's claim holding that TDS credit should be allowed to person from whose income deduction was made. On appeal, the Commissioner (Appeals) allowed assessee's claim on the ground that since the assessee had already paid the due taxes in REPL, it would be travesty of justice to not allow the benefit of TDS to the assessee. The Tribunal upheld the order of the Commissioner (Appeals). On appeal by Revenue dismissing the appeal of Revenue the Court held that revenue having assessed REPL's income in respect of such TDS claim could not deny assessee's claim on mere technical ground that income in respect of said TDS claim was not that of assessee, given that assessee and REPL were sister concerns and REPL had not raised any objection with regard to assessee's TDS claim. The appeal of the Revenue is accordingly dismissed.
CIT v. Relcom (2015) 234 Taxman 693 / (2016) 133 DTR 82 / 286 CTR 102 (Delhi)(HC)

Section 201 : Consequences of failure to deduct or pay.

2192 **S.201 : Deduction at source – Failure to deduct or pay – Barred by limitation since it was not passed within four years from the end of assessment year – Amendment w.e.f. 1st April 2010 is prospective.**
Order u/s. 201 for the financial year 1994-95 is barred by limitation since it was not passed within four years from the end of the end of the said assessment year. Amendment to section 201 w.e.f. 1st April, 2010 providing for an extended limitation period of seven is prospective.(AY.1996-97)
CIT v. Jet Lite (India) Ltd (2015) 379 ITR 185/128 DTR 91 (2016) 236 Taxman 453 / 282 CTR 113 (Delhi)(HC)

2193 **S.201 : Deduction at source – Failure to deduct or pay – Limitation – Order was passed beyond four years – Appeal of assessee was allowed. [S.210]**
Court held that; the payment for the assessment year 1995-96 pertained to the payment made to Jeppson and Co. for navigational data. The amendment to section 210 with effect from April 1, 2010, provided for an extended limitation period of seven years. However, that amendment was prospective. Followed *CIT v. NHK Japan Broadcasting Corporation [2008] 305 ITR 137 (Delhi)* and *Bhura Exports Ltd. v. ITO [2014] 365 ITR 548 (Cal.)*, (AY. 1995-96 to 1999-2000)
CIT v. Jet Lite (India) Ltd. (2015) 379 ITR 185 / 128 DTR 91 (2016) 236 Taxman 453 / 282 CTR 113 (Delhi)(HC)

S.201 : Deduction at source – Failure to deduct or pay – Assessment of recipient companies was completed and both companies were not liable to pay any tax, the liability to pay interest would stop running – Levy of interest was not justified. 2194

Assessee company made payments to two companies after deducting TDS, however, Assessee did not credit said TDS with Revenue within prescribed period. Assessing Officer treated assessee as in default and demanded amount of TDS along with interest. Commissioner (Appeals) partly allowed appeal of the assessee and held that assessee company would be liable to pay interest under section 201(1A) till assessment of these two companies were made and not till date when TDS was deposited by assessee. Tribunal upheld order of Commissioner (Appeals). On appeal by revenue dismissing the appeal the Court held that it was observed that both payee companies were running in losses and considering their income and expenditure, it was held that they were not liable to pay any tax therefore when assessment qua payee companies were not liable to pay any tax, liability to pay interest upon late payment of TDS by assessee would stop running therefore, order of Commissioner (Appeals) was to be upheld. (AY. 1997-98, 1998-99)

CIT v. Labh Construction & Industries Ltd. (2015) 235 Taxman 102 (Guj.)(HC)

S.201 : Deduction at source – Failure to deduct or pay – The amendment brought in sub-section (3) of section 201 by the Finance Act, 2014 extending period of limitation to seven years was effective from 1-10-2014 and could not be said to be retrospective in absence of any specific retrospective amendment by the Legislature. [S.201(IA)] 2195

Earlier the AO issued a notice on the assessee u/s. 201(1)/201(1A) on 17- 2-2014 for AY 2008-09. The said notice was held to be time barred by the High Court *vide* its order dated 5-12-2014, in view of the provisions of S. 201(3) as it then existed.

Thereafter, S. 201(3) was substituted by Finance (No.2) Act, 2014, with effect from 1-10-2014, whereby the period of limitation was extended to seven years. Thereupon, the AO issued on assessee, a notice u/s. 201(1)/201(1A) on 20-1-2015 for the same assessment year 2008-09. The AO thus attempted to take advantage of the amendment extending period of limitation for completion of assessment up to 7 years.

On writ, the High Court held that the said amendment was effective from 1-10-2014 in absence of any specific retrospective effect. Thus, the proceedings which had ended and attained finality with the passing of High Court order dated 5-12-2014 cannot be sought to be revived through the methodology adopted by the AO. (AY. 2008-09)

Oracle India (P.) Ltd. v. DCIT (2015) 376 ITR 411 / 235 Taxman 227 (Delhi)(HC)

S.201 : Deduction at source – Failure to deduct or pay – Burden is on the assessee to prove that payee has paid the tax on the amount received – Assessee was held liable. [S.191, 201(IA)] 2196

In the instant appeal the assessee challenged the jurisdiction of the Assessing Officer to demand the amount of tax not deducted at source by an order passed under sub-sections (1) and (1A) of section 201.

The contention raised by assessee was that in view of Explanation to section 191 the assessee may be made liable provided the payee had not offered the money received by him for taxation and had, thus, failed to pay tax on that. It submitted that in the

absence of a clear cut finding that the payee in this case had failed to offer the money received by him for taxation and had failed to pay tax thereon, the liability under section 191 could not have been foisted upon the assessee for omission on its part to deduct tax at source The assessee relied on *Hindustan Coca Cola Beverage (P.) Ltd. v. CIT [2007] 293 ITR 226 (SC)*. Dismissing the appeal the Court held that this will not alter the liability to charge interest under section 201(1A) till the date of payment of taxes by the deductee-assessee or the liability for penalty under section 271C. Even otherwise whether the payee has offered money for taxation or whether the payee has paid tax on that, is a defence which the assessee could have taken. If he takes the defence, it is for him to prove it. It cannot be suggested that it was the obligation of the Assessing Officer to first explore the possible defences and then to collect evidence in support thereof. Accordingly appeal was dismissed.
Nopany Marketing Co. (P.) Ltd. v. CIT (2015) 231 Taxman 802 (Cal.)(HC)

2197 **S.201 : Deduction at source – Failure to deduct or pay – Limitation – Proceedings initiated after four years from end of financial year – Barred by limitation.**
Initiation of the proceedings under section 201 after four years from the end of the financial year was barred by limitation. (AY. 1999-2000 to 2001-02)
CIT (TDS) v. C. J. International Hotels P. Ltd. (2015) 372 ITR 684 / 231 Taxman 818 / 285 CTR 43 (Delhi)(HC)

2198 **S.201 : Deduction at source – Failure to deduct or pay – Order was passed without giving an opportunity of hearing – Order levying interest was quashed. [S. 133A, 194C, 201(IA)]**
The Petitioner was a Co-operative Housing Society registered under the provisions of Co-op Societies Act with the object of providing and has in furtherance of that object, formed several layouts and proposed to distribute the sites to its members. The Petitioner in this regard has entered into an agreement with certain individuals and a party for development of the land so acquired and has undertaken the process of developing the land into house of sites. Survey was conducted in the premises of the assessee and his books of account was examined wherein they alleged assessee as assessee in default and he was liable to deduct TDS u/s. 194C for the payment made to the developers. Demand was raised against the assessee and 7 days time was granted. The assesssee's grievance was that the said demand notice u/s. 156 has curtailed the benefit of 30 days which the petitioner has sought to appeal against the said order. The Department rejected the stay of demand of the impugned order. The assessee filed Writ petition challenging the order passed u/s 201(1) & 201(1A) and the consequent demand made the Petitioner is in writ action seeking quashing of the proceedings and the assessee also alleged that respondent has initiated coercive recovery action by attaching bank account of the petitioner without giving the petitioner a reasonable opportunity of being heard and without furnishing in detail the finding conducted u/s. 133A of the Act. The HC allowed WP and held that though the petitioner had submitted a submission note, the same has not been considered by the respondent with reference to the survey conducted u/s. 133A nor he has referred to the documents produced by the petitioner. Petitioner having produced information/documents about the filing of the return of payee to claim benefit of proviso to S.201(1) which were not considered by the AO nor he

provided an opportunity of hearing to the petitioners order u/s. 201(1) & 201(1A) were liable to be quashed. (AY. 2008-09 to 2014-15)
Remco (BHEL) House building Co-operative Soc. Ltd v. ITO (2015) 273 CTR 57 / 232 Taxman 355 (Karn.)(HC)

S.201 : Deduction at source – Failure to deduct tax – Limitation – Action to be taken within reasonable period in absence of prescription of time limit – Four-year period reasonable – Notice after seven years was held to be not justified. [S.201(IA)] 2199
The assessee paid interest to its sister concerns on the loans taken by it year after year. However, for the three assessment years 1989-90, 1990-91 and 1991-92 it did not deduct any tax on the ground that it did not pay any interest at all. In the relevant assessment years, no action was taken against the assessee for non-deduction of tax at source. At a subsequent stage notice was issued proposing action under section 201. The assessee contended that it did not effect deduction since the creditors have acceded to its request to waive the interest on the ground that it incurred losses. The Assessing Officer and the Commissioner (Appeals) did not accept the contention of the assessee. The Tribunal, however, examined the matter from the point of view of limitation. It did take note of the fact that section 201 or other analogous provisions did not prescribe any limitation for recovery of the amount representing deduction of tax at source. However, it treated the four-year period as constituting limitation for initiating steps under that provision.
On appeal :
Held, dismissing the appeal, that it was nearly seven years thereafter that a notice was issued to the assessee. For an assessee to be required to pay the amount, even if due, five or six years preceding the demand, would be a serious problem. Several developments take place over the period and the nature of relations undergoes change. Therefore, the Tribunal was justified in invoking the theory of reasonable period for passing the orders under section 201(1A) in the absence of a time limit being specified in the Act. The finding that the levy of interest under section 201(1A) could not be said to be within the reasonable time was legal and valid. (AY.1989-90 to 1991-92)
CIT v. U. B. Electronic Instruments Ltd. (2015) 371 ITR 314 / 126 DTR 107 / 232 Taxman 259 (T&AP)(HC)
Editorial : Referred, Raymond Woollen Mills Ltd v. ITO (1996) 57 ITD 536 (Bom.) (Trib.)

S.201 : Deduction at source – Failure to deduct or pay – Interest – Month – Levy of interest is compensatory in nature thus gap between point of time when tax ought to have been deducted at source and point of time when tax actually deducted are to be seen and in this context that connotation of expression of 'month' is to be examined. [S. 201(IA), General Clauses Act, S.3(35)] 2200
Assessee couldn't be held as assessee in default, in view of directions of High Court, for period from 20-2-1996 to 15-3-2010 and hence was liable to interest only with effect from 16th November 201. Accordingly, interest under section 201(1A) was required to be computed for period of 16th November 2010 to 14th December 2012. When interest was, on this basis, required to be recomputed, Assessing Officer computed it for a period of 26 months on basis that, there was 24 calendar months in this period and

this period included part of calendar month November 2010 as also part of calendar month December 2012. Appellant moved rectification petition against AO's so giving effect to directions of Supreme Court. Assessee submitted that, since total period was of 24 months and 28 days, period for which interest under section 201(1A) could be levied was only 25 months. Assessing Officer, however, was not impressed with this plea. Aggrieved, assessee filed an appeal before CIT(A) but appeal was dismissed. Held, there was no dispute that, expression 'month' was not defined for purpose of Section 201(1A) nor there was any direct judicial authority in context of Section 201. Section 3(35) of General Clauses Act defined "month " as, unless there was anything repugnant in subject or context, "a month reckoned according to the British calendar". Mandate of Section 3(35) was to count, compute or calculate according to, or as per, the British calendar. Even this definition was not in absolute terms and this definition could be discarded. Period of time gap between 16th November 2010 to 14th December 2012 was less than 25 months because, on 14th December 2012, period of 25 months had not elapsed from 16th November, 2010. Period which was elapsed between these two dates was 24 months and 28 days. Going by provisions of General Clauses Act, therefore, period of time between 16th November 2010 to 14th December 2012 was less than 25 months. Accordingly, interest under section 201(1A) could not have been levied for period of more than 25 months. During course of arguments, connotations of 'calendar month' were argued at length but these discussions proceeded on fallacious assumption that, expression 'month', appearing in section 201(1A), was either required to be interpreted as a calendar month or a period of thirty days. Expression 'month' referred to "a month reckoned according to British calendar". A month as per British calendar" and "a month reckoned as per British calendar" were not same thing and could not be used inter changeably. Considering all, grievance of assessee that, on facts of this case, interest under section 201(1A) could not have been charged for more than 25 months, upheld. Assessing Officer was accordingly, directed to recompute interest under section 201(1A). Appeals were allowed. (AY. 1997-98 to 2006-07, 2009-10)

Oil & Natural Gas Commission v. ACIT (2015) 155 ITD 603 / 129 DTR 28 / (2016) 175 TTJ 488 (SMC)(Ahd.)(Trib.)

2201 **S.201 : Deduction at source – Failure to deduct or pay – Limitation – As per proviso to section 201(3) inserted by Finance Act 2009 for the financial year 2007-08 and earlier years – When action under section 201(1) is time barred action under section 201(1A) is also time barred.**

The Tribunal held that the order under section 201(1) got time barred because of expiry of 2 years from the end of financial year in which the statement is filed. When action under section 201(1) is time barred action under section 201(1A) is also time barred. (AY. 2006-07 to 2013-14)

Dy. CIT v. Jai Prakash Associates Ltd. (2015) 172 TTJ 83 (Luck.)(Trib.)

S.201 : Deduction at source – Failure to deduct or pay – Processing charges to laboratories – Whether payee included amount received as income of relevant assessment year to be seen – Interest is to be computed on basis of tax in respect of which assessee treated as in default – Additional evidence admitted and matter remanded. [S.201(1), 201(IA) 194C, 194I, 194J] 2202

The assessee, engaged in the business of production of films, made payments to GL. The Assessing Officer passed an order under section 201(1) of the Act, for failure by the assessee to deduct tax at source under section 194J of the Act. The assessee contended that GL had included the payment as its income and paid the taxes thereon. The Commissioner (Appeals) directed the Assessing Officer to verify whether the payee had offered the amount received by it as income of the relevant assessment year. On appeal; Held, that there was no infirmity in the order of the Commissioner (Appeals).

The assessee challenged the demand raised under sections 201(1) and (1A) of the Act in respect of professional and consultancy charges, contending that since some of the payments out of the professional and consultancy charges were less than ₹ 20,000, there was no requirement for deduction of tax at source. The Commissioner (Appeals) confirmed the order of the Assessing Officer. On appeal: Held, that since the evidence was produced by the assessee for first time before the Tribunal claiming that the assessee had deducted tax at source for the payments exceeding ₹ 20,000, the evidence required to be considered before deciding whether the assessee could be treated as in default. Matter remanded.

The Assessing Officer raised demand under sections 201(1) and (1A) of the Act, on the ground that the assessee had incurred expenditure towards advertisement and publicity charges without deducting tax at source. The assessee contended that the distributor had made the payments towards advertising and publicity on behalf of the assessee and deducted the tax at source on such payments. The Commissioner (Appeals) confirmed the order of the Assessing Officer. On appeal: Held, that the additional evidence produced on behalf of the assessee regarding the issue was to be verified. Matter remanded.

The Assessing Officer issued a notice under sections 201(1) and (1A) of the Act, on the ground that the assessee had made payments towards location rent to UKM without deducting tax at source. The assessee contended that since the location rent was paid on the basis of a composite contract between the parties including supply of manpower, food and lighting on a rate-contract basis for an agreed number of days, the payments would come within the purview of works contract under section 194C of the Act. The Commissioner (Appeals) directed the Assessing Officer to compute the deduction of tax at source in terms of section 194I of the Act treating the location rent as income from rent. On appeal : Held, that the exact nature of payment and the contract entered into between the parties was to be verified. Matter remanded. (AY. 2008-09, 2009-10)

Sowbhagya Media Ltd. v. ITO (2015) 39 ITR 404 / 70 SOT 395 (Hyd.)(Trib.)

2203 **S.201 : Deduction at source – Failure to deduct or pay – Month – Delay in remitting deducted tax to Government – Interest to be computed taking period of thirty days – Not British calendar month. [S. 201(IA)]**

The interest payable under section 201(1A) of the Act for the delay in remitting tax deducted at source to the Government account is to be computed taking a period of thirty days as a month instead of the British calendar month. (AY. 2012-13)

Navayuga Quazigund Expressway P. Ltd. v. Dy. CIT (2015) 39 ITR 612 / (2016) 156 ITD 141 / 177 TTJ 390 (Hyd.)(Trib.)

Section 206AA : Requirement to furnish Permanent Account Number.

2204 **S.206AA : Requirement to furnish Permanent Account Number even in the absence of PAN payer not required to deduct TDS at 20% if case covered by DTAA – DTAA overrides the provisions of Income-tax Act. [S.90(2), 195, 201(IA)]**

The ITAT had to consider whether section 206AA of the Act was applicable in cases which are governed by the DTAAs and whether section 206AA of the Act would override section 90(2) of the Act and therefore the tax deduction was liable to be made @ 20% in absence of furnishing of PANs by the recipient non-residents. HELD by the ITAT:

Section 206AA of the Act prescribes that where PAN is not furnished to the person responsible for deducting tax at source then the tax deductor would be required to deduct tax at the higher of the following rates, namely, at the rate prescribed in the relevant provisions of this Act or at the rate/rates in force; or at the rate of 20%. In the present case, assessee was responsible for deducting tax on payments made to non-residents on account of royalty and/or fee for technical services. The assessee deducted the tax at source at the rates prescribed in the respective DTAAs between India and the relevant country of the non-residents. The case of the Revenue is that in the absence of furnishing of PAN, assessee was under an obligation to deduct tax @ 20% following the provisions of section 206AA of the Act. Section 90(2) provides that the provisions of the DTAAs would override the provisions of the domestic Act in cases where the provisions of DTAAs are more beneficial to the assessee. It would be quite incorrect to say that though the charging section 4 of the Act and section 5 of the Act dealing with ascertainment of total income are subordinate to the principle enshrined in section 90(2) of the Act but the provisions of Chapter XVII-B governing tax deduction at source are not subordinate to section 90(2) of the Act. Section 206AA of the Act is not a charging section but is a part of a procedural provisions dealing with collection and deduction of tax at source. Therefore, where the tax has been deducted on the strength of the beneficial provisions of section DTAAs, the provisions of section 206AA of the Act cannot be invoked by the Assessing Officer to insist on the tax deduction @ 20%, having regard to the overriding nature of the provisions of section 90(2) of the Act. (AY. 2011-12)

DDIT v. Serum Institute of India Limited (2015) 118 DTR 157 / 170 TTJ 119 / 68 SOT 254 / 40 ITR 684 (Pune)(Trib.)

Section 206C : Profits and gains from the business of trading in alcoholic liquor, forest produce, scrap, etc.

S.206C : Collection at source – Trading – Forest produce – Timber imported and sold – Liable to deduct tax at source – No distinction between timber grown in India and timber imported from broad. [S.44AC] 2205

Assessees were timber merchants. They were importing timber from other countries and selling them mostly to registered dealers in Kerala and outside State. Assessing Officer observed that assessees were not collecting any 'tax at source' in terms of section 206C(1) from purchasers/dealers to whom imported timber was sold. Assessing Officer treated assessees as assessees in-default under section 206C(6) and demanded tax and interest. Assessee filed the Writ Petition and contended that they were not covered under section 206C(1). Dismissing the petition the Court held that; section 206C does not draw any distinction between 'timber grown in India' and 'timber imported', from abroad, therefore, assessee was required to collect tax at source from purchasers/dealers in terms of section 206C at time of sale.

Hillwood Furniture (P.) Ltd. v. ITO (2015) 232 Taxman 763 / 275 CTR 429 (Ker.)(HC)

S.206C : Collection at source – Trading – Forest produce – Provision will apply to import of timber as well as timber grown in India. [S.44AC] 2206

The petitioners were timber merchants, importing timber and selling them to registered dealers in India. They were not collecting tax at source u/s. 206C from the purchasers/ dealers to whom imported timber was sold. AO proceeded to treat the assessee as 'assessee-in-default' and charge interest u/s. 206C(7). The Court held that the provisions of section 206C did not draw a distinction between timber grown in India and timber imported from abroad. Chance of evading tax by the buyer weighed more in the mind of the law makers that they stipulated that seller shall effect the collection of tax at the time of sale at the prescribed rate. Import of timber would satisfy the term "obtained by any other mode" as envisaged under the relevant provisions.

Hillwood Furniture (P) Ltd. v. ITO (2015) 232 Taxman 763 / 275 CTR 429 / 116 DTR 257 (Ker.)(HC)

Excel Timbers (P) Ltd. v. Dy. CIT (2015) 232 Taxman 763 / 275 CTR 429 / 116 DTR 257 (Ker.)(HC)

Hilwood Timber v. Dy. CIT (2015) 232 Taxman 763 / 275 CTR 429 / 116 DTR 257 (Ker.) (HC)

Excellent Timber Imports & Exports (P) Ltd. v. ITO (2015) 232 Taxman 763 / 275 CTR 429 / 116 DTR 257 (Ker.)(HC)

Hillwood Imports & Exports (P) Ltd. v. DCIT (2015) 232 Taxman 763 / 275 CTR 429 / 116 DTR 257 (Ker.)(HC)

Section 220 : When tax payable and when assessee deemed in default.

2207 **S.220 : Collection and recovery – Assessee deemed in default – Stay – Reassessment – Pendency of appeal before Commissioner (Appeals) – Assessee to move Commissioner (Appeals) for stay bringing subsequent events to his notice and Commissioner (Appeals) to consider application on merits. [S. 148]**

On the basis of certain proceedings under the Central Excise Act, 1944, the assessments of the assessee for the assessment years 2010-11 and 2011-12 were reopened by notice under section 148 of the Income-tax Act, 1961, and an additional demand for tax of ₹ 64 lakhs was raised, the Commissioner (Appeals) permitted the assessee to pay the demand in instalments, but upon default by the assessee in making payment of the first instalment the assessee's bank account was attached and the assessee filed a Writ Petition which the High Court dismissed. On a special leave petition to the Supreme Court contending that the assessee had so far paid ₹ 27.7 lakh and that in the meantime, the Customs, Excise and Service Tax Appellate Tribunal had set aside the order of the adjudicating authority and remitted the case for fresh adjudication.

The Supreme Court directed the assessee to approach the Commissioner (Appeals) with an application for stay bringing the intervening events to his notice whereupon the Commissioner (Appeals) would consider the application on its merits. (AY 2010-11, 2011-12)

Sidhi Vinayak Metcom Ltd. v. UOI (2015) 378 ITR 372 / 128 DTR 305/ (2016) 282 CTR 223 (SC)

Editorial: Decision of the Jharkhand High Court in Sidhi Vinayak Metcom Ltd. v. UOI [2015] 5 ITR-OL 307 (Jharkhand) was set aside.

2208 **S.220 : Collection and recovery – Assessee deemed in default – Stay cannot be granted merely because appeal was filed. [S.153A, 226(3)]**

Dismissing the petition the Court held that stay for recovery of tax demand raised by Assessing Officer after issuing a notice under section 153A could not be granted merely on ground that an appeal had been filed disputing such demand. (AY. 2005-06)

Jalan Jee Polytex Ltd. v. ACIT (2015) 235 Taxman 140 (All.)(HC)

2209 **S.220 : Collection and recovery – Assessee deemed in default – Stay of recovery proceedings – Effect of Instruction of CBDT – Stay to be granted if issue covered by order of superior authority in favour of assessee – Duty of Assessing Officer to follow order of Tribunal.**

On writ against the stay of recovery the Court held that the jurisdictional Tribunal, while dealing with a similar issue, held in favour of the assessee. Therefore, the Commissioner (Appeals) was to dispose of the appeal on its own merits within a period of three months from the date of receipt of a copy of the order. The Assessing Officer shall not proceed with the recovery during the pendency of the appeal before the Commissioner (Appeals). Instruction No 1914 dated 2-12-1993 is referred. (AY 2009-10)

Kalapet Primary Agricultural Co-op. Credit Society Ltd. v. ITO (2015) 378 ITR 658 / 64 taxmnn.86 (Mad.)(HC)

S.220 : Collection and recovery – Assessee deemed in default – Stay – Appeal was pending before Commissioner (Appeals) – Stay granted to the extent of fifty per cent – Further stay of balance amount – Commissioner (Appeals) commenced hearing – Direction to dispose of appeal as expeditiously as possible. [S.220(6)] 2210

The issue on the appeal was whether the grant received from the State of Maharashtra was capital receipt or Revenue receipt. The Assessing Officer granted stay of recovery to the extent of 50 per cent of the tax payable. On a request to stay the balance amount the Commissioner refused to stay on the grounds that the deposit of the amounts would cause no financial hardship to the assessee. On a Writ Petition, Held, that since the Commissioner (Appeals) was seized of the matter and hearing it, it would be appropriate that in the peculiar facts of the case the Revenue did not adopt any coercive proceedings till such time as the Commissioner (Appeals) disposed of the assessee's appeal arising out of the assessment order and for a period of two weeks thereafter. The Commissioner (Appeals) was to dispose of the appeal as expeditiously as possible. (AY. 2008-09)

Maharashtra Airport Development Co. Ltd. v. Dy. CIT (2015) 377 ITR 262 (Bom.)(HC)

S.220 : Collection and recovery – Assessee deemed in default – Stay – When stay was granted levy of interest was not valid. 2211

Allowing the Petition the Court held that where a stay is granted under section 220(6) in view of pending appeal before Commissioner (Appeals), then such an assessee would not be treated in default till such time its appeal is decided and before that there is no occasion to charge interest under section 220(2). (AY.2007-08, 2008-09)

Hindustan Unilever Ltd. v. Dy. CIT (2015) 377 ITR 281 / 233 Taxman 353 / 279 CTR 71 / 122 DTR 209 (Bom.)(HC)

S.220 : Collection and recovery – Assessee deemed in default – Stay – Depreciation –Charitable trust – Order of Assessing Officer refusing to stay was set aside. [S. 11, 32] 2212

Assessing Officer is bound by the order passed by the jurisdictional High Court without taking any stand that the High Courts of other States are taking a different view. Order of Assessing Officer to refusal to stay the demand was set aside. (AY. 2009-10)

Devi Karumariamman Educational Trust v. Dy. CIT (2015) 233 Taxman 420 (Mad.)(HC)

S.220 : Collection and recovery – Assessee deemed in default – Claim of interest gets revived from inception. 2213

As and when there is finality of assessment proceedings, original notice of demand comes to surface and for any default on part of assessee, in terms of proviso to section 220(2) claim of interest gets revived from inception. (AY. 1973-74)

CIT v. Udaipur Mineral Development Syndicate (P.) Ltd. (2015) 232 Taxman 393 / 275 CTR 533 (Raj.)(HC)

2214 **S.220 : Collection and recovery – Assessee deemed in default – Stay – Identical issue was decided in favour of assessee in earlier year – Demand must be stayed till the disposal of appeal by Commissioner (Appeals). [S. 246]**

Whether where assessee filed an appeal against assessment order on a particular issue, in view of fact that identical issue had been decided in assessee's favour in earlier assessment year, demand raised for relevant year was to be stayed till disposal of appeal by Commissioner (Appeals). (AY. 2010-11)

Disha Construction v. Devireddy Swapna (Ms.) (2015) 232 Taxman 98 (Bom.)(HC)

2215 **S.220 : Collection and recovery – Assessee deemed in default – Interest – Settlement Commission – Interest for default in payment of tax – Application for settlement of case – Interest payable from date of default till date of admission of application for settlement of case. [S.245D(1), 245D(4)]**

Interest under section 220(2) of the Act, is legally leviable from the date of default in payment of the demand by the assessee till the date of admission of the application of the assessee by the Settlement Commission under section 245D(1) and not till the final order of the Settlement Commission under section 245D(4).

CIT v. Leonie M. Almeida (Smt.) (2015) 374 ITR 304 / 233 Taxman 273 / 122 DTR 422 (Bom.)(HC)

2216 **S.220 : Collection and recovery – Assessee deemed in default – Stay – 25% of tax in dispute was directed to pay in two installments.**

Assessee claimed that it was an investment company and during relevant assessment year, there was no trading of shares. However, Assessing Officer, without considering this fact, determined taxable turnover and demanded huge amount of tax. Pending appeal before Commissioner (Appeals), assessee filed application for stay of demand. Assessing Officer rejected stay application and directed assessee to pay 50 per cent of demand. On Writ the Court held that it is discretion of authority regarding demand of percentage to be deposited; however, taking into consideration assessee's request that its business was not good and it was not in a position to pay 50 per cent of demand as directed by Assessing Officer, assessee was to be directed to pay 25 per cent of demand in two instalments. (AY. 2011-12)

Smart Professional Services (P.) Ltd. v. Dy. CIT (2015) 231 Taxman 515 (Mad.)(HC)

2217 **S.220 : Collection and recovery – Assessee deemed in default – Power of stay is a discretionary one – No reasonable grounds were made out to grant stay in respect of entire disputed outstanding demand – Petition was dismissed.**

The AO during the course of appellate proceedings, granted a partial stay of demand to the assessee. The assessee in turn filed a Writ Petition contending that the AO should have granted stay of entire outstanding demand until the final disposal of appeal.

The High Court observed that the AO had been conferred with the power to treat the assessee as not being in default in respect of the amount in dispute in the appeal, however subject to conditions as he may think fit to impose. The word 'as he may think fit to impose' would definitely mean that the power vested in the authority is wide enough and can be exercised according to his discretion. The High Court held that

the AO had not exercised his powers arbitrarily or capriciously and that no reasonable grounds were made out to grant stay in respect of entire disputed outstanding demand. (AY. 2010-11)
Jyothy Laboratories Ltd. v. Dy. CIT (2015) 231 Taxman 65 / 118 DTR 207 (Mad.)(HC)

S.220 : Collection and recovery – Assessee deemed in default – Stay application – Authority to *prima facie* consider merits and balance of convenience and irreparable injury – Authority to record reasons and then conclude whether stay should be granted and if so on what condition. 2218
Held, the Revenue had not been able to show any reasons which had weighed the authority for passing the order rejecting the stay application. When the question of grant of stay against any demand of tax is to be considered, the authority may be required to *prima facie* consider the merits and balance of convenience and also irreparable injury. These had neither been examined nor considered. The authority was required to record the reasons and then reach an ultimate conclusion as to whether the stay should be granted and if so on what condition. In the absence of any reasons, the order rejecting the stay application could not be sustained. (AY. 2011-12)
Hitech Outsourcing Services v. ITO (2015) 372 ITR 582 / 231 Taxman 413 (Guj.)(HC)

S.220 : Collection and recovery – Assessee deemed in default – Garnishee order – Appeal pending for more than a year before Commissioner (Appeals) – Stay application pending for four months – Recovery of sum from bank by garnishee notice – Not a case of sudden coercive action with suddenness – Department not entitled to adjust refund due to assessee without notice to it – Commissioner (Appeals) directed to dispose of appeal and stay application within six weeks. 2219
Held, (i) assessee's appeal was pending for one year and a quarter. The stay application was pending before the Commissioner (Appeals) for four months. It could not be said that the assessee received coercive action from the Department with suddenness. Execution or recovery has to be made with promptitude. If a decree holder or the Revenue in income-tax cases sleeps over a demand there would be every likelihood of their being unable to realise the fruits of the decree or the demand.
(ii) That, however, the Income-tax Department could not unilaterally adjust the amount due on refund against a tax demand without giving a notice to the assessee. This was so because there was no appeal from set off orders. Therefore, if an amount of ₹ 42,96,720 was due to the assessee from the Revenue as refund and had been set-off against the tax demand by the income-tax authorities without notice to the assessee they had acted contrary to the Division Bench judgment. If that was the case, the Department was to immediately remit that amount to the account of the assessee with the bank. The Commissioner (Appeals) was directed to dispose of the appeal and stay application pending before him within six weeks of communication of this order. It would be open to the Revenue to approach the Commissioner (Appeals) to pray for orders against the assessee to secure the tax due. (AY. 2010-11)
Indian Chamber of Commerce v. DIT(E) (2015) 372 ITR 228 (Cal.)(HC)

2220 **S.220 : Collection and recovery – Assessee deemed in default – Stay – *Prima facie* case – Unconditional stay must be granted by the CIT(A). [S. 11, 251, Constitution of India, Art. 289]**

Assessee was statutory authority set up *inter alia* for purpose of planning, co-ordinating and supervising development of Mumbai Metropolitan Region and it was appointed as a special planning authority in place of CIDCO for notified areas. It claimed exemption under section 11 and alternatively claimed that it was an agent of State Government and, thus, was not chargeable to tax in view of decision of Tribunal in *City & Industrial Development Corpn. of Maharashtra Ltd. v. Asstt. CIT [2012] 138 ITD 381 (Mum.)* Assessing Officer did not accept said claim and charged its income to tax. Pending disposal of appeal before Commissioner (Appeals), assessee sought for stay of demand but same was rejected on ground that above decision was inapplicable as in that case exemption under section 11 was not claimed. Court held that submission of being an agent of State was not based on any claim for exemption under any provision of Act but under Article 289 of Constitution of India, therefore, decision of Tribunal in above case would *prima facie* apply to facts of assessee's case and, unconditional stay would be granted pending disposal of appeal before Commissioner (Appeals). (AY. 2011-12)

Mumbai Metropolitan Region Development Authority v. Dy. CIT (2015) 273 CTR 317 / 230 Taxman 178 (Bom.)(HC)

2221 **S.220 : Collection and recovery – Assessee deemed in default – Stay – Appeal pending before CIT(A) – CIT(A) is directed to dispose of application expeditiously.**

Commissioner rejected the application to stay the demand. Assessees bank accounts including cash credit accounts were attached by the income-tax authorities. Assessee filed the Writ Petition, allowing the Petition the Court directed that the attachment with regard to cash credit account was discharged and the CIT(A) was directed to dispose the appeals with in three months. As regards other bank accounts of the assessee were continued to remain attached with a rider that the Department will not be able to appropriate any sum therefrom till the disposal of the appeal before the CIT(A).The continuation of attachment and operation of the bank accounts will abide by the order to be passed by Commissioner (Appeals). (AY. 2011-12)

P.C. Chandra and Sons (India) P. Ltd. v. Dy. CIT (2015) 373 ITR 223 / 235 Taxman 144 (Cal.)(HC)

2222 **S.220 : Collection and recovery – Assessee deemed in default – Interests – Petitioner was directed to file revision petition before Commissioner. [S. 234A, 234B, 234C, 264]**

Consequent to order passed by Settlement Commission, impugned proceedings were passed calling upon petitioner to pay interest under section 220(2). Petitioner contended that respondents had admitted that demand had been paid on various dates and was fully paid in July 2007; therefore, question of demanding interest consequent to order of Commission in 2008 did not arise. On Writ dismissing the petition the Court held that since demand had been raised consequent to order passed by Settlement Commission, computation of period for purpose of levy of interest could not be adjudicated in a writ Petition and, hence, petitioner was to be directed to file a revision before Commissioner under section 264.

Vaata Infra Ltd. v. ITO (2015) 229 Taxman 373 / 116 DTR 167 (Mad.)(HC)

S.220 : Collection and recovery – Assessee deemed in default – Appeals were pending – Stay – Revenue was not justified in calling upon to pay demand. [S. 220(6)] 2223

Where assessee's appeals were pending before appellate authority in respect of assessment order and after filing of said appeals, assessee filed stay petition under section 220(6), revenue was not justified in calling upon assessee to pay demand. (AY. 2008-09 to 2012-13)

Viswakarma Mines & Building Materials (P.) Ltd. v. Dy. CIT (2015) 54 taxmann.com 65 / 229 Taxman 436 (Mad.)(HC)

S.220 : Collection and recovery – Assessee deemed in default Waiver of interest – Assessee paying tax after 27 years of completion of assessment – Waiver application was considered and the assessee was made to pay fixed amount of interest as full and final settlement – Since the Writ Petition was admitted and pending for all these years, no interest shall be demanded from October, 2005 till date. [S.220(2)] 2224

Once the Assessee pays off the total tax demand along with the interest raised by the Department after 27 years of completion of Assessment i.e. up to 1990, in October. 2005, as per the notice of demand of 2004. Further, demand cannot be raised by the Department for the period up to 2005. However, the Assessee is liable to pay interest for the period of delay while making payment of the demand. The waiver application was considered and the assessee was directed to pay a fixed amount as interest as full and final settlement. Since the Writ Petition were admitted and pending for all these years, no interest shall be demanded from October, 2005 till date.(AY. 1977-78 to 1998-9)

Christy Arockia Raj v. CIT (2015) 274 CTR 61 / 229 Taxman 549 / 114 DTR 55 (Mad.)(HC)

S.220 : Collection and recovery – Assessee deemed in default – Interest – Interest has to be calculated from the period after expiry of 30 days as stated under S. 220(1) of the Act and not from the date on which the return has been filed. [S.156] 2225

The assessee did not file the return of income. Consequently, a search was conducted in the premises of the assessee and then the AO, after making the assessment, raised a demand by issuing notice u/s. 156 of the Act. Under the notice u/s. 156, the demand has to be paid within the time specified u/s. 220 (1) of the Act. Therefore, the contention of the assessee is that the interest on the demand has to be paid from the date commencing after the end of the period (30 days) as stated under section 220 of the Act. However, the contention of the Department is that the interest has to be paid from the date on which the return has been filed and therefore, the interest on the demand has to be paid from that date and not from the expiry of the period as stated in section 220 (2) of the Act.

On a writ filed by the assessee, the High Court held that the case is squarely covered under the Apex Court judicial decision in *Vikrant Tyres Ltd. v. ITO (2001) 247 ITR 821* in which it has been held that interest has to be calculated from the period after expiry of 30 days as stated under sec. 220(1) of the Act and not from the date on which the return has been filed.(AY. 2006-07 to 2009-10)

Govindachary v. TRO (2015) 232 Taxman 750 / 275 CTR 541 / 115 DTR 122 (Karn.)(HC)

2226 **S.220 : Collection and recovery – Assessee deemed in default – Pendency of stay application – Bank account cannot be attached without issuing a notice. [S,226(3)]**

The assessee filed an application for stay before the Assessing Authority when the matter was pending before the Commissioner (Appeals). This application of stay was not disposed of by the Assessing Officer without any explanation for nearly two years. During the pendency of that application, the authorities passed an order for attachment of bank account under section 226(3) in a hastily manner without giving any prior notice.

On writ:

The Court held that the Division Bench of the Bombay High Court rendered in *Society of Franciscan (Hospitaller) Sisters v. Dy. DIT (Exemptions) [2013] 351 ITR 302 (Bom.)(HC)* held that the authorities who are discharging quasi-judicial functions cannot keep the application for stay pending and on the other hand to proceed for recovery by taking recourse to section 226(3) of the said Act. The Division Bench in univocal term held that the application for stay is not a meaningless formality and the fairness on the part of the quasi-judicial authority is an intrinsic element of such functions.

In *Golam Momen v. Asstt. CIT [2003] 263 ITR 69 (Cal.)(HC),* it is held that mere filing an appeal does not tantamount to stay of the recovery proceedings. Section 226(3) contemplates the notice to be issued to the assessee but it does not say that prior notice before taking course to the aforesaid provision is required to the assessee.

While considering the unjust hardship which may be caused to the assessee, the Court shall also bear in mind the interest of the Revenue as well. Out of the total demand a sum of ₹ 1 lakh have already been paid by the petitioner. To mitigate the situation and to render justice between the parties it is to be directed that the petitioner should pay a further sums of ₹ 1 lakh and ₹ 2 lakh on date fixed thereby. The bank shall allow the petitioner to operate the bank account, under attachment. Immediately upon the payment the order of attachment shall stand recalled/revoked/cancelled and permit the withdrawal of the other amounts therefrom.

Anil Kumar Banerjee v. UOI 2015) 229 Taxman 75 (Cal.)(HC)

2227 **S.220 : Collection and recovery – Assessee deemed in default – Stay – Stay was granted subject to certain conditions.**

Assessee filed stay petition before Commissioner (Appeals) for stay of demand till disposal of appeals but same was rejected as assessee did not produce cash position so as to examine matter regarding assessee's financial constraint for non-payment of TDS. However though reasoning of Commissioner (Appeals) while rejecting stay petition could not be faulted in its entirety, but when order was passed, Commissioner (Appeals) ought to have noted that appeal arising out of earlier assessment orders in identical issue was pending before High Court and conditional order of stay had been granted. Therefore, assessee was to be granted stay order subject to certain conditions. (AY. 2012-13 to 2014-15)

Vodafone Cellular Ltd. v. CIT (A) (2015) 370 ITR 750 / 229 Taxman 91 / 114 DTR 177 (Mad.)(HC)

S.220 : Collection and recovery – Assessee deemed in default – Settlement Commission – Waiver of interest – Settlement Commission has to exercise its discretion judicially and satisfy that three conditions laid down in the section – Matter remanded. [S.245D(4)] 2228

A search was conducted at the residential and business premises of the assessee. The assessee filed return declaring certain undisclosed income for block period and block assessment was completed on 26-2-1997 on higher income. The assessee filed an application before the Settlement Commission on 10-2-1997 offering certain additional income and the Settlement Commission passed order under sub-section (4) of section 245D.

The assessee also filed a separate petition for waiver of interest levied under sub-section (2) of section 220. The Settlement Commission merely relying on the decision of the Income-tax Settlement Commission (Special Bench) in the case of Damani Brothers, In re [1999] 238 ITR 36 / 104 Taxman 283 ordered that the interest levied on the assessee under sub-section (2) of section 220 for the period subsequent to 10-2-1997, being the date of filing the application before the Settlement Commission, be cancelled.

The Revenue filed Writ Petition alleging that decision of the Settlement Commission was without considering as to whether the assessee fulfilled all the three conditions laid down in clauses (i), (ii) and (iii) of sub-section (2A) of section 220. Court held that, while passing an order under sub-section (2A) of section 220, Settlement Commission has to exercise its discretion judicially and satisfy that three conditions laid down under clauses (i), (ii) and (iii) of sub-section (2A) of section 220 have been fulfilled, before passing an order waiving interest. Matter remanded.

As the Order passed by the Settlement Commission does not satisfy the tests laid down by the Apex Court in the judgments referred supra, the said order, in so far as it pertains to wavier of interest levied on the assessee under sub-section (2) of section 220, for the period subsequent to 10-2-1997, being the date of filing of the application before the Settlement Commission under sub-section (1) of section 245C is set aside. Therefore, the Settlement Commission is directed to consider the application filed by the assessee under sub-section (2A) of section 220 with regard to waiver of interest levied under sub-section (2) of section 220 afresh and pass a considered order in terms of the law laid down by the Apex Court. (AY. 1986-87 to 1996-97)

CIT v. Addl. Commissioner (IT&WT) Settlement (2015) 229 Taxman 78 (Ker.)(HC)

S.220 : Collection and recovery of tax – Assessee deemed-in-default – Interest – Original demand was not paid – Matter set aside – Interest is leviable from the initial demand. [S. 156, 220(2), 254] 2229

For relevant year, assessment was completed in year 2003 wherein disallowance was made under section 14A. In appellate proceedings, Tribunal sustained said disallowance but remanded matter back to Assessing Officer for recomputation of amount of disallowance. In remand proceedings, Assessing Officer having redetermined amount of disallowance, issued a notice of demand levying interest under section 220(2). In appeal the assessee contended that in the notice of demand itself the assessee was directed to pay tax demand within 30 days of service of said notice, there was no occasion for the

AO to impose interest u/s. 220(2) in the notice of demand itself, since the occasion to levy the said interest could arise if and only if, the assessee defaulted in payment of the tax demand within 30 days of the issuance of the said notice. CIT(A) accepted the explanation of assessee and set aside the order of AO levying interest. On Revenues appeal, allowing the appeal the Tribunal held that, since the assessee had not satisfied initial demand raised in year 2003, it was required to pay interest under section 220(2). Therefore impugned action taken by Assessing Officer did not require any interference. (AY. 2000-01)
ACIT v. HCL Corporation Ltd. (2015) 68 SOT 272 (URO)(Delhi)(Trib.)

Section 221 : Penalty payable when tax in default.

2230 **S.221 : Collection and recovery – Penalty – Tax in default – Penalty for failure to pay TDS in time can be levied even if the assessee voluntarily pays the TDS – No bar to passing order under section 201 read with section 221 simultaneously. [S.2(7), 201, 205]**
For failure to pay TDS in time penalty can be levied even if the assessee voluntarily pays the TDS. Financial hardship, diverse locations and lack of computerization are not good excuses. The fact that CIT(A) decided in favour of the assessee & deleted the penalty does not necessarily mean that two views are possible - Levy of penalty was held to be justified. There is no bar to passing order under section 201 read with section 221 simultaneously. Accordingly the imposition of penalty was up held. (AY. 1985-86, 1987-88)
Reliance Industries Ltd. v. CIT (2015) 377 ITR 74 / 279 CTR 128 / 122 DTR 353 / 233 Taxman 307 (Bom.)(HC)

2231 **S.221 : Collection and recovery – Penalty – Tax in default – Matter remanded. [S. 14OA, 220]**
Where Tribunal rightly held that assessee was liable to pay penalty for not depositing taxes before filing return but while doing so, arbitrarily and without assigning any reason reduced penalty, matter was to be remanded to reconsider same. Matter remanded. (AY. 2008-09, 2009-10)
Kudos Chemie Ltd. v. CIT (2015) 230 Taxman 174 (P&H)(HC)

2232 **S.221 : Collection and recovery – Penalty – Tax in default – Interest – Since definition of 'tax' under section 2(43) did not include penalty or interest, penalty under section 221(1) could not be levied. [S.2(43), 221, 234B, 234C]**
Assessee-firm filed its return of income and had not deposited interest under sections 234B and 234C. AO treated it as an assessee in default and imposed penalty under section 221. In *CIT v. P. B. Hathiramani [1994] 207 ITR 483/[1993] 68 Taxman 449 (Bom.)*, High Court held that penalty under section 221 was leviable only when assessee was in default or is deemed to be in default in making a payment of 'tax'. Since definition of 'tax' under section 2(43) did not include penalty or interest, penalty under section 221(1) could not be levied. (AY. 2004-05)
CIT v. Great Value Food (2015) 228 Taxman 133 (Mag.)(P&H)(HC)

S.221 : Collection and recovery – Penalty – Tax in default – Penalty cannot be levied for non-payment of S. A tax if the assessee has financial hardship. 2233

The Tribunal held that;the assessee claimed that it was having meagre cash and current balances and was in financial constraints during the year under consideration. If there is financial hardship to the assessee it has to be considered as sufficient cause in which event penalty cannot be levied. The Revenue was unable to point out as to whether the assessee had sufficient cash/bank balance so as to meet the tax demand and also could not point out as to whether any funds were diverted for non-business purposes at the relevant point of time so as to say that an artificial financial scarcity was created by the assessee. Accordingly, penalty u/s 221(1) could not be levied. (AY. 2010-11, 2011-12)
DCIT v. Aanjaneya Life Care Ltd. (2015) 40 ITR 691 (Mum.)(Trib.)

Section 222 : Certificate to Tax Recovery Officer

S.222 : Collection and recovery – Certificate to Tax Recovery Officer – Income-tax department put subject property to auction – Forfeiture of bid amount was held to be justified. 2234

Income-tax department put subject property to auction. As per advertisement/public notice 25 per cent of bid amount would have to be paid within 30 days of auction and balance amount would have to be paid within 90 days from date of confirmation of sale. Petitioner paid 25 per cent of bid amount within 30 days of auction but failed to make balance payment within 90 days from date of confirmation of sale. Request of petitioner to grant extension to deposit balance bid amount was not accepted and Chief Commissioner forfeited amount already paid by petitioner. On writ dismissing the petition the Court held that; granting of further time and/or extension of time would tantamount to varying terms and conditions on which bids were invited and sale came to be confirmed and, therefore, decision of Chief Commissioner for forfeiting amount already paid by petitioner on its failure to make payment of entire bid amount within stipulated time was justified.
Panchratna Real Estate (P.) Ltd. v. CCIT (2015) 234 Taxman 501 (Guj.)(HC)

S.222 : Collection and recovery – Certificate to Tax Recovery Officer – Benami properties – Attachment of properties and assessment in name of Dawood Ibrahim Kaskar – Suit by benami holder for declaration of ownership – Trial Court allowing Chamber summons of Department for implement of Dawood Ibrahim Kaskar and others as parties – Held to be proper. 2235

The Income-tax Department received information from various sources that there were twenty-three properties which were held benami and the actual owner was Dawood Ibrahim Kaskar. The Income-tax Department attached the properties under section 222 of the Income-tax Act, 1961, and made assessment in the name of Dawood Ibrahim Kaskar as if they were his own properties. The petitioner filed a Writ Petition which was dismissed where after he filed a civil suit. The Income-tax Department filed a Chamber summons to implead (i) the Central Bureau of Investigation (Special Task Force), (ii) the Municipal Corporation of Greater Mumbai, (iii) the Joint Commissioner of Police (Crime), Mumbai and (iv) Dawood Ibrahim Kaskar. The Trial Court allowed the

parties to be arrayed as defendants in the suit. On a Writ Petition contending that the petitioner had placed on record the document of the year 1951 by which the property was purchased by his father, that the date of the purchase might be even prior to the birth of Dawood Ibrahim Kaskar and, therefore, the allegation of the authorities that the property was benami property could not be *prima facie* accepted and that the parties who were sought to be arrayed as parties were neither necessary nor proper parties. Held, dismissing the petition, that having regard to the reasons mentioned in the order and especially the foundation of the application which was based on information which had been revealed in the investigation carried out pursuant to the bomb blasts of the year 1993, the order passed by the Trial Court allowing the Chamber summons filed by the Income-tax Department could not be found fault with. The added parties if not necessary were proper parties to the suit whose presence would aid in a proper adjudication of the suit.
Ahmed Vazir Parkar v. UOI (2015) 378 ITR 377 (Bom.)(HC)

2236 **S.222 : Collection and recovery – Certificate to Tax Recovery Officer – Neither any assessment order was passed nor any notice of demand was served – Attachment of moveable property was held to be invalid. [S. 156, 220]**
Allowing the petition the Court held that where no assessment order was passed against petitioner assessee nor any notice of demand was issued, it was not an assessee or deemed assessee or a default assessee and, therefore, recovery proceedings initiated against it by attaching movable property were illegal and invalid. (AY. 2012-13)
Telangana State Beverage Corporation Ltd. v. UOI (2015) 377 ITR 622 / 233 Taxman 276 / 126 DTR 441 (AP&T)(HC)

2237 **S.222 : Collection and recovery – Certificate to Tax Recovery Officer – Properties mortgaged – Transfer was held to be not void – Order passed by TRO attaching immovable property for purpose of sale was to be quashed. [S.281]**
State corporation sanctioned a term loan in favour of assessee developer 'V' to establish a hotel. However said loan was subsequently transferred to 'V.K.' clubs. Borrower created an equitable mortgage in favour of said corporation by depositing title deed of certain land and buildings. Pursuant to an Income-tax proceeding initiated against assessee 'V' and 'V.K.', TRO passed an order attaching properties mortgaged with said corporation. On writ Single Judge set aside the order of Tax Recovery Officer. On appeal by the revenue dismissing the appeal the Court held that; where transfer to said corporation by way of mortgage was without notice of pendency of assessment proceeding, transfer could not be said void, therefore order passed by TRO attaching immovable property for purpose of sale was to be quashed.
CIT v. Karnataka State Industrial Investment Development Corporation Ltd. (2015) 378 ITR 234 / 233 Taxman 17 / 281 CTR 514 (Karn.)(HC)

2238 **S.222 : Collection and recovery – Certificate to Tax Recovery Officer – Alternative property for attachment – Prayer for release of property attached was accepted.**
For relevant assessment year, certain tax demand was raised against assessee. Against said order, appeal filed was pending before Tribunal. In meantime, in order to collect tax due, Revenue authorities attached a property belonging to assessee. Since assessee

wanted to utilize said property in its business, instant petition was filed praying for a direction to release said property on condition that assessee was prepared to offer an alternative property for attachment during pendency of appellate proceedings before Tribunal. Allowing the petition the Court held that in view of fact that alternative property offered by assessee was of higher value as compared to property already attached, assessee's prayer for release of said property was to be accepted. (AY. 2008-09)
Damac Holdings (P.) Ltd. v. Dy. CIT (2015) 232 Taxman 99 (Ker.)(HC)

S.222 : Collection and recovery – Certificate to Tax Recovery Officer – TRO should have awaited disposal of assessee's appeal under Rule 86 to IInd Schedule pending with JC before disposing off attachment proceedings – Matter remanded [Rule 86, Schedule II] 2239

Revenue authorities attached property and bank accounts of assessee in order to recover tax dues payable by his late father – Assessee approached Jurisdictional Commissioner (JC) against said action. As there was no response, assessee approached CC (Chief Commissioner). CC directed JC to treat assessee's application as appeal under Rule 86, Schedule II. In spite of said directions, JC did not consider assessee's objections and in meantime TRO passed an order holding that attachment of properties belonging to assessee was valid. On writ allowing the petition the Court held that in view of directions issued by CC regarding disposal of assessee's objections, TRO should have awaited disposal of assessee's appeal under Rule 86 to IInd Schedule pending with JC before disposing of attachment proceedings. Matter remanded.
Vinod K. Bhagat v. TRO (2015) 231 Taxman 665 (Bom.)(HC)

S.222 : Collection and recovery – Certificate to Tax Recovery Officer Power to arrest – In recovery proceedings initiated by SEBI petitioner failed to furnish proposal of payment of dues Detention and arrest order passed by Tax Recovery Officer against petitioner was arbitrary and illegal. [S. 227, 228A, 229, 232, Rules, 73, 76 of Schedule 11, Securities and Exchange Board of India Act, 1992, S. 28A] 2240

Petitioner was called upon by SEBI to pay certain dues. On failure of petitioner, SEBI initiated recovery proceedings under section 28A. Petitioner had appeared before Tax Recovery Officer in terms of notice under Rule 73(1) and was advised to make payment towards dues and/or submit a proposal for payment of dues. On failure of petitioner to furnish any substantial proposal for payment of dues, by impugned order petitioner was arrested and sent to civil prison.

On writ allowing the petition the Court held that order of arrest and detention by Tax Recovery Officer for not giving a proposal of repayment was a sheer abuse of power. In absence of finding that petitioner had means to pay, mere non-payment of dues did not constitute neglect or refusal to pay. Since authority of respondent had not arrived at a satisfaction that conditions specified in clauses (a) and (b) of Rule 73(1) were satisfied and had further not complied with mandate of Rule 73(1) of recording reasons of satisfaction in writing, detention and arrest order was patently illegal and arbitrary and, therefore, same was to be quashed. Rule 73 does not confer power on Tax Recovery Officer to arrest and detain defaulter for not giving a proposal for payment of dues.
Vinod Hingorani v. SEBI (2015) 230 Taxman 251 / 278 CTR 232 (Bom.)(HC)

2241 **S.222 : Collection and recovery – Certificate to Tax Recovery Officer – Bank guarantee was produced – No justification for enforcing recovery proceedings.**
Petitioner was a company engaged in civil contract work registered under KVAT Act, 2003. Commissioner of Income-tax (TDS) issued endorsement to petitioner demanding payment of tax of ₹ 1.24 crores as balance amount due. Petitioner replied stating that it had already furnished bank guarantee to secure payment of balance amount and requested respondents not to take any recovery action in terms of impugned order as it intended to prefer further appeal against said order. Since petitioner had already produced to satisfaction of Additional Commissioner of Income-tax that bank guarantee for balance amount was still in force, there was no justification for respondents to enforce recovery proceedings against petitioner. Petitioner had right of appeal, which it intended to file, thus petitioner was to be permitted to file appeal. (AY. 2006-07 to 2009-10)
Janatha Co-operative Bank v. CIT (2015) 229 Taxman 74 (Karn.)(HC)

Section 225 : Stay of proceedings in pursuance of certificate and amendment or cancellation thereof.

2242 **S.225 : Collection and recovery – Stay – CIT(A) has granted stay with certain directions – No cause of action – No interference was called. [Art. 226]**
While stay application in appeal against assessment order was pending, recoveries of amounts, in terms of order of assessment, were sought to be made from assessee. Assessee filed Writ Petition seeking direction to cancel/quash recovery proceedings. In meantime, Commissioner (Appeals) disposed of stay application giving certain directions. Once stay application along with appeal against orders of assessment had been decided by Commissioner (Appeals), cause of action on which writ was founded ended and, hence, there was no reason to interfere in Writ Petition. (AY. 2005-06, 2009-10)
Jahalani Trading Company v. ITO (2015) 228 Taxman 140 (Mag.)(Raj.)(HC)

Section 226 : Other modes of recovery.

2243 **S.226 : Collection and recovery – Mode of recovery – Garnishee proceeding – Mandatory to issue and forward a notice.[S.226(3)]**
It is mandatory to issue and forward a notice to the Assessee before going ahead with the garnishee proceeding. (AY.2006-07)
Suntec Business Solutions (P) Ltd. v. UOI (2015) 232 Taxman 367 / 274 CTR 162 (Ker.)(HC)

2244 **S.226 : Collection and recovery – Banks tenanting premises – Premises acquired by Income-tax Department – Income-tax Department unilaterally increasing rent – Coercive measures under section 226(3) to recover rent – Not valid. [S. 23(1)(a), Bihar Buildings (Lease, Rent and Eviction) Control Act, 1982]**
The petitioners were public sector banks, being Government of India undertakings, who were tenants of certain premises. The petitioners were regularly paying rent to the landlord and after the premises were taken over by the Income-tax Department by issuing notices dated July 28, 2014, under section 26(3) of the Income-tax Act, 1961, they had been paying rent to the Tax Recovery Officer. The Tax Recovery Officer sought

to unilaterally enhance the rent payable by the petitioners manifold and to recover it from the respective accounts of the petitioners maintained by the Reserve Bank of India, pursuant to which notices were issued and action taken. On writ petitions :
Held, allowing the petitions, that the provisions of section 23(1)(a) of the Act relate to the determination of income from house property for the purpose of filing of income-tax return and assessment thereof and the same have no relevance at all so far as fixation of rent payable by the tenant to the landlord is concerned. Any such fixation of fair rent or higher rent can only be either on the basis of agreement between the parties or by the exercise of powers in areas covered by the provisions of the Bihar Buildings (Lease, Rent and Eviction) Control Act, 1982, by the competent authorities therein and not unilaterally by the Tax Recovery Officer or any other officer of the Income-tax Department. The entire action of the Tax Recovery Officer and the consequential action taken by the Reserve Bank of India, are *de hors* the powers conferred upon them by the law of the land and they are, accordingly, quashed. Any amount, which may have been recovered from the accounts of the petitioners should be refunded to the petitioners forthwith.
State Bank of Bikaner and Jaipur v. CIT (2015) 373 ITR 418 / 274 CTR 396 / 115 DTR 119 (Patna)(HC)
Union Bank of India v. TRO (2015) 373 ITR 418 / 232 Taxman 613 / 274 CTR 396 / 115 DTR 119 (Patna)(HC)

S.226 : Collection and recovery – Garnishee proceedings – Writ petition by person who was not the legal owner of assets in question – Not maintainable. [S.226(3), Constitution of India, Art. 226] 2245
On appeal by revenue, allowing the appeal the Court held that; the suit filed by the respondent for grant of declaration with regard to the properties had already been dismissed and the appeal filed against such judgment of the trial court was pending. For the first time, on January 6, 2003, the respondent filed his first returns of income or wealth for the six assessment years being 1997-98 to 2002-03. It was for the first time, before the Department that the respondent had declared the properties in question to be his properties. Right over the properties apparently had always been that of the Math, and the right of the respondent had never been established by any authority or court of law. Therefore, there was no justification in going into the merits of the correctness of the notices which had been challenged in the Writ Petition by the respondent who would be a stranger to the notices. Decision of the Single Judge of the Karnataka High Court in *Bhishma Pithamaha v. TRO [2009] 316 ITR 63 (Karn.)* set aside.
TRO v. Bhishma Pithamaha (2015) 377 ITR 584 / 281 CTR 348 (Karn.)(HC)

S.226: Collection and recovery – Garnishee proceedings – State reorganisation – Assessee was not a successor in interest to Corporation. Tax dues of Andhra Pradesh Beverages Corporation for assessment year 2012-13 could not be recovered from company. Company was not an assessee in default nor a garnishee. [S. 226(3), Andhra Pradesh Reorganisation Act, 2014, S. 53, 68] 2246
Allowing the petition the Court held that taxes due in relation to which recovery were sought to be made concerned financial year 2011-12 and assessment year 2012-13. At that time, the petitioner was not in existence. The petitioner was not an assessee nor a deemed assessee in default. No assessment order was passed against it nor was

any notice of demand issued. Going by the legal provision in section 156 recovery proceedings could not be initiated against the petitioner. Therefore, apparently, notices were absolutely illegal and invalid. It was not a successor in interest to APBCL. In the relevant accounting year it had not started business nor had any income been derived. It did not appear from the objects clause of the Memorandum of Association that it had acquired any rights, assets and properties of APBCL. Thus, the question of shouldering liability by the petitioner under section 226(3) did not arise. The recovery proceedings were not valid. (AY.2012-13)

TRO v. UOI (2015) 377 ITR 622 / 233 Taxman 276 (T&AP)(HC)

Telangana State Beverage Corporation Ltd. v. UOI (2015) 377 ITR 622 / 233 Taxman 276 (T&AP) (HC)

Section 234A : Interest for defaults in furnishing return of income.

2247 **S.234A : Interest – Advance tax – Return – Deduction at source – Selling property to developer – Developer deducting tax at source but failing to deposit amount into Government treasury – Assessee unable to upload return for failure by developer to deposit tax deducted at source – Developer depositing tax deduction at source with interest after assessee filing writ – Revenue stating that it would not charge any interest-Petition became infructuous and was dismissed as withdrawn. [S. 139, 234B, 234C]**

The petitioners (non-resident Indians) sold their property to a developer. The developer, while paying consideration to the petitioners, deducted ₹ 1.23 crores as tax at source but failed to deposit the amount into the Government Treasury. The petitioners were unable to upload their return for the assessment year 2014-15 for the reason of non-deposit of tax deducted at source. When the petitioners brought this non-deposit of tax deducted at source to the notice of the Commissioner, he did not take any action against the developer. On a writ petition:

Held, that after the filing of the petition, the developer deposited the tax deducted at source along with interest. The Revenue stated that it would not charge any interest under section 234A for default in furnishing of return in time nor interest under sections 234B and 234C for default in payment of advance tax. Thus, the petition became infructuous and was dismissed as withdrawn. (AY 2014-15)

Zulfikar Jeweanjee Moriswala v. DCIT (TDS) (2015) 375 ITR 148 / 127 DTR 272 / 281 CTR 385 / 234 Taxman 264 (Bom.)(HC)

2248 **S.234A : Interest – Method of accounting – Project completion method – Parking charges received is liable to tax and no relevance to project completion method – Liable to pay interest. [S. 145, 234B]**

Assessee was engaged in business as builder and developer and was following project completion method for payment of taxes. Assessee received parking charges collected on vacant land belonged to him. However, he did not file return on ground that income earned on parking charges would be taxed when project would be complete. On appeal the Court held that since parking charges had nothing to do with assessee's project and

was assessable to tax, assessee was obliged to pay advance tax, therefore, non-payment of same would levy interest under section 234A and 234B. (AY. 2000-01)
Sudhir G. Borgaonkar v. ACIT (2015) 375 ITR 322 / 230 Taxman 327 / 121 DTR 333 (Bom.)(HC)

Section 234B : Interest for defaults in payment of advance tax.

S.234B : Interest – Advance tax – Interest is automatic if conditions are met. Form ITNS 150 is a part of the assessment order and it is sufficient if the levy of interest is stated there even though the assessment order did not contain any direction to charge interest. [S.143(3)] 2249
The assessment order did not contain any direction for the payment of interest. The ITAT and the Delhi High Court held that since no direction had actually been given in the assessment order for payment of interest, the case was covered by the decision of the Supreme Court in *'Commissioner of Income Tax & Ors. v. Ranchi Club Ltd.' [(2001) 247 ITR 209]* which merely dismissed the appeal affirming the High Court judgment reported in *'Ranchi Club Ltd. v. Commissioner of Income Tax' [(1996) 217 ITR 72]*. The Department claimed before the Supreme Court that in view of the decision in *'Kalyankumar Ray v. Commissioner of Income Tax, West Bengal-IV, Calcutta [1992 Supp (2) SCC 424]* interest under section 234B is part of Form ITNS 150 which is not only signed by the Assessing Officer but it is really part of the assessment order itself. HELD by the Supreme Court allowing the appeal:
It will be seen that under the provisions of Section 234B, the moment an assessee who is liable to pay advance tax has failed to pay such tax or where the advance tax paid by such an assessee is less than 90 per cent of the assessed tax, the assessee becomes liable to pay simple interest at the rate of one per cent for every month or part of the month. The levy of such interest is automatic when the conditions of section 234B are met. The facts of the present case are squarely covered by the decision contained in Kalyankumar Ray's case inasmuch as it is undisputed that contained a calculation of interest payable on the tax assessed. This being the case, it is clear that as per the said judgment, this Form must be treated as part of the assessment order in the wider sense in which the expression has to be understood in the context of section 143, which is referred to in Explanation 1 to section 234B. This being the case, we set aside the judgment of the High Court and allow the appeal of the Revenue.
CIT v. Bhagat Construction Co. Pvt. Ltd. (2015) 279 CTR 185 / 124 DTR 17 / 235 Taxman 135 / (2016) 383 ITR 9 (SC)
CIT v. M.R.G. Plastic Technologies & Ors. (2015) 279 CTR 185 / 124 DTR 17 / (2016) 383 ITR 9 (SC)

S.234B : Advance tax – Interest – Waiver or reduction – Circular – Deduction restored in appeal on basis of order passed by High Court – Benefit of circular available only when a decision is of High Court within whose jurisdiction assessee assessable or if Supreme Court declares law – Decision of Single Judge was set aside. [S. 234C] 2250
Exemption notifications and Board circulars would bind the Revenue authorities to the fullest extent but those notifications and circulars have to be strictly construed. Paragraph

2(c) of order F. No. 400/234/95 IT(B), dated January 30, 1997, issued under section 119(2)(a) of the Income-tax Act, 1961, as modified by order F. No. 400/129/2002-IT(B), dated June 26, 2006, indicates that where any income was not chargeable to income-tax in the case of an assessee on the basis of any order passed by the High Court within whose jurisdiction he is assessable to income-tax, and as a result he did not pay income-tax in relation to such income in any previous year and, subsequently, in consequence of any retrospective amendment of law or the decision of the Supreme Court, or, as the case may be, a decision of a Larger Bench of the jurisdictional High Court in any assessment or reassessment proceedings the advance tax paid by the assessee during such financial year is found to be less than the amount of advance tax payable on his current income and the assessee is chargeable to interest under section 234B or section 234C, If the Chief Commissioner/Director General is satisfied that this is a fit case for reduction or waiver of such interest, he can exercise his power and grant the relief to the assessee. As is clear from the clause, if any order is passed on the basis of any order passed by the High Court within whose jurisdiction the assessee is not assessable to income-tax, then the benefit of the circular is not available to the assessee. The circular is carefully worded making it clear that it is only when in terms of a judgment of the High Court within whose jurisdiction the assessee is assessable it is not liable to pay tax or if the Supreme Court declares the law, it is the law for the whole country that the assessee would be entitled to have such benefit. It is only where the decision of the High Court within whose jurisdiction the assessee is assessable is reversed by the Supreme Court or if the Supreme Court lays down the law in a case arising from any jurisdiction in the entire country, that the assessee would be entitled to the benefit.

Held accordingly, that the single judge was not justified in extending the benefit of the circular when it was not applicable to the case of assessee. (AY. 2001-02)

CCIT v. UB Global Corporation Ltd. (2015) 378 ITR 461 (Karn.)(HC)

Editorial: Order of the Single Judge in UB Global Corporation Ltd. v. Chief CIT [2013] 355 ITR 87 (Karn.)(HC) was set aside.

2251 **S.234B : Interest – Advance tax – Computation sheet in ITNS 150 is part and parcel of assessment order – Levy of interest was held to be justified. [S. 143(1), 234C]**

Allowing the appeal of Revenue the Court held that assessed tax is on the total income determined u/s. 143(1) or on regular assessment and not as computed by the assessee. While paying the advance tax, shall be treated as the basis for the purpose of payment of interest on advance tax paid short. It is further held that both the provisions are in the mandatory terms and would apply automatically. Further computation sheet in ITNS 150 is part and parcel of assessment order and as such charging of interest is legal and valid. (AY.1996-97)

CIT v. Natraj Engineer (P) Ltd. (2015) 128 DTR 204 / (2016) 66 taxmann.com 48/ 286 CTR 103 / (Pat.)(HC)

2252 **S.234B : Interest – Advance tax – Book profit – Liable to pay interest [S. 115JA]**

Allowing the appeal of Revenue the Court held that in view of decision in *Jt. CIT v. Rolta India Ltd. [2011] 330 ITR 470 (SC)*, interest under sections 234B and 234C shall be payable on failure to pay advance tax in respect of tax payable under section 115JA. (AY. 1997-98)

CIT v. Salgaonkar Mining Industries (P.) Ltd. (2015) 235 Taxman 96 (Bom.)(HC)

S.234B : Interest – Advance tax – Explanation with retrospective effect – Interest cannot be levied. 2253

Dismissing the appeal of Revenue the Court held that where assessee computed book profit as per prevailing law, no interest under section 234B could be levied consequent to inclusion of various items in computing book profit as per Explanation to section 115JB which has been brought on statute by Finance Act, 2008 with retrospective effect from 1-4-2001. (AY. 2006-07)

CIT v. JSW Energy Ltd. (2015) 379 ITR 36 / 234 Taxman 133 (Bom.)(HC)

S.234B : Interest – Advance tax – Quantum is deleted interest is consequential. 2254

Where quantum addition in respect of which interest under section 234B was charged had already been deleted and matter of quantum addition had attained finality, interest under section 234B was not chargeable since issue of charging of interest under section 234B was consequential to quantum addition.

CIT v. State Bank of Patiala (2015) 232 Taxman 100 (P&H)(HC)

S.234B : Interest – Advance tax – Settlement Commission – Interest would be computed up to date of admission of application by Settlement Commission under section 245D(1) and not up to date of order of Settlement Commission under section 245D(4).[S.245D(1), 245D(4)] 2255

Application was filed before Settlement Commission and order was passed. Question arose as to what would be terminal point of period for which interest under section 234B would be levied. Allowing the petition the Court held that interest under section 234B would be computed up to date of admission of application by Settlement Commission under section 245D(1) and not up to date of order of Settlement Commission under section 245D(4).

G. M. Foods v. IT&WT SC (2015) 231 Taxman 793 (Cal.)(HC)

S.234B : Interest – Advance tax – Interest cannot be waived when the Assessee was at fault for not declaring its full taxable income and addition was sustained by the appellate forum.[S. 148, 234B, 220(2)] 2256

Assessee did not fully declare its taxable income in its original return of income as well return filed pursuant to notice issued under section 148. An addition representing the difference between the declared cost of construction of hotel building as per books and as per the Department Valuation Officer, was made by the AO. Interest u/s. 234A, 234B and 220(2) was also levied. The Petitioner assessee applied for waiver of interest. It was held that interest cannot be waived as the addition sustained by the appellate forum was the income on which the assessee ought to have paid tax at the very outset. Levy of interest was compensatory in nature and was meant to compensate the Department for the delay in getting the due tax. The Chief CIT has taken into account the relevant criteria prescribed in the Board orders issued on the subject, and has correctly applied the yardstick for determining whether the assessee was entitled for a waiver of the interest. (AY. 2005-06)

Deliza Residency v. CCIT (2015) 116 DTR 180 (Ker.)(HC)

2257 **S.234B : Interest – Advance tax – Interest was held to be leviable though the same was not charged in the regular assessment. [S.143(3), 154]**

Income of assessee in original assessment was determined at nil and, therefore, no interest was charged under section 234B. Later, assessee's income was modified on account of change in quantum of unabsorbed depreciation and business loss and, accordingly, Assessing Officer charged interest under section 234B. Court held that interest was rightly charged under section 234B(4) despite fact that no interest had been levied under section 234B(1) at time of framing regular assessment. (AY. 1996-97)

AIMS Oxygen Ltd. v. Addl.CIT (2015) 230 Taxman 300 (Guj.)(HC)

2258 **S.234B : Interest – Advance tax – Book profit-liable to pay interest. [S. 115JA, 234C]**

Assessee was liable to pay interest under sections 234B and 234C in respect of tax determined on basis of book profit under sections 115JA. (AY. 1998-99)

Jt. CIT v. Sumit Industries Ltd. (2015) 229 Taxman 369 (Guj.)(HC)

2259 **S.234B : Interest – Advance tax – Non-resident – Since the assessees were non-resident companies entire tax was to be deducted at source on payments made by the payee to it and there was no question of payment of advance tax by the assessee's. Therefore, it would not be permissible for the Revenue to charge any interest under section 234B to the assessee. [S. 195, 209]**

The assessees, non-resident companies, were manufacturing equipment relating to oil and gas, energy, transportation and aviation for supply to customers in India. After a survey under section 133A at their liaison office, reassessment proceedings were initiated against the assessees. The assessees filed nil returns of income and thereafter, a final assessment order was passed wherein the AO held that the services provided by the assessee are taxable in India. The AO further levied interest u/s. 234B of the Act. The CIT(A) deleted the interest under sec. 234B. The Tribunal upheld the order of the CIT(A).

On appeal the Court held that the implication of an absolute obligation upon the payer to deduct tax at source under section 195(1) is that it becomes the responsibility of the payer to determine the amount it ought to deduct from the remittance to be paid to the assessee, If an assessee files nil returns at the stage of assessment, and maintains that it is not liable to tax in India, the payer is obliged to apply to the AO to determine what portion, if any, of its remittance to the assessee is liable to be deducted at source towards tax. The view taken by the Tribunal was correct. The primary liability of deducting tax (for the period concerned, since the law has undergone a change after the Finance Act, 2012) is that of the payer.

DIT (E) v. GE Packaged Power Inc. (2015) 373 ITR 65 / 115 DTR 70 / 275 CTR 20 / 230 Taxman 653 (Delhi)(HC)

DIT v. GE Jenbacher GmbH & Co. OHG (Delhi)(HC) www.itatonline.org.

DIT v. GE Nuov Pignones P.A. (Delhi)(HC) www.itatonline.org.

DIT v. GE Engine Services Distribution LLC www.itatonline.org

DIT v. GE Energy Parts Inc; www.itatonline.org

DIT v. GE Aircraft Engine Services Limited www.itatonline.org

DIT v. GE Malaysia SDN BHD www.itatonline.org

DIT v. GE Japan Ltd www.itatonline.org

S.234B : Advance tax – Interest – Liable to pay interest where the assessment is done on book profit. [S. 115JB, 234C] 2260

Dismissing the appeal of assessee the Tribunal held that the interest under sections 234B and 234C shall be payable on failure to pay advance tax in respect of tax payable under section 115JB. (AY. 2009-10)

Binani Cement Ltd. v. Dy. CIT (2015) 68 SOT 190 (URO)(Kol.)(Trib.)

S.234B : Interest – Advance Tax – Not committing any default in payment of advance tax – Interest cannot be imposed under section 234B. 2261

Held that where the assessee has not committed any default in payment of advance tax and there was no liability to pay interest under section 234B. (AY. 1998-99 to 2000-01)

Flag Telecom Group Ltd. v. Dy. CIT (2015) 153 ITD 702 / 38 ITR 665 / 119 DTR 115 / 69 SOT 679 / 170 TTJ 1 (Mum.)(Trib.)

S.234B : Advance tax – Interest – Failure by payer to deduct tax at source – Interest cannot be imposed on assessee. [S. 234C] 2262

Tribunal held that since the assessee was a non-resident and tax was to be deducted at source by then Indian company interest was not chargeable under sections 234B and 234C of the Act. (AY. 2008-09)

Fugro Geoteam AS v. Add. CIT (IT) (2015) 37 ITR 46 (Delhi)(Trib.)

S.234B : Advance tax – Interest – Assessee claiming to adjust advance tax payable out of cash seized – Question settled by High Court – Special leave petition pending before Supreme Court – AO is bound to follow decision of High Court. 2263

During the course of search conducted at the premises of the assessee a certain amount of cash was seized and the AO charged interest under section 234B of the Act, refusing to allow credit for the amount seized. He also refused to follow the judgment of the Punjab and Haryana High Court on the ground that the Department had filed a special leave petition against the decision. The CIT(A) held that the fact that the Department had filed a special leave petition against the decision of the High Court did not mean that the said decision would not be law of land till confirmed by the Supreme Court and therefore the AO was to accept the application of the assessee to reduce the interest under section 234B of the Act. On appeal by the Department.

Held, dismissing the appeal, that it was not in dispute that the assessee made a request for adjustment of cash seized towards advance tax installments. The issue was settled by the Punjab and Haryana High Court in favour of the assessee in the case of *CIT v. Arun Kapoor [2011] 334 ITR 351 (P & H)*. The judgment of the High Court merely could not be disregarded merely because the special leave petition of the Department was pending before the Supreme Court. Therefore, the AO was bound to follow the decision of the High Court and there was no infirmity in the order of the CIT(A). (AY. 2008-09)

ACIT v. Hans Raj Gandhi (2015) 37 ITR 418 (Chandigarh)(Trib.)

Section 234C : Interest for deferment of advance tax.

2264 **S.234C : Interest – Deferment of advance tax – Waiver of interest – Case which was not falling under such notified classes, would not be entitled to waiver of interest. [S. 119, 234A, 234B]**
Assessee filed petition seeking waiver of interest under section 234C on basis of Notification dated 26-6-2006 issued by CBDT under section 119(2)(a) which was dismissed by the Commissioner. On writ dismissing the petition the Court held that Income-tax authorities are authorised to waive off interest under sections 234A, 234B and 234C only for such classes of income and cases for which general or special orders have been issued by CBDT, since assessee's case was not falling under such notified classes, he would not be entitled to waiver of interest under section 234C. (AY. 1990-91)
Fertilizers & Chemicals Travancore Ltd. v. Dy. CIT (2015) 377 ITR 591 /233 Taxman 29 (Ker.)(HC)

2265 **S. 234C : Advance tax – Assessed income was below the returned income – Not liable to pay interest**
Assessee is not liable to interest on returned income when the assessed income was below returned income. (AY. 2006-07)
Abhishekh Cotspin Mills Ltd. v. Asst. CIT (2015) 41 ITR 293 (2016) 70 SOT 180 (Pune) (Trib.)

Section 234D : Interest on excess refund.

2266 **S.234D : Interest on excess refund – Section did not operate retrospectively – Liable to pay interest.**
Where section 234D was in force on date of assessment and did not operate retrospectively, assessee would be required to pay interest on excess refund from date on which section 234D came into force.
CIT v. Avery Cycle Inds. Ltd. (2015) 231 Taxman 814 (P&H)(HC)

2267 **S.234D : Interest on excess refund – Refund granted prior to 1-6-2003 but proceedings for assessment completed after 1-6-2003.**
Tribunal was not justified in deleting interest leviable under section 234D on the excess refund paid to the company. (AY. 2003-04)
CIT v. Colgate Palmolive (I) Ltd. (2015) 370 ITR 728 (Bom.)(HC)

Section 234E : Fee for default in furnishing statements.

2268 **S.234E : Fee – Default in furnishing the statements – Provisions of section 234E are neither *ultra vires* nor unconstitutional. [S. 200A]**
The assessee filed a writ petition challenging vires of section 234E dismissing the petition the Court held that provisions of section 234E are neither *ultra vires* nor unconstitutional. Petition was dismissed. (AY. 2012-13)
Amrit Lal Mangal (Dr.) v. UOI (2015) 235 Taxman 410 / (2016) 131 DTR 387 / 284 CTR 180 (P&H)(HC)

S.234E : Fee – Default in furnishing the statements – Constitutional validity – Delay in furnishing TDS statements – Levy of fee was held to be valid. [Constitution of India, Art. 226] 2269

Fee for default in furnishing TDS statements was levied upon the petitioner under section 234E of the Act. The petitioner challenged the constitutional validity of section 234E contending that it was *ultra vires* of Constitution of India since levy of 'fee' was regarded as a consideration for services rendered and in the said case the Government was not providing any service to the deductors and as such levy of fee under section 234E invalid and thus bad in law. It is held that if the assessee does not furnish the return under section 220A, it would result in perennial problems and financial burden to the Government namely on account of late payment of refund interest and 234E is levied to regularize the said late filing. Therefore, the impugned section i.e., 234E is *intra vires* of the Constitution since it does not suffer any vices for being declared to be *ultra vires* of the Constitution and hence no merits given to these writ petitions.

Lakshminirman Bangalore (P.) Ltd. v. DCIT (2015) 124 DTR 49 / 234 Taxman 275 / 279 CTR 245 (Karn.)(HC)

S.234E : Fee – Default in furnishing the statements – Deduction at source – Constitutional validity – The late filing of TDS returns by the deductor causes inconvenience to everyone and S. 234E levies a fee to regularize the said late filing. The fee is not in the guise of a tax nor is it onerous. The levy is constitutionally valid. [S. 200(3), 206C(3), Article 14, 226, 227] 2270

Dismissing the petition on constitutional validity of section 234E, the court held that late filing of TDS returns by the deductor causes inconvenience to everyone and S. 234E levies a fee to regularize the said late filing. The fee is not in the guise of a tax nor is it onerous therefore the levy is constitutionally valid.

Rashimikant Kundalia v. UOI (2015) 373 ITR 268 / 275 CTR 138 / 229 taxman 596 (Bom.) (HC)

S.234E : Fee – Deduction at source – Default in furnishing the statements – Prior to the amendment to S. 200A w.e.f. 1-6-2015, the fee for default in filing TDS statements cannot be recovered from the assessee – Deductor while processing the S. 200A statement. However, the AO is entitled to pass a separate order u/s. 234E to levy the fee within the limitation period. [S.200A, IPC S. 396, 408] 2271

According to s. 234E the assessee is liable to pay fee for the delay in delivery of the statement with regard to TDS and the assessee shall pay the fee as provided u/s. 234E(1) before delivery of the statement u/s. 200(3). Pursuant to the amendment of s. 200A by the Finance Act, 2015, after June 1, 2015, if the assessee fails to pay the fee for the periods of delay, then the assessing authority has all the powers to levy fee while processing the statement u/s. 200A by making adjustment. Prior to June 1, 2015, the A.O. had authority to pass an order separately levying fee u/s. 234E of the Act, but not to levy a fee while processing the statement of tax deducted at source. Tribunal held that, the AO exceeded his jurisdiction in levying fee u/s. 234E while processing the statement and making adjustment u/s. 200A for the A.Y. 2013-14. It was open to the AO to pass a

separate order u/s. 234E of the Act levying fee, provided the limitation for such a levy did not expire. (AY. 2013-14)
G.Indhrani (Smt) v. Dy. CIT (2015) 41 ITR 439 / 172 TTJ 239 (Chennai)(Trib.)
Rajaguru Spinning Mills Ltd. v. Dy. CIT (2015) 41 ITR 439 (Chennai)(Trib.)
A. Dhakshinamurthy v. Dy. CIT (2015) 41 ITR 439 (Chennai)(Trib.)
Padma Textiles v. Dy. CIT (2015) 41 ITR 439 (Chennai)(Trib.)
Murthy Lungi Company v. Dy. CIT (2015) 41 ITR 439 (Chennai)(Trib.)

2272 **S.234E : Fee – Default in furnishing the statements – Prior to the amendment to s. 200A w.e.f. 1-6-2015, the fee for default in filing TDS statements cannot be recovered from the assessee-deductor. [S.200A]**
Prior to the amendment to S. 200A w.e.f. 1-6-2015, the fee for default in filing TDS statements cannot be recovered from the assessee, i.e. deductor. (AY. 2013-14)
Sibia Healthcare Pvt. Ltd. v. DCIT (2015) 63 taxman.com 333 (Asr.)(Trib.); www.itatonline.org

Section 237 : Refunds.

2273 **S.237 : Refunds – Return filed was not processed – Department was to be directed to refund amount paid by assessee in excess – Since assessee did not pursue his claim timely, revenue would not be liable to pay any interest on said amount. [S.139, 245]**
Assessee had effected payment of advance tax in respect of a receipt that was not taxable in his hands. Department accepted said payment of tax without demur but Assessing Officer did not act upon return filed by assessee claiming refund of excess tax paid. Assessee filed writ petition. Court held that assessee could not have resorted procedure under sections 237 to 245 since there was no assessment and, consequently, no tax paid based on an assessment, however the department was to be directed to refund amount paid by assessee in excess. Since assessee did not pursue his claim timely, revenue would not be liable to pay any interest on said amount. (AY. 2000-01)
C. Padmakumar v. Dy. CIT (2015) 231 Taxman 410 / 279 CTR 522 / 122 DTR 435 (Ker.) (HC)

Section 239 : Form of claim for refund and limitation.

2274 **S.239 : Form of claim for refund and limitation – Advance tax – Delay in filing claim – Condonation of delay – Genuine hardship to assessee to be examined – Order rejecting application on merits – Not proper exercise of power – Matter remanded. [Ss. 119(2)(b), 148]**
The assessee claimed refund of advance tax paid in relation to the assessment years 1996-97 and 1997-98. The claim for refund was rejected on the ground that the returns were filed after the due dates for both assessment years and the claim for refund could not be entertained. The assessee filed applications for condonation of the delay in terms of section 119(2)(b) of the Income-tax Act, 1961 whereupon the Chief Commissioner held that the returns having been filed in response to notices issued under section 148 the assessee would not be entitled to claim refund of advance tax paid. The Chief

Commissioner also held that the assessee had not properly explained the delay. On a writ petition, the single judge set aside these orders, condoned the delay and directed the Chief Commissioner to consider the applications for refund. On appeal.
Held, that what the Chief Commissioner was required to examine was whether, to avoid genuine hardship to the assessee, it was necessary to condone the delay in making the application for refund. The order of the Chief Commissioner did not show that he had examined the applications in the manner required under section 119(2)(b). On the other hand, he had discussed the merits of the applications holding that the delay had not been properly explained and that when the returns were filed in response to notices issued under section 148, the assessee would not be entitled to claim refund of advance tax paid. Thus, such an order did not reflect a proper exercise of power under section 119(2)(b) and for that reason, the order rejecting the applications was unsustainable.
(ii) That the single judge ought to have directed reconsideration of the applications for condonation of delay instead of condoning the delay himself. Therefore, the proper consequential order to be passed was to direct reconsideration of the applications with a direction to pass fresh orders in the matter. (AY 1996-97, 1997-98)
Dy. CIT v. Vasco Sales and Marketing Corporation (2015) 377 ITR 318 (Ker.)(HC)

Section 240 : Refund on appeal, etc.

S.240 : Refund on appeal – Revised return was held to be invalid – Tax and interest paid on revised return was liable to be refunded to the assessee. [S. 4, 139(5), 148 Article 265] 2275
When revised return was held to be invalid; tax and interest paid on revised return was liable to be refunded to the assessee. (AY. 1992-93)
K. Nagesh v. ACIT (2015) 376 ITR 473 / 232 Taxman 507 / 280 CTR 62 (Karn.)(HC)

Section 244 : Interest on refund where no claim is needed.

S.244 : Interest on refund – Excess tax paid on behalf of employees by U. K. company – Interest on refund – Rate of tax – Assessee carrying on business through permanent establishment in India – Debt claim in respect of which interest was paid effectively connected with permanent establishment – DTAA-India-UK [Article 12] 2276
The assessee was indeed carrying on business through a permanent establishment in India. Paragraph (6) of Article 12 contemplates that the debt claim in respect of which interest paid is effectively connected with such permanent establishment on fixed rates. In this case, the assessee paid excess tax on behalf of its employees. The AO, after assessment, had ordered refund. So there arose a debt claim and the interest was effectively connected with the permanent establishment on fixed rates. This would be assessed as business profits and in regard to business profits, the rate of tax was 48 per cent. The order of the Assessing Officer confirmed by the Tribunal was correct.
B.J. Services Co. Middle East Ltd v. ACIT (2015) 234 Taxman 604 / (2016) 380 ITR 138 (Uttarakhand)(HC)

2277 **S.244 : Interest on refund – Return of income-deduction at source-credit for refunds – Interest on refund – Department is directed to follow directions of Delhi High Court in Court on its own motion v. CIT (2013) 352 ITR 273 (Delhi)(HC) and to be vigilant and ensure that such mistakes do not occur. Department is also directed to set up a self-auditing vigilance cell to redress taxpayers' grievances.[S. 143(3), 201, 244A, 245]**
The Petitioner filed a PIL to bring out the irregularities committed by the Income Tax Department. It was submitted that the Delhi High Court has also passed the strictures against the Income Tax Department in a similar Petition, which was filed in the Delhi High Court and which was disposed of by the order dated 14th March, 2013 (Court On Its *Own Motion v. CIT (2013) 352 ITR 273)*. The Petitioner has invited attention to the said Judgment and Order passed by the Delhi High Court and took the Court through the various alleged mistakes committed by the Income Tax Department in issuing incorrect notices under Sections 244 and 245 of the Income-tax Act, thereby seeking recovery from number of income tax assessees. He brought to the Court's notice the immense hardships caused to all these income tax assessees as a result of the alleged mistakes committed by the Income Tax Department. It is submitted that the initial returns, which were taken by the Income Tax Department, were due to a technical error, which is rectified. It was alleged that there was a bug in the computer system. According to the Petitioner, this has been done deliberately. In reply, the department submitted that the directions given by the Delhi High Court have been followed in letter and spirit. HELD by the High Court:
The Income Tax authorities shall follow the directions given by the Delhi High Court in case of *Court On Its Own Motion v. CIT (2013) 352 ITR 273* in other cities, including the city of Mumbai, in Maharashtra State. We hope and trust that the Income Tax Department will be more vigilant and ensure that such mistakes will not occur in future. We also direct the Income Tax Department to form a Vigilance Cell to ensure that there is a monitoring authority, which would monitor various policy decisions which are taken and a self auditing mechanism is required to be formulated to ensure that the income tax assessees are not made to run from pillar to post for the purpose of redressal of their grievances. (PIL No. 27 of 2014, dt. 28-8-2015)
Arun Ganesh Jodgeo v. UOI (Bom.)(HC); www.itatonline.org

Section 244A : Interest on refunds.

2278 **S.244A : Interest on refunds – Book profit – Priority first on adjustment of minimum alternate tax credit – Minimum alternate tax credit available should be allowed to be set off – Tax liability to be determined taking note of advance tax paid and tax deduction at source available – Refund not on minimum alternate tax credit received but on adjustment – Eligible for interest on refund. [S.115JA, 115JAA(4), 115JB]**
As per provisions of section 115JAA(4), tax credit should be allowed set off in a year when tax becomes payable on the total income computed in accordance with the provisions of the Act other than section 115JA or section 115JB, as the case may be. Assessee was not expected to pay the advance tax to the extent of the minimum alternate tax credit brought forward from the preceding years. Only the balance tax liability remaining, if any, after such set off, was payable by the assessee as advance tax.

If that is so, the minimum alternate tax credit that is available should be allowed to be set off and, thereafter, the tax liability has to be determined taking note of the advance tax paid and the tax deducted at source available. Priority should be given first on the adjustment of the minimum alternate tax credit. Therefore, the order of the Tribunal was in consonance with the statutory provision.(AY. 1998-99)
CIT v. Ambattur Clothing Ltd. (2015) 375 ITR 233 / 23 DTR 113 (Mad.)(HC)

S.244A : Interest on refunds – Delayed payment of interest – No amount over and above statutory interest payable to assessee – Matter remanded.[S. 154] 2279
Allowing the appeal of revenue the Court held that allowing the appeal partly, that the order of the Tribunal to the extent it directed payment of any sum over and above the interest payable under section 244A(1) to the assessee, could not be upheld. (AY. 1997-98, 1998-99)
CIT v. Indian Farmer Fertilizer Co-operative Ltd. (2015) 374 ITR 56 / 231 Taxman 233 (Delhi)(HC)

S.244A : Interest on refunds – Interest on income-tax refund received by a non-resident is not effectively connected with the PE (Permanent Establishment) either on asset test or activity test. Accordingly such interest cannot be assessed as business profits but has to be assessed as "interest" under Article 11/12-DTAA-India-France. [Art. 11, 12] 2280
The High Court had to consider whether the interest received u/s. 244A is chargeable to tax at the rate prescribed in Article 12 of DTAA between India and France. The Tribunal restored the issue of the rate at which interest is to be charged to tax on income-tax refund received under Section 244A of the Act to the Assessing Officer to be decided in the light of the Indo-France DTAA and the decision of the Special Bench of the Tribunal in the matter of *Assistant Commissioner of Income Tax v. Clough Engineering Ltd. [130 ITD 137]*. On appeal by the department HELD dismissing the appeal:
The decision of the Special Bench in Clough Engineering 130 ITD 137 had been followed by the Tribunal in *M/s. DHL Operations B.V., The Netherlands v. Dy. Director of Income Tax]*. The issue before the Tribunal was the rate of tax on which Income tax refund is to be taxed i.e. on the basis of the Articles of DTAA or under the Act. The Tribunal on examination of the DTAA in the above case concluded that interest on income tax refund is not effectively connected with the PE (Permanent Establishment) either on asset test or activity test. Therefore, taxable under the Article 11(2) of Indo Netherlands tax treaty. The Revenue carried the aforesaid decision of M/s. DHL Operations B.V. (supra) in appeal to this Court, being Income Tax Appeal No.431 of 2012. This Court by order dated 17th July, 2014 refused to entertain the appeal. In the circumstances no fault can be found with the impugned order of the Tribunal in restoring the issue to the Assessing Officer to determine / adopt the rate of tax on refund in the light of the relevant clauses of Indo-France DTAA and the decision of Special Bench in Clough Engineering. (AY. 1997-98)
DIT v. Credit Agricole Indosuez (No.2) (2015) 377 ITR 102 / 280 CTR 491 / 126 DTR 156 (Bom.)(HC)

2281 **S.244A : Interest on refunds – Delay in granting refund – Entitled interest but not entitled further compensation by way of interest on such interest. [S. 214(2), 243(1)(b)]**
Allowing the Writ the Court held that in case of delay in granting refund, assessee would be entitled to compensation and interest can be awarded by way of compensation, but assessee would not be entitled to further compensation by way of interest on such interest, which is awarded as compensation.
Gujarat Flourochemicals Ltd. v. CIT (2015) 377 ITR 307 / 230 Taxman 298 / 118 DTR 317 (Guj.)(HC)

2282 **S.244A : Interest on refunds – Excess tax paid on self-assessment – Interest is payable on refund of such excess. [S.140A]**
The assessee claimed that interest u/s. 244A was due to it on refund arising out of excess self-assessment tax paid by it to the Revenue. It was held that interest u/s. 244A(1)(a) would not apply to refund arising out of excess payment of self-assessment tax. Interest u/s. 244A(1)(b) would be liable only if tax is paid pursuant to a demand notice and not if paid voluntarily. There cannot be a general rule for payment of interest. Interest is payable if excess amount is paid due to erroneous assessment by the Revenue and not if assessee is to be blamed for miscalculation. (AY. 2006-07)
CIT v. Engineers India Ltd. (2015) 373 ITR 377 / 116 DTR 242 / 232 Taxman 287 / 275 CTR 354 (Delhi)(HC)

2283 **S.244A : Interest on refunds – Interest on interest is not allowable.**
Assessee cannot claim interest on interest on amount that are due to him by way of refund. (AY. 1976-77)
Joseph Korah v. ITO (2015) 229 Taxman 331 / 122 DTR 389 (Ker.)(HC)

2284 **S.244A : Interest on refunds – Self-assessment – Interest – Refund of tax paid on self-assessment – Interest payable on such refund. [S.140A, 154]**
It cannot be held that the assessee is only entitled to interest under section 244A(1)(b) on tax deducted at source or advance tax but not on self-assessment tax paid under section 140A of the Act which was found to be paid in excess. The assessee shall be entitled to interest under section 244A(1)(b) on the refund of self-assessment tax as well) (AY. 1989-90)
CIT v. Punjab Chemical and Crop Protection Ltd. (2015) 370 ITR 481 / 231 Taxman 312/ 122 DTR 252 / 279 CTR 171 (P&H)(HC)

2285 **S.244A : Interest on refunds – Interest – Only where delay is on part of Department – Failure by assessee to furnish tax deduction at source certificates – Refund directed after filing of affidavit and indemnity bond with particulars by assessee – No interest was payable.**
The occasion to pay interest would arise only if the delay to make the refund was on the part of the Department. If the delay in refund is attributable to the assessee, wholly or in part, the period of such delay shall be excluded from the period for which the interest is payable.

The assessee was an industrial undertaking involved in the business of conversion of steel scrap into ingots. From the payments due to the assessee, its customers had deducted tax at source, being ₹ 3,52,721 in the financial years 1991-92 and 1992-93. However, the relevant certificates were not issued to the assessee. The assessee made a claim for refund of the amount to the extent of tax deduction at source. The refund was made on June 12, 2001, for ₹ 3,52,721. The assessee submitted representations on June 24, 2001, and October 23, 2001, with a request to pay interest under section 244A(2) on the amount from the due date till the date of payment. The claim was rejected. On a writ petition :

Held, dismissing the petition, that the tax deduction at source from the assessee was, with reference to about 10 bills, spread over one year. The record did not disclose the nature of steps taken by the assessee for obtaining the tax deduction at source certificates, either from the concerned agencies or even from the Department. It was only in the year 2001, that the assessee filed an affidavit and an indemnity bond, furnishing particulars. Soon thereafter, refund was directed. It was not the case of the assessee that even after it had submitted the tax deduction at source certificates or the indemnity bond, there was any delay on the part of the Department in making the refund. The case was covered by sub-section (2) of section 244A.

L. Madanlal Steels Ltd. v. Chief CIT (2015) 370 ITR 205 / 231 Taxman 413 (T&AP)(HC)

S.244A : Interest on refunds – Self-assessment tax – From the payment till the date of refund. [Ss.140A, 264] 2286

Assessee filed petition before the Commissioner under section 264 for grant of interest on refund of self assessment tax paid by the assessee. The petition was rejected by the Commissioner. On writ, allowing the claim of assessee, the Court directed the revenue to pay interest from the date of payment on self assessment tax i.e. 31-8-1994 till the date of refund i.e. 24-10-1998 and pay the same within six weeks. (AY. 1994-95)

Stock Holding Corporation of India Ltd..v. N.C. Tewari (2015) 373 ITR 282 / 113 DTR 297 / 229 Taxman 512 / 274 CTR 16 (Bom.)(HC)

S.244A : Interest on refunds – Interest on refund of tax is not covered by definition of 'interest' mentioned under Article 12(4) of India, therefore, Assessing Officer is justified in imposing TDS at higher rate while granting such interest to assessee – DTAA-India-Italy. [Ss. 9(1)(i), 195, Article 12(4)] 2287

Assessee an Italy based company, was engaged in the business of designing, building and supplying full range of plant solutions on different types of packages such as turnkey, engineering and individual components worldwide. Assessee filed its return of income in India. In assessment Proceedings, assessee was found eligible for refund of tax. Assessing Officer deducted tax at source u/s. 195(1) at rate of 42.02 per cent on amount of refund including interest u/s. 244A. In appellate proceedings, assessee's plea was that in terms of Article 12 of India-Italy DTAA, rate of tax deducted at source on interest on refund could not exceed 15 per cent. It was held that since definition of interest as mentioned under Article 12(4) of India-Italy DTAA did not cover interest on refund of tax, plea raised by assessee was to be rejected. Consequently, impugned order passed by Assessing Officer was upheld. (AY. 2000-01, 2002-03)

Ansaldo Energia SPA v. Dy. DIT(IT) (2015) 155 ITD 899 (Chennai)(Trib.)

2288 **S.244A : Interest on refunds – Self-assessment tax – Entitled to refund.**
Assessee paid self-assessment tax, it was entitled to interest u/s. 244A from date of payment of tax on self-assessment to date of refund of amount. (AY. 2006-07)
Abhishekh Cotspin Mills Ltd. v. ACIT (2015) 41 ITR 293 / *(2016) 70 SOT 180 (Pune)(Trib.)*

2289 **S.244A : Refund – Interest on refund – Powers of Assessing Officer and Commissioner (Appeals) – No power to exclude period for purpose of grant of interest under section 244A(1) – Chief Commissioner or Commissioner alone to decide – Matter remanded.**
For the assessment year 1995-96, the Commissioner (Appeals) granted tax benefit for amalgamation to the assessee and subsequently rectified his order and granted the tax benefit for the assessment year 1996-97. The Tribunal held that the benefit of tax credit was to be allowed to the assessee for the assessment year 1995-96 itself. While giving effect to the order of the Tribunal, the Assessing Officer denied the claim of the assessee to interest under section 244A of the Income-tax Act, 1961. The Commissioner (Appeals) confirmed this. On appeal:
Held, that under the express provisions of section 244A(2) of the Act, the question of exclusion of period for the purpose of grant of interest under section 244A(1) of the Act was necessarily and mandatorily to be decided either by the Chief Commissioner or Commissioner. Neither the Assessing Officer nor the Commissioner (Appeals) were right in ordering exclusion of the period for computation of interest on refund under section 244A(1) of the Act as it was outside the ambit of their powers. The matter was to be restored to the Assessing Officer to refer the issue regarding exclusion of period in section 244A(2) of the Act either to the Chief Commissioner or Commissioner for determination. Matter remanded. (AY. 1995-96)
MMTC Ltd. v. ACIT (2015) 39 ITR 36 (Delhi)(Trib.)

Section 245 : Set off of refunds against tax remaining payable.

2290 **S.245 : Set off of refunds against tax remaining payable – Revenue must give an opportunity of hearing – Matter remanded. [S.194A(1), 237, 240]**
Dismissing the appeal of revenue the Court held that where revenue seeks to set off refund due to assessee against tax demand pending for another assessment year under section 245, it must give an opportunity of hearing to assessee. Order of single judge was modified accordingly. (AY.2014-15)
CIT v. State Bank of India (2015) 235 Taxman 479 / *(2016) 283 CTR 167* / 384 ITR 227 /130 DTR 288 *(Uttarakhand)(HC)*

2291 **S.245 : Set off of refunds against tax remaining payable – Intimation regarding adjustment quashed.**
Affirming the decision of the single judge, Court held that, the single judge had rightly opined that the adjustment was not tenable in the peculiar facts and circumstances of the case. That apart, the fact was that notwithstanding the fact that the assessee was entitled to get the refund even as early as in January, 2014, pertaining to the four assessment years, the refunds were not processed and the matter was pending. The court to prevent an aberration of justice and to promote substantial cause of

justice, quashed the intimation dated March 24, 2014, under section 245 in respect of the assessment year 2008-09 (against the dues of the assessment year 2011-12), the intimation dated April 22, 2014, for adjustment of refund in respect of the assessment years 2009-10 and 2010-11 (against the dues of the assessment year 2011-12) and the intimation dated March 24, 2014, for adjustment of the refund for the assessment year 2012-13 (against the dues of the assessment year 2011-12). It was made clear that the court had not dealt with the merits of the matter pertaining to the stay application against recovery of taxes, etc. (AY. 2008-09 to 2012-13).
ACIT v. Sundaram Asset Management Co. Ltd. (2015) 378 ITR 500 / 235 Taxman 40 / 122 DTR 241 (Mad.)(HC)

S.245 : Set off of refunds against tax remaining payable – Prior intimation for proposed action of adjustment of tax due out of refund due is mandatory – When stay is granted for demand, refunds of other years cannot be adjusted against such demand. 2292
Allowing the petition the Court held that giving of prior intimation under section 245 of proposed action of adjustment of tax due out of refund due is mandatory and when a party raises objection such as a stay of demand, Supreme Court's decision covering demand which is still a subject matter of a pending appeal, etc., which would warrant not adjusting refund against pending demand in response to prior intimation, officer of revenue exercising powers under section 245 must apply his mind to it and must record reason why objection is not sustainable and also communicate it to party before or at time of adjusting refund. Where Assessing Officer proceeded with adjustment as proposed in prior notice without taking notice of assessee's objections, entire object of giving prior intimation as provided under Act had been rendered superfluous and adjustment of refund against demands due as well as consequent demand for interest was unsustainable. Similarly when stay is in force, refund of earlier years cannot be adjusted against the demand of subsequent year where the stay is in force by higher authority. (AY.2007-08, 2008-09)
Hindustan Unilever Ltd. v. Dy. CIT (2015) 377 ITR 281 / 233 Taxman 353 / 279 CTR 71 (Bom.)(HC)

S.245 : Set off of refunds against tax remaining payable – Penalty – Adjustment made without giving an opportunity of hearing was set aside. 2293
Revenue sought to adjust refund of certain sum of assessee against outstanding penalty demand. Where intimation under section 245 was issued and adjustment was made simultaneously on same date and no opportunity of hearing was given to assessee before adjustment was made, impugned adjustment order was to be set aside. (AY. 2013-14)
Oriental Insurance Co. Ltd. v. Dy. CIT (2015) 229 Taxman 521 (Delhi)(HC)

Section 245A : Definitions.

S.245A : Settlement Commission – Powers – Right to information – Access to information with respect to disposal and pendency of matters before Settlement Commission – Officers designated under Right to Information Act passing orders – Settlement Commission has no power by an administrative order to declare such 2294

orders as being void *ab-initio* – Remedy is to file appeal before Central Information Commission. [Right to Information Act, 2005, S. 18(1)(f)]

The petitioner filed an application under the Right to Information Act, 2005, seeking information with respect to disposal and pendency of matters before the Settlement Commission. The Central Public Information Officer furnished certain information to the petitioner. However, certain other information as sought in the application was denied. The petitioner preferred an appeal before the First Appellate Authority which was partly allowed. The Settlement Commission by an administrative order declared the orders passed by the two officers designated under the Right to Information Act, 2005, as being void *ab initio*. On a writ petition:

Held, allowing the petition, (i) that the orders passed by the Central Public Information Officer and the First Appellate Authority could not be nullified by an administrative order. Even if an order is a nullity, it would continue to be effective unless set aside by a competent body or court. The Chairman of the Settlement Commission is not authorised under the RTI Act to interfere with the orders passed under the RTI Act.

(ii) That the Central Information Commission would have the power to enquire into any complaint in respect of matters relating to access of information under the 2005 Act. However, the Chairman of the Settlement Commission had acted without authority of law in nullifying orders passed under the RTI Act. Thus, interference with the order was warranted in the writ proceedings.

R.K. Jain v. Chairman, ITSC (2015) 370 ITR 1 (Delhi)(HC)

Section 245C : Application for settlement of cases.

2295 **S.245C : Settlement Commission – Related parties – Dismissal of application was held to be justified. [S.245D(1)]**

Settlement Commission, decided batch of 25 settlement applications filed u/s. 245C (1). Out of 25 applications, 12 applications were admitted and allowed to be proceeded with u/s. 245D(1) and 13 applications were held to be not fit for admission as having been filed by persons who were not covered in definition of related parties as per Explanation to S. 245C(1) for purposes of clause (ia) of Proviso to sub-section (1) and had been dismissed. Matter arose for consideration was if Petitioner. Assessee in each Petitions was related party of respective specified person u/s. 245C(1)(ia) of it Act. On writ petition in HC, HC dismissed the Petition and held that under clause (a)(v) of S. 245C, only if director of Applicant company had substantial interest in specified person (company), then, applicant company, its directors and relatives of its directors qualify as related parties. Company would not qualify as related party merely because any relative of one of its directors had substantial interest in specified person. Under clause (a)(vi), Applicant would qualify as related party, if specified person (company) or any of its directors or any relative of any of its directors had substantial interest in Applicant. Holding of substantial interest in specified person, by director of Applicant, was necessary qualifying condition. If legislature had intended to enlarge ambit of qualifying condition by including relative of director it would have specifically provided so. Court could not enlarge ambit of the qualifying condition and read into it what was

not so specifically provided by legislature. For Petitioner to qualify as related party, one of its directors must hold substantial interest in specified person 'Y'. Admittedly, that was not case and said condition was not satisfied. None of directors of Petitioner hold substantial interest in 'Y'. Merely because relative of one of directors of Petitioner was stated to be holding a substantial interest in specified person would be of no avail.
Rockland Hotels Ltd. v. ITST (2015) 128 DTR 121 / (2016) 380 ITR 197 / 282 CTR 142 / 236 Taxman 160 (Delhi)(HC)

S.245C : Settlement Commission – Settlement of cases – Bogus purchases – Assessment was pending – Full and true disclosure – Petition of the Commissioner was rejected. [Ss. 69C, 245D(2C)] 2296

A scrutiny assessment was undertaken, in case of second respondent, i.e., assessee, showing that it had purchased materials/goods from various parties. In assessment proceedings, Assessing Officer made addition to assessee's income under section 69C taking a view that purchases made from some parties were bogus. Assessee filed an application under section 245C before Settlement Commission for assessment years in question. Settlement Commission passed an order under section 245D(2C) directing assessee's application for settlement to be proceeded with. It was found from records that at time of filing application before Settlement Commission, assessment proceedings were still pending. Moreover, Settlement Commission took a majority view that disclosure of additional income at stage at which application was brought before it appeared to be *prima facie* full and true. In aforesaid circumstances, impugned direction issued by Settlement Commission could not be interfered with. (AY. 2010-11 to 2012-13)
CIT v. ITSC (2015)375 ITR 483 / 232 Taxman 368 / 280 CTR 163 (Bom.)(HC)

S.245C : Settlement Commission – Settlement of cases – Conditions – Procedure – Application – Order of the Settlement Commission calling for report under rule 9 cannot be quashed when the CIT has not rejected application made by assessee. 2297

The assessee filed an application before the Settlement Commission post a search and seizure operation conducted in its premises. The Commission called for a report from the CIT to which the CIT responded that the assessment proceedings for a few of the years were pending before the Apex and High Courts and hence the Settlement Commission should keep the proceedings in abeyance till the disposal of the appeals before the courts. However, the Commission proceeded to issue a notice to the CIT to furnish its report under rule 9 failing which it would initiate further proceedings.
The High Court dismissed the departmental appeal and held that the Department had not raised any objection at the time of admission of the case and if need be, the department could raise the contention during the proceedings before the Commission and hence the appeal of the department to quash the Commission's communication and order was invalid. (AY. 2007-08 to 2014-15)
CIT v. Asian Natural Resources India Ltd. (2015) 117 DTR 426 / 235 Taxman 419 / (2016) 282 CTR 569 (MP)(HC)

Section 245D : Procedure on receipt of an application under section 245C

2298 **S.245D : Settlement Commission – Not paid requisite amount of taxes and interest – Application stood abated. [S. 245C, 245HA]**
Assessee filed revised settlement application and same was permitted to proceed with – Department observed that assessee had not paid requisite amount of taxes and interest on revised undisclosed income on or before specified date; hence application should be abated. On writ the assessee stated that amount which was already seized during search proceedings and adjusted prior to order under section 245D(1) should be treated as tax paid and accordingly application need not be abated. Dismissing the petition the court held that where amount had already been adjusted by department against demand made under block assessment and no amount remained to be payable, in absence of any further payment, settlement application stood abated.
Grahshilpa Construction (P) Ltd. v. ITO (2015) 234 Taxman 414 (Guj.)(HC)

2299 **S.245D : Settlement Commission – Adjustment of additional tax against refund due – Merely because the Commissioner has recorded wrongly that no refund was due to assessee, settlement proceedings could not be discontinued. [S.143(1), 154, 234B, 245C, 245D(2C)]**
Settlement Commission rejected the petition on the ground that Commissioner recorded the finding that no refund was due to the assessee. On writ allowing the petition the Court held that merely because the Commissioner has recorded wrongly that no refund was due to assessee, settlement proceedings could not be discontinued. On facts, rectification of intimation thereafter by Assessing Officer resulting in assessee being entitled to refund in relevant assessment year hence dismissal of application for settlement merely on ground of Commissioner's report was held to be not justified. Assertion of Commissioner required investigation hence the application restored to Commission for fresh disposal. (AY. 2007-08 to 2014-15)
Vascon Engineers Ltd. v. ITSC (2015) 376 ITR 360 / 235 Taxman 436 / (2016) 282 CTR 530 (Bom.)(HC)

2300 **S.245D : Settlement Commission – Full and true disclosure – Granting immunity against penalty and prosecution is held to be justified. [S.245H]**
Dismissing the petition of revenue the Court held that merely by offering additional amounts, the original declaration by the assessee became one that of not full and true for the purpose of settlement cannot be accepted hence the order of the Settlement Commission granting immunity against penalty and prosecution is held to be justified.
CIT v. K.T.P. Mohammed Mazhar (2015) 273 CTR 582 / 232 Taxman 385 / 113 DTR 344 (Ker.)(HC)

2301 **S.245D : Settlement Commission – Procedure – Application – It was not permissible for assessee to revise application offering lesser income than disclosed in the original application. [Ss.245C, 245D(2D)]**
Assessee filed application to Settlement Commission disclosing certain undisclosed income. Thereafter by a letter, he revised undisclosed income by substituting lesser income. Settlement Commission admitted application and assessee paid tax as per revised disclosure. It was not permissible for assessee to revise application under section

245C and he was to pay additional tax in terms of original application. As there was non-compliance with provisions of section 245D(2D) and, therefore, proceedings before Settlement Commission stood abated.
Pukhraj Bhabhutmal Shah v. ITO (2015) 230 Taxman 40 / 118 DTR 239 (Guj.)(HC)

S.245D : Settlement Commission – Procedure – Application – True and full disclosure – Petition of revenue was dismissed. [S.245C, 245D(4), 245HA] 2302
The revenue filed writ petition against order passed by the Settlement Commission ordering the settlement applications to be proceeded with further on the ground that the settlement applications were invalid as the assessee had not made true and full disclosure of all the material facts of its income and the manner in which the income was earned.
The assessee raised preliminary objection that entertaining said petition would result in the expiry of 18 months time-limit stipulated in section 245D(4A)(iii) which would result in abatement of settlement application. The revenue, on the other hand, argued that if writ petition was not entertained, then in proceedings under section 245D it might be contended by the assessee that the revenue had waived/given up the issue regarding 'true and full disclosure of income'. It further argued that if the Settlement Commission ultimately allowed settlement application, then the revenue would be without any remedy.
Having regard to the fact that the time-limit of 18 months stipulated in section 245D(4A)(iii) is going to expire on 30-11-2014; and that upon expiry of the said time-limit the settlement applications would abate as provided in section 245HA, this writ petition at this stage is not to be entertained. At the same time, in order to allay the apprehension of the revenue, interests of justice would be served if this writ petition is disposed of with the following clarifications:-
Disposal of this writ petition shall not come in the way of the Commissioner raising the contention at the hearing under section 245D(4) that the settlement applications do not make true and full disclosure of income and/or the manner in which the income was earned; and
In case the Settlement Commission allows the settlement applications at the hearing under section 245D(4), the operation of such order shall remain stayed for a period of 6 weeks from the date of passing of the order.
If the Settlement Commission allows the settlement applications under section 245D(4) and the Commissioner chooses to challenge such order in a fresh writ petition, he would not be estopped from challenging the finding of the Settlement Commission on all issues including the issue regarding true and full disclosure of income and the manner in which the income was earned.) (AY. 2005-06 to 2012-13)
CIT v. Income Tax Settlement Commission (2015) 230 Taxman 311 (Bom.)(HC)

S.245D(2C) : Settlement Commission – Assessee depositing tax on admitting additional income – Required amount deposited within time when application admitted – Further tax liability determined after final order satisfied – Interest for period during pendency of application before Settlement Commission – Unwarranted. [S.158BC, 220(2), 245D(1)] 2303
Consequent to search and seizure at the premises of a group, notice under section 158BC of the Act was served on the assessees. Even though they disclosed nil income,

they approached the Settlement Commission and disclosed ₹ 10 lakhs in the hands of each of the three assessees. The Settlement Commission directed the Revenue to accept the offer of additional income of ₹ 1,48,16,160 and rejected the waiver of interest. Consequently, interest under section 220(2) in terms of section 245D(2C) was directed to be recovered. While computing the amounts payable, the Assessing Officer made an addition of ₹ 13,03,211 as interest recoverable for the period between January 1, 2004, and March 26, 2010. The Commissioner (Appeals) held that section 245D(2C) could be invoked only if the assessee did not deposit the tax payable on income disclosed and admitted under section 245D(1). In the instant case, the assessee deposited ₹ 6,12,000/- within the time prescribed under section 245D(2C) on the income of ₹ 10 lakhs in terms of the order under section 245D(1). This was confirmed by the Tribunal. On appeals:
Held, dismissing the appeals, that when the application was filed before the Settlement Commission, the assessee deposited the admitted tax liability. Soon, thereafter, when the application was admitted, the amount required was deposited within the time stipulated under section 245D(6A). The further tax liability determined was payable after the final decision. The records and the materials examined by the Commissioner (Appeals) and upheld by the Tribunal disclosed that even the tax liability finally determined was satisfied. In these circumstances, the addition of interest for the period during the pendency of the application before the Settlement Commission was entirely unwarranted. (BP. 1-4-1995 to 5-10-2001)
CIT v. Govind Lal (2015) 374 ITR 591 / 126 DTR 286 (Delhi)(HC)
CIT v. Ved Prakash (2015) 374 ITR 591 / 126 DTR 286 (Delhi)(HC)
CIT v. Vishan Das (2015) 374 ITR 591 / 126 DTR 286 (Delhi)(HC)

2304 **S.245D(4) : Settlement Commission – Power – Grant immunity from prosecution and penalty – Procedure – Application – Full and True Disclosure – Pursuant to suggestion of the Settlement Commission and to put a finality to the litigation, if assessee has offered additional amounts in addition to the undisclosed income originally declared, such additional offer would not render the original disclosure dubious for the purposes of settlement – Settlement Commission did not err in granting immunity from prosecution and penalty where assessee has co-operated during the proceedings with the Settlement Commission. [S. 132, 158BC, 245H]**
A search was initiated u/s. 132 of the Act pursuant to which notices u/s. 158BC of the Act were issued. During the pendency of block assessment proceedings, the assessee filed an application before the Settlement Commission, Chennai. The Settlement Commission included the additional amounts offered by the assessee into the total income for the purposes of settlement and also granted immunity from penalty and prosecution proceedings u/s. 245H of the Act on the ground that assessee co-operated during the Settlement Commission proceedings.
The Department preferred a Writ Petition before the Kerala High Court and the Hon'ble High Court held that if the assessee, at the suggestion of the Settlement Commission, has offered "additional income" to put an end to litigation and also to forgo his claim regarding non-taxability of such amounts, the Settlement Commission would be well within its jurisdiction to include such amounts in the final amount for settlement and would also not make the application as one without full and true disclosure. For the

same reasoning, the Settlement Commission did not err in granting immunity from penalty and prosecution proceedings. (AY. 2000-01)
CIT v. Settlement Commission (IT&WT) (2014) 272 CTR 559/ (2015) 113 DTR 322(Ker.) (HC)

Section 245HA : Abatement of proceeding before Settlement Commission.

S.245HA : Settlement Commission – Provision for abatement of proceedings where no order passed by cut-off date – Discrimination likely among applicants for factors not under their control – Provisions arbitrary – To be read down so that proceedings treated as abated only where failure owing to reasons attributable to applicant – Direction to proceed with applications as if not abated where delay not attributable to applicant – Supreme Court – No interference. [Constitution of India, Article 14, 226] 2305
On petitions challenging the validity of sections 245HA(1)(iv) and (3) of the Income-tax Act, 1961, as amended by the Finance Act, 2007, the High Court found the provisions violative of Article 14 of the Constitution, but did not invalidate the provisions, and instead, read them down, in particular, the provisions of section 245HA(1)(iv), so that only where the application could not be disposed of for any reasons attributable on the part of the applicant would proceedings abate under section 245HA(1)(iv). The court directed the Settlement Commission to consider whether the proceedings had been delayed on account of reasons attributable to the applicant and if they were not, to proceed with the application as if not abated. On appeal to the Supreme Court :
Held, affirming the decision of the High Court, that the judgment of the High Court was a well-considered one and did not call for any interference.
UOI v. Star Television News Ltd. (2015) 373 ITR 528 / 231 Taxman 341 / 124 DTR 225/ 279 CTR 531 (SC)
Editorial: Decision in Star Television News Ltd. v. UOI [2009] 317 ITR 66 (Bom.) is affirmed.

Section 245I : Order of settlement to be conclusive.

S.245I : Settlement Commission – Order – Conclusive – Error of law and fact calculating penalty – Unless the order was proved to be perverse the said order cannot be challenged. [S. 245D(4), 271(1)(c), Constitution of India, Article 226] 2306
High Court by impugned order held that even if there was an error of law or fact in calculating penalty by Settlement Commission, discretion exercised by it requires no interference unless exercise of power made by Settlement Commission was perverse requiring interference under Article 226 of Constitution. Since there was no equity existence in favour of petitioner, order passed by Settlement Commission would attain finality under section 245-1. (AY. 2001-02, 2002-03)
Arjun Singh Mohan Singh (HUF) v. CIT (2014) 47 taxmann.com 295 (All.)(HC)
Editorial: SLP was dismissed (S.L.A. (C) No. 19468 of 2014 dated 4-12-2014)(AY. 2001-02 & 2002-03) Arjun Singh Mohan Singh (HUF) v. CIT (2015) 230 Taxman 273 (SC)

Section 245N : Definitions.

2307 **S.245N : Advance Rulings – Jurisdiction – General submission of allegation of tax avoidance – Capital gains – Authority ought not to have refused to entertain application – Resident company was held to be not liable to withhold tax-DTAA-India-Mauritius. [S. 45, 245Q, Art. 4, 13(4)]**

Mauritius companies purchasing shares in Indian company from company in India. In the share purchase agreement, Mauritius companies and other shareholders mentioned in agreement alienating their shares to company in India. Department making general submissions on merits and not substantiating case on basis of documents or other evidence to correlate evidence with its submissions. No finding in relation to *prima facie* finding that transaction designed for avoidance of tax in India, Authority ought not to have refused to entertain application. Resident company was held to be not liable to withhold tax.

Serco BPO P. Ltd. v. AAR (2015) 379 ITR 256 / 234 Taxman 630 / 280 CTR 1 (P&H)(HC)

Section 245O : Authority for Advance Rulings.

2308 **S.245O : Advance rulings – Where a party seeks advance ruling, endeavour of Authority should be to decide case on merits and settle issue between parties in advance and Authority should not throw out application on mere technicalities. [S. 9, 195, R. 17]**

Applicant, engaged in Telecommunication services, entered into agreement with telecom operators of Brazil to render Ring Back Tone services to customers in Brazil. It filed an application to seek advance ruling on applicability of withholding tax provisions to one-time premium paid by it to telecom operators in Brazil. Application had been admitted and heard; thereafter, Authority dismissed application on last date fixed for hearing for non-appearance of applicant. On writ the Court held that as per rule 17, Authority could not dismiss application particularly when non-appearance appeared to be for sufficient cause where a party seeks advance ruling, endeavour of Authority should be to decide case on merits and settle issue between parties in advance and Authority should not throw out application on mere technicalities.

Onmobile Global Ltd. v. Chairman, Authority for Advance Rulings (2015) 230 Taxman 608 / 124 DTR 13 / 279 CTR 518 (Karn.)(HC)

Section 245R : Procedure on receipt of application.

2309 **S.245R : Advance rulings – Procedure – Application – Deduction at source – Long term capital gain – Order was set aside as no reasoning was given – DTAA – India –Singapore. [Art. 13(4)]**

Assessee, a Mauritius based company sold equity shares of Indian company to a company located in Singapore. Singapore based company at time of paying sale consideration deducted tax at source and paid same to credit of Government of India on long-term capital gain. Assessee filed an application seeking advance ruling on question as to whether it was liable to pay capital gain tax in India in terms of Article 13(4) of

India-Mauritius DTAA. AAR declined to entertain assessee's application holding that said application was in respect of a transaction designed *prima facie* for tax avoidance in terms of section 245R(2)(iii). On writ allowing the petition the Court held that since impugned order had not given any reason as to why entire issue/transaction had been designed *prima facie* for purpose of avoiding tax, it was to be set aside and, matter was to be remanded back for *de novo* consideration. Matter remanded.
NEO Path Ltd. v. DIT (2015) 230 Taxman 554 (Bom.)(HC)

S.245R : Advance rulings – Ruling sought on questions relating to fees for technical services – Not a device to avoid tax – Income from royalty and interest declared in return and taxability conceded – DTAA-India-Belgium-Portugal – Application admitted. 2310
The applicant raised questions about the taxability of the income generated by fees for technical services relying on the Double Taxation Avoidance Agreements between India and Belgium and between India and Portugal. The Department objected to admission of the application on the ground that after filing the application, the applicant had filed a return declaring, *inter alia*, income on account of royalty and interest on which tax had been charged and, therefore, in not seeking a ruling on any question pertaining to royalty or interest, the applicant had tried to avoid payment of income-tax. The Authority ruled : That the three questions on which rulings were sought did not pertain to income on royalty or the income generated on account of earned interest. There was no statement in the application that the applicant did not have an income from royalty or from interest and the applicant conceded the taxability of the royalty and interest income. Therefore, this could not be seen as a device to avoid tax. The application was to be admitted.
Magotteaux International S.A. Belgium, in re (2015) 373 ITR 658 / (2016) 131 DTR 79 / 283 CTR 408 (AAR)

S.245R : Advance rulings – Non-resident – Assessing Officer not informed of application before Authority – Application admitted. 2311
Where the Department objected that after filing the application when the matter proceeded before the Assessing Officer on the basis of the return filed by the applicant the Assessing Officer was not informed about the applicant having filed the application before the Authority, the Authority ruled, that admittedly, the applicant was a non-resident Indian. Considering that the applicant was not an Indian taxpayer the application was admitted.
Soregam S. A., Belgium, In re (2015) 373 ITR 660 (AAR)

Section 246 : Appealable orders.

S.246 : Appeal – Commissioner (Appeals) – Common order – Assessing Officer passing common order – Assessee's right of appeal is not affected. [S. 201, 221] 2312
The Court held that the fact an appeal is provided under section 246(1)(i) from an order passed under section 201 would not by itself require the passing of a separate order under section 201 prior to the passing of an order under section 221. There is no bar in passing an order section 201 read with section 221 simultaneously. The assesss right of appeal was not affected by reason of the Assessing Officer passing a common

order under section 201 read with section 221. The assessee was still entitled to file an appeal from the orders passed under section 201 and section 221 under section 246(1)(i) and (I), respectively. The grievance of the assessee was that in view of there being a common order under section 201 and section 221 an opportunity to raise a fresh plea in the penalty proceedings which may or may not be raised during the quantum proceedings was lost. Similarly, the requirement of a written order treating a person to be an assessee in default may not be necessary when it was admitted between the parties that the assessee was in default. (AY. 1985-86, 1987-88)
Reliance Industries Ltd. v. CIT (2015) 377 ITR 74 / 279 CTR 128 / 122 DTR 353 / 233 taxmann 307 (Bom.)(HC)

Section 246A : Appealable orders before Commissioner (Appeals).

2313 **S.246A : Appeal – Commissioner (Appeals) – Competency of appeal – Agreed addition – Appeal maintainable only by aggrieved person – Assessee consenting to assessment – Subsequent penalty cancelled – Assessee was not an aggrieved person – Assessee not competent to appeal. [S.271(1)(c)]**
The assessees were co-owners of an ancestral property which they sold for a total consideration of ₹ 7,36,07,624. The cost of acquisition was taken at ₹ 2,70,000 per bigha. The Assessing Officer found that the prescribed circle rate for agricultural land, as on April 1, 1981, in the area ranged from ₹ 7,000 to 8,000 per bigha. There was no dispute that there was a communication in writing signifying the assent of the assessee to the cost being determined at ₹ 8,000 per bigha in place of ₹ 2,70,000 per bigha. According to the assessee, this was agreed to on the condition that there would be no penalty proceedings and it was for buying peace that the concession was made. However, proceedings were taken to impose penalty under section 271(1)(c). Thereupon, the assessees preferred appeals before the Commissioner (Appeals) under section 246A of the Act. There was delay in filing the appeals. The Commissioner took the view that there was no explanation for the delay and the assessees were not aggrieved persons. The Tribunal affirmed the orders of the Commissioner (Appeals). On further appeals to the High Court :
Held, dismissing the appeals, that the assessees had given in writing, their consent to the cost of the land being taken at ₹ 8,000 per bigha, as on the relevant date, for the purpose of calculation of capital gains. This was not a case which involved a concession of law. It was a case, where a pure question of fact as to what was the value of the land, was involved. It was also relevant to notice that the assessees did not choose to make available any evidence in support of their contentions. It was also important to notice that there was no dispute that, though penalty proceedings were taken, they had all ended in the penalty being cancelled. The assessees were not aggrieved persons and were not competent to appeal. The Court also observed that Section 246A of the Income-tax Act, 1961, provides a right of appeal only to a person who is aggrieved. Generally when an assessment is made on the basis of the consent of the parties, in view of the provision creating the right of appeal, namely, section 246A unless there is any grievance for the

party as such that the concession was wrongly recorded or that he was coerced into making such concession the party cannot be treated as an aggrieved person.
Deep Kukreti v. CIT (2015) 371 ITR 257 / 125 DTR 130 (Uttarakhand)(HC)
Sudhir Kukreti v. CIT (2015) 371 ITR 257 / 125 DTR 130 (Uttarakhand)(HC)

Section 249 : Form of appeal and limitation.

S.249 : Appeal – Commissioner (Appeals) – Admitted tax paid belatedly – Financial difficulties – Delay of 534 days – Delay was condoned. [S. 249(4)(a), 271(1)(c)] 2314
Assessee filed appeal without depositing tax due. He paid tax belatedly. Assessee stated that he was in dire financial difficulty to pay tax at that particular point of time and after making sufficient arrangements to get funds, assessee had paid tax due on account of which delay occasioned. Tribunal condoned the delay and admitted the appeal, following the ratio in *Ram Nath Sahu v. Gobardhan Sao (2012) 3 SCC 195*. On appeal by revenue, dismissing the appeal of revenue the court held that on a careful perusal of the order of the Tribunal, that there appears to be some explanation shown by the assessee showing sufficient cause for the delay in filing the appeals. The judgment of the Supreme Court, relied on by the Tribunal, is applicable to the facts of the present case. Therefore, this Court is of the considered view that there is no reason warranting interference with the order passed by the Tribunal.
CIT v. S. Duraipandi (2015) 232 Taxman 103 (Mad.)(HC)

S.249 : Appeal – Commissioner (Appeals) – Delay of 12 years – Illness must be at time of expiry of limitation – If assessee was ill but got allright, illness cannot be any excuse for delay in filing appeal. [S. 254(1)] 2315
Dismissing the appeal of assessee the Tribunal held that; Facts revealed that assessee was regularly performing his duties in his department till his retirement in 2009. No proof was submitted to show that due to illness, assessee was utterly disabled to attend to any work or was unfit to assist his legal representative or advocate. There being no evidence on record to show that assessee was prevented by sufficient cause from filing appeals within time, delay in filing appeals before CIT(A) could not be condoned and, accordingly, appeals were dismissed.(AY. 1994-95, 1998-99)
Satbarg Singh v. ITO (2015) 155 ITD 45 (Chd.)(Trib.)

Section 250 : Procedure in appeal.

S.250 : Appeal – Commissioner (Appeals) – Additional evidence – Commissioner (Appeals) is under statutory obligation to put additional material/evidence taken on record by him to Assessing Officer. [S. 144, 153A, R. 46A] 2316
Allowing the appeal of revenue the Court held that even if additional evidence produced by assessee are in nature of clinching evidence leaving no further room for any doubt or controversy, Commissioner (Appeals) is under statutory obligation to put additional material/evidence taken on record by him to Assessing Officer. (AY. 2002-03 to 2008-09)
CIT v. E.D. Benny (2015) 234 Taxman 802 / 126 DTR 296 / (2016) 283 CTR 212 (Ker.)(HC)

2317 **S.250 : Appeal – Commissioner (Appeals) – Cross examination – Alternative remedy – Petition was dismissed. [Article 226]**

Appeal was filed against order assessing income of assessee on basis of alleged payments said to have been made by one MMTC. Assessee filed writ for a mandamus directing respondent to provide opportunity to cross examine said MMTC. Dismissing the petition the Court held that; since it was open to petitioner to agitate said issue before appellate authority in terms of provisions of Income-tax Rules and Appellate Authority would be at liberty to permit petitioner to cross examine officials of MMTC, if required. Petitioner should agitate all issues raised in writ petition before Appellate Authority. (AY. 2006-07 to 2012-13)

Naresh Prasad Agarwal v. CIT (2015) 232 Taxman 506 (Mad.)(HC)

2318 **S.250 : Appeal – Commissioner (Appeals) – Additional ground – Claim of export market development allowance was made first time before CIT(A) by filing letter – Fact reflected in printed annual report which contained balance-sheet – Authority directed to consider additional ground and evidence on the merits. [S. 250(5)]**

The assessee failed to claim deduction on account of market development expenses in the return. This fact was reflected in the printed annual report, which contained the balance-sheet of the assessee-company. The assessee filed an appeal before the Commissioner (Appeals). After it filed the appeal in a letter to the Commissioner (Appeals) it sought to raise an additional ground and prayed that he determine the total income on the basis of the deduction as allowable under section 37(1) and stating that the omission was neither wilful nor unreasonable. The Commissioner (Appeals), however, was of the view that the assessee had not explained that the omission was not wilful or unreasonable. The Tribunal upheld the order of the Commissioner (Appeals).

On appeal :

Held, allowing the appeal, that the finding of the Commissioner (Appeals) was not in consonance with section 250(5). In terms of section 250(5), the duty is cast on the Commissioner (Appeals) to satisfy himself as to whether the omission to raise the additional grounds in the appeal was not wilful or unreasonable. If the assessee gives an explanation and supports that explanation with relevant material to state why the additional ground was not raised at the first instance, the Commissioner (Appeals) should go into the issue whether such a omission was wilful or unreasonable. The Commissioner (Appeals) had erroneously thrown the onus on the assessee to explain the omission as not wilful or unreasonable. The assessee had given certain reasons with records to show that it was a *bona fide* claim but out of inadvertence it was not stated in the return. The failure to make the claim was not wilful and the additional ground raised by the assessee could not be termed as unreasonable. (AY. 1987-88)

Ramco Cements Ltd. v. Dy. CIT (2015) 373 ITR 146 (Mad.)(HC)

2319 **S.250 : Appeal – Commissioner (Appeals) – Additional evidence – When the AO has asked further time to forward remand report, CIT(A) should not have proceeded further without providing a reasonable opportunity. [S.254(1), R. 46A]**

When there was a *bona fide* reason that prevented the Assessing Officer to verify and produce the Remand Report and he asks further time, in the circumstances due to non-

consideration of the *bona fide* reason by the CIT(A) & ITAT, proceeding further with the matter is erroneous.(AY. 2003-04 to 2009-10)
CIT v. Essence Commodities Ltd. (2015) 274 CTR 416 / 114 DTR 393 / 233 Taxman 564 (MP)(HC)

S.250 : Appeal – Commissioner (Appeals) – Powers – Commissioner (Appeals) justified in spreading the addition over two years. [S. 69B, 142A] 2320
On appeal by revenue dismissing the appeals, the Court held that when the assessees themselves claimed that the construction was spread over two to three years, the finding of the Commissioner (Appeals) that addition, if any made, for the unexplained cost of construction, had to be spread over such years, was nothing but a finding which was necessary for disposal of the case. It was an issue directly involved in the appeals before him and such directions, were not beyond the powers of the Commissioner (Appeals). (AY. 2004-05)
CIT v. Shivlal (2015) 371 ITR 109 / 229 Taxman 461 (Mad.)(HC)

S.250 : Appeal – Commissioner (Appeals) – Powers to conduct further inquiry – Matter was remanded.[S.68] 2321
AO has held that the burden to prove identity of creditor its creditworthiness and genuineness transaction was not established, therefore addition was made under section 68. CIT(A) and Tribunal without conducting any proper enquiry deleted the addition. On appeal by revenue allowing the appeal the Court held that, this approach not having been adopted, the impugned order of ITAT, and consequently that of CIT (Appeals), cannot be approved or upheld. Appeal of revenue was allowed, however the issue of reassessment was remanded to the CIT(A).(AY. 2004-05)
CIT v. Jansampark Advertising & Marketing (P) Ltd. (2015) 375 ITR 373 / 231 Taxman 384 (Delhi)(HC)

S.250 : Appeal – Commissioner (Appeals) – Additional evidence – Admission of additional evidence was held to be justified. [Rule 46A] 2322
Where facts of a case warrant that, before disposal of any appeal, Commissioner (Appeals) is required to make further inquiries, either on his own or through Assessing Officer, he is not denuded of powers to do so because of provisions of rule 46A. Where the assessee could not produce complete books of account at assessment stage on account of prolonged and fatal illness of its managing partner, Commissioner (Appeals) was justified in allowing assessee's application filed under rule 46A of 1962 Rules and accepting additional evidence brought on record in course of appellate proceedings. (AY. 2003-04)
ACIT v. Krafts Palace (2015) 68 SOT 338 (URO) / 40 ITR 158 / 154 ITD 275 (Agra)(Trib.)

S.250 : Appeal – Commissioner (Appeals) – Additional evidence – Acceptance of additional evidence without confronting it to the TPO – Order set aside. [Rule 46A] 2323
The assessee is a wholly owned subsidiary of US Company and undertaking International transaction with the AE. The dispute was regarding considering new comparable by CIT(A) and excluding few comparables without referring back to TPO/AO

in violation of Rule 46A as accepting additional evidences at appeal stage. It has also been concluded that a potential comparable cannot be excluded by assessee simply on the ground of high profit rate, unless it is conclusively shown that such higher profit was the result of some abnormal conditions prevailing in that case alone. The case set aside to TPO. (AY. 2004-05)
ACIT v. Convergys India Services (P) Ltd. (2015) 169 TTJ 17 (UO) (Delhi)(Trib.)

2324 **S.250 : Appeal – Commissioner (Appeals) – Binding precedent – Order of Tribunal is binding on CIT(A), failure to do so could attract contempt proceedings. [S. 80(IB)(10), 254(1)]**
The CIT(A) decided the appeal of the assessee against which the revenue preferred appeal before Tribunal. The Tribunal sent the matter back to decide the matter afresh in accordance with law. The CIT(A) again passed the order by following the order of his predecessor and ignoring the order of the Tribunal. The Tribunal warned the CIT(A) and did not initiate contempt proceedings since it was a first matter reported to the Bench. The Tribunal set aside the impugned order of CIT(A) and restored the matter in issue to his file with direction to redecide the appeal strictly in accordance with law and following the earlier order of the Tribunal. (AY. 2007-08)
Dy. CIT v. Sham Sunder Sharma (2015) 172 TTJ 120 / 122 DTR 466 (Chd.)(Trib.)

2325 **S.250 : Appeal – Commissioner (Appeals) – Admission of fresh evidence – Failure by Department to list out fresh material brought for first time on record before Commissioner (Appeals) – No acceptance of fresh evidence to come to final conclusion except personal visit to premises. [S.251, R.46A]**
Held that the objection by the Department that there was violation of provisions of rule 46A of the Income-tax Rules, 1962 could not stand as the Department failed to list out the fresh material brought for the first time on record before the Commissioner (Appeals). The Commissioner (Appeals) did not accept fresh evidence to come to final conclusion except personal visit to the factory premises to have first hand information on research and development activities (AY. 2007-08, 2008-09)
ACIT v. Lakshmi Machine Works Ltd. (2015) 38 ITR 61 / 69 SOT 157 / 167 TTJ 40 (UO) (Chennai)(Trib.)

Section 251 : Powers of the Commissioner (Appeals).

2326 **S.251 : Appeal – Commissioner (Appeals) – Powers – Stay – Financial hardship is irrelevant – *Prima facie* case to be considered. [S.254(1)]**
While disposing of stay application, authority, before considering financial situation of an applicant, has to first consider *prima facie* case pleaded by applicant and if same is covered against revenue in view of a decision of a superior forum, then question of considering issue of financial hardship is irrelevant. Stay application cannot be rejected on ground that issues raised in appeal and stay have already been dealt with in assessment order. (AY. 2011-12)
Mumbai Metropolitan Region Development Authority v. Dy. CIT (2015) 273 CTR 317 / 230 Taxman 178 (Bom.)(HC)

S.251 : Appeal – Commissioner (Appeals) – Powers – Reference to valuation Officer – Valuation as on 1-4-1981 – Matter remanded. [S. 45, 55A, 250(4)] 2327

Where Assessing Officer fails to make enquiry under section 55A while passing assessment order, Commissioner (Appeals) during appellate proceedings before him can make such an enquiry (by making reference to DVO) either himself or direct Assessing Officer to do so in terms of section 250(4). On Writ Court held that however, before Commissioner (Appeals) makes such a reference to DVO in term of section 55A, he must be of opinion that value determined by Registered Valuer as FMV of property as on 1-4-1981 is less than its FMV. Matter remanded. (AY. 2002-03)

Rallis India Ltd. v. CIT (2015) 374 ITR 462 / 276 CTR 351 / 230 Taxman 483 / 116 DTR 217 (Bom.)(HC)

S.251 : Appeal – Commissioner (Appeals) – Powers – Additional evidence – Commissioner (Appeals) taking into account additional evidence and submission of Income-tax Department – Order valid. [R. 46A] 2328

Court held that under rule 46A, all depends upon the satisfaction of the Commissioner (Appeals) as to the admissibility of the documents and no adversarial exercise needs to be undertaken at that stage. Once the document is admitted as additional evidence, for the first time at the stage of appeal, the Department is entitled to put forward its own contention or objection vis-a-vis the same. Here again, two aspects become relevant. If the additional evidence is in the form of any document, the Department shall be entitled to examine or make its own scrutiny of the document. On the other hand, if the evidence is in the form of deposition of any witness, it shall be entitled to cross-examine him. The first is provided for under clause (a) and the second under clause (b) of sub-rule 3. Independently the Department can adduce its own oral or documentary evidence to contradict or rebut the additional evidence that was adduced by a party, for the first time, at the stage of appeal.

Held, that the record did not disclose that the Department had raised any objection whatever, to the additional evidence that was produced by the assessee. On the other hand, arguments were advanced with reference to the additional evidence also and the Commissioner (Appeals) dealt with the additional evidence. In other words, the Commissioner (Appeals) took into account the additional evidence duly taking into account the plea of the Department. His order was valid.(AY 1998-99)

CIT v. Unique Plastics P. Ltd. (2015) 373 ITR 201 (T&AP)(HC)

S.251 : Appeal – Commissioner (Appeals) – Stay – 25 per cent of demand was with revenue by way of refund, further demand of 50% of tax was held to be unreasonable. 2329

Where 25 per cent of demand was already with revenue in form of an amount due by way of refund to assessee, condition of deposit of 50 per cent of demand imposed by AAC for grant of stay of assessment order pending disposal of appeal was not justified. (AY. 2011-12)

Sooriya Hospital v. CIT (2015) 229 Taxman 242 (Mad.)(HC)

2330 **S.251 : Appeal – Commissioner (Appeals) – Powers – Enhancement – Notice is must.**
If CIT(A) intends to enhance tax liability to detriment of assessee, that too in an appeal preferred by assessee, a notice under section 251(2) must be issued requiring assessee to show cause as to why such a course of action be not taken. (1990-91 to 1992-93)
Y Brahmiah v. ITO (2015) 229 Taxman 558 (AP)(HC)

2331 **S.251 : Appeal – Commissioner (Appeals) – No jurisdiction to enhance the new source of income and direct the Assessing Officer to initiate proceedings u/s. 201(1). [S.40(a)(ia), 201(1)]**
The Tribunal held that the CIT(A) exceeded her jurisdiction in directing the Assessing Officer to make disallowance of payments under section 40(a)(ia) in a set aside matter as the same involved taxability of income from a new source of income which was neither considered by the Assessing Officer nor was subject matter of set aside order passed by the Tribunal and the CIT(A) also exceeded her jurisdiction in directing the Assessing Officer to initiate proceedings under section 201(1). The Tribunal decided the appeal in favour of assessee. (AY.2007-08)
Cheil India P. Ltd. v. ITO (2015) 172 TTJ 302 / 123 DTR 138 (Delhi)(Trib.)

2332 **S.251 : Appeal – Commissioner (Appeals) – Penalty – Power – Direction issued by CIT(A) to AO for exploring to make addition of unexplained donation under S. 115BBC are contrary to the provisions of law.[S. 115BC]**
In the appeal against penalty order the CIT(A) cannot give direction to AO for exploring the additions in an assessment. Therefore, direction issued by CIT(A) to AO for exploring to make addition of unexpanded donation under S. 115B care contrary to the provisions of law. (AY. 2007-08 to 2009-10)
KPC Medical College & Hospital v. Dy. CIT (2015) 172 TTJ 204 / 122 DTR 379 (Kol.)(Trib.)
Kali Pradip Choudhuri Foundation v. Dy. CIT (2015) 172 TTJ 204 / 122 DTR 379 (Kol.)(Trib.)

2333 **S.251 : Appeal – Commissioner (Appeals) – Binding nature – Assessing Officer failed to give effect to directions issued by Commissioner (Appeals), it amounted to gross abuse of process of law and, in such a case, matter was to be brought to notice of Chairman CBDT so that necessary action could be taken for providing training/guidance in this respect to revenue officials. [S. 14A]**
On the facts of the case the AO has failed to give effect to the order of Tribunal relating to computation of disallowance in terms of section 14A. On appeal CIT(A) directed the AO to give effect to the order of Tribunal. Against the said order the revenue filed an appeal before Tribunal. Dismissing the appeal of revenue the Court held that Order of lower judicial authority merges with that of appellate authorities and lower authority is bound to give effect to order of higher/Appellate Authority unless it has been set aside or modified, as the case may be by higher /highest court to said Appellate Authority. On the facts the Assessing Officer failed to give effect to directions issued by Commissioner (Appeals), it amounted to gross abuse of process of law and, in such a case, matter was to be brought to notice of Chairman CBDT so that necessary action could be taken for providing training/guidance in this respect to revenue officials. (AY.2006-07)
ACIT v. S. Ganesh (2015) 68 SOT 110 (URO)(Mum.)(Trib.)

S.251 : Appeal – Commissioner (Appeals) – Revised computation – Claim can be made before Appellate Authorities even if not made before Assessing Officer.[S.10A] 2334

At the time of filing its return, the assessee claimed 50 per cent of deduction under section 10A of the Act. During the course of the assessment proceedings, the assessee filed a revised computation of income claiming 100 per cent deduction. The Assessing Officer denied the claim on the ground that the claim made after the return, otherwise than by way of a revised return, could not be entertained. The Commissioner (Appeals) directed the Assessing Officer to allow deduction under section 10A of the Act at 100 per cent. On appeal :

Held, dismissing the appeal, that even if a claim was not made before the Assessing Officer, it could be made before the Appellate Authorities. Therefore, the claim made by the assessee before the Commissioner (Appeals) was allowable. (AY. 2010-11)

ITO v. XS Cad India P. Ltd. (2015) 39 ITR 51 / 70 SOT 366 (Mum.)(Trib.)

S.251 : Appeal – Commissioner (Appeals) – Powers – Commissioner (Appeals) directing Assessing Officer to consider agricultural income for rate purpose – Not entitled to remit issue for further investigation. 2335

Held, that in the first round of appeal, the CIT(A) observed that the Assessing Officer should carry out a detailed inspection in respect of agricultural operations, standing crops, trees and agricultural yield and also directed the Assessing Officer to consider the agricultural income as exempt in case of denial of exemption of the trust was treated as allowed in accordance with the provisions of the Act. Thus the Commissioner (Appeals) could not remit the issue for further investigation to the Assessing Officer. The CIT(A) ought to have called for a remand report, if it required reconsideration. The order of the Commissioner (Appeals) was not sustainable to that extent. However, the assessee could not be denied exemption on the basis of agricultural activity as the assessee produced a certificate from the Revenue authorities exhibiting the standing of mango, bettelnut and coconut trees and 108 acres of agricultural land which could generate incomes shown by the assessee. (AY. 2002-03, 2005-06, 2006-07)

Dy. CIT v. R. N. Shetty Trust (2015) 37 ITR 584 (Bang.)(Trib.)

Section 253 : Appeals to the Appellate Tribunal.

S.253 : Appellate Tribunal – Settlement Commission – In light of abatement of proceedings before Settlement Commission, assessee was entitled for restitution of its appeal before Tribunal. [Ss. 245C, 245D, 245HA] 2336

Assessee had challenged block assessment order made under section 158BC before Tribunal which proceedings had been withdrawn in view of fact that Settlement Commission had allowed settlement application made by assessee to be proceeded with. Settlement Commission abated the petition. The assessee filed petition before the Court which was dismissed. However the Court held that in light of abatement of proceedings before Settlement Commission, assessee was entitled for restitution of its appeal before Tribunal.

Grahshilpa Construction (P.) Ltd. v. ITO (2015) 234 Taxman 414 (Guj.)(HC)

2337 **S.253 : Appellate Tribunal – Limitation – Delay of 754 days – No satisfactory explanation regarding delay – Delay could not be condoned.**
Held, the material on record showed that in the case of the firm, the managing partner had been on medical treatment for a very short duration for an intermittent period. It would not have been difficult for the managing partner if really he had been diligent to file the appeal in time. Even assuming that he was on continuous medical treatment, the son or other partners should have been diligent in taking up the responsibility in filing the appeal in time. Therefore, when the conduct on the part of the assessee exhibited gross negligence and a procrastinating attitude and incorrect grounds, the Tribunal rightly dismissed the petition to condone the delay of 754 days. (AY. 2007-08)
Ajmeer Sheriff and Co. v. ITO (2015) 373 ITR 15 / 234 Taxman 168 (Mad.)(HC)

2338 **S.253 : Appellate Tribunal – Powers – Appeal not entertained on ground barred by limitation – Tribunal has no power to consider merits – Matters set aside.[S.254(1)]**
Section 253(5) of the Income-tax Act, 1961, mandates that an appeal should be admitted before an order is passed on the merits. Once the appeal itself is not entertained, the question of going into the merits of the matter does not arise.
Held, that the procedure adopted by the Tribunal was highly prejudicial to the interests of the assessee inasmuch as the Tribunal having decided not to proceed with the matter on the ground of condonation of delay could not unilaterally decide the appeals on the merits, especially when the assessee was not given proper opportunity to contest the matter in the main appeals on the merits. Matters were set aside to the Tribunal for reconsideration. (AY. 1995-96 to 2000-01)
Centre for Individual and Corporate Action (CICA) v. ACIT (2015) 370 ITR 35 (Mad.)(HC)

2339 **S.253 : Appellate Tribunal – Favourable remand report – Strictures passed against the Department for 'mischievous adamancy to attempt to mislead the Tribunal – Filing of appeal with complete knowledge of its fate by revenue only reflects mischievous adamancy to attempt to mislead Tribunal and waste time of Court and officers concerned. [S.68, R. 46A]**
CIT(A) deleted the addition after considering the remand report of Assessing Officer who has stated that he has verified the genuineness of loans and gave favourable remand report. Against the order of CIT(A) allowing the appeal, the Revenue filed appeal before the Tribunal. Dismissing the appeal of revenue the Tribunal held that filing of appeal with complete knowledge of its fate by revenue only reflects mischievous adamancy to attempt to mislead Tribunal and waste time of Court and officers concerned. (AY. 2004-05, 2006-07, 2009-10)
ACIT v. R.P.G. Credit & Capital Ltd. (2015) 155 ITD 29 / 173 TTJ 255 (Delhi)(Trib.)

2340 **S.253 : Appellate Tribunal – Department representative can only support the AO's order and cannot set up an altogether new case before the ITAT. [S. 43(3), 73]**
The Departmental Representative has no jurisdiction to go beyond the order passed by the Assessing Officer. He cannot raise any point different from that considered by the Assessing Officer or the Commissioner of Income-tax (Appeals). His scope of

arguments is confined to supporting or defending the impugned order. He cannot set up an altogether different case. Followed *ACIT v. Aishwarya K. Rai (2010) 127 ITD 204 (Mum)(Trib)*/ *ITO v. Anant Y. Chavan (2009) 126 TTJ 984 (Pune)(Trib.)*/ Mahindra and Mahindra (2009) 313 ITR 263 (SB)(Mum.)(Trib.) (ITA No. 2138/Mum/2010, dated 7-8-2015) (2006-07)
DCIT v. Envision Investment & Finance Pvt. Ltd. (Mum.)(Trib.); www.itatonline.org

S.253 : Appellate Tribunal – New contention not basis of disallowance by Assessing Officer cannot be adjudicated – Departmental representative cannot enlarge the scope of the revenue's appeal. [S.80-IA, 254(1)] 2341
The assessee claimed deduction under section 80IA of the Income-tax Act. Held, that the contention raised by the Department was not the basis of disallowance by the Assessing Officer, subject matter before the Commissioner (Appeals) and the Tribunal. Therefore, the issue raised by the Department was a new one and could not to be adjudicated by the Tribunal. Tribunal relied on the ratio of judgment in *Kamal Kishore and Co v. CIT (1998) 232 ITR 668 (MP)(HC)*. The bus shelters and foot overbridges should be considered as part of the infrastructure facility and therefore, the assessee was entitled to deduction under section 80-IA of the Act. (AY. 2004-05 to 2009-10)
Dy. CIT v. Vantage Advertising P. Ltd. (2015) 39 ITR 240 / 70 SOT 610 (Kol.)(Trib.)

S.253 : Appellate Tribunal – No cross objection can be filed against the order of Commissioner under section 263. [S.263] 2342
Tribunal held that provisions of the Act does not provide for filing of cross objection against the order u/s. 263 hence the cross objection of revenue was dismissed. I.T.A. No. 1326/Hyd/14 C.O. No. 57/Hyd/14, dt. 07.08.2015) (AY. 2009-10)
Malineni Babulu (HUF) v. ITO (Hyd.)(Trib.); www.itatonline.org

S.253 : Appellate Tribunal – *Ex parte* dismissal – None was present dismissal was held to be justified. [ITAT Rule, 19(2)] 2343
It was held that where none was present on behalf of assessee for hearing, neither any adjournment was sought, appeals filed by assessee was to be dismissed keeping in view provisions of rule 19(2) of Income-tax (Appellate Tribunal) Rules. (AY. 2001-02 to 2007-08)
Susham Singla v. ACIT (2014) 33 ITR 449 / (2015) 154 ITD 310 / 67 SOT 236 / 70 SOT 610 (Chd.)(Trib.)

S.253 : Appellate Tribunal – Commissioner (Appeals) – Stay – Appeal in the ITAT can be filed against order of the CIT(A) on a stay application. Stay should be granted if relevant criteria of existence of *prima facie* arguable case, irreparable loss and financial position are not considered by the CIT(A). [S. 201(1), 250] 2344
Considering the fact that the issue on merits is yet to be decided by the CIT(A) and being of the view that the findings arrived at in para 5 have not taken into consideration the relevant criteria for deciding the issue namely the existence of prima facie arguable case in favour of assessee or not; irreparable loss if any and the financial position of the assessee etc. as no reference to these settled legal parameters is found mentioned in the

order. It also seen that the merits of the order of the Assessing Officer till date have not been tested by any Appellate Authority. Thus, in these peculiar facts and circumstances, we direct the Revenue authorities from refraining to take any co-ercive action against the assessee till the passing of the order of the CIT(A) on merits. In view of the same, the Ld. CIT(A) is directed to pass a speaking order in the appeals on merit after giving the assessee a reasonable opportunity of being heard. (AY. 2010-11 to 2015-16)
Bharat Heavy Electricals Ltd. v. ITO(TDS) (Delhi)(Trib.); www.itatonline.org

2345 **S.253 : Appellate Tribunal – Appeal – Penalty – Annual information return – Appeal is maintainable before Tribunal and not before CIT(A). [S. 271FA]**
The order under section 271FA was passed by DIT who is equivalent in rank with CIT(A). Therefore, order of DIT cannot be challenged or assailed by filing an appeal before an Officer i.e. CIT(A), who is equivalent in rank with DIT. Hence, Appeal could only be filed before a higher forum than forum whose order was to be challenged and higher forum was only ITAT and before it order of the Director of Income-tax could only be challenged by filing an appeal. Hence, Appeal by assessee had been rightly filed before the Tribunal and the Tribunal was competent to adjudicate appeal on merit, hence revenue's preliminary objection dismissed. (AY.2012-13)
Raibareilly District Co-operative Bank Ltd. v. DIT (2015) 154 ITD 441 / *114 DTR 321* / *38 ITR 27* / *168 TTJ 274* / *54 taxmann.com 382 (Lucknow)(Trib.)*

2346 **S.253 : Appellate Tribunal – Cross objection – Appeal by department – In a cross-objection, a new legal issue can be raised for the first time before the ITAT. [S.153A, 253(4), 254(1), Rule 22, 36A]**
In the appeal filed by the department, the assessee filed a cross-objection in which it raised the ground for the first time that the assessment order passed u/s 153A was not valid as satisfaction was not recorded, no incriminating material was recovered etc. The department objected to the cross-objection on the ground that the assessee was not permitted to raise issues before the Tribunal which were not raised before the lower authorities. HELD by the Tribunal rejecting the department's plea:
There is no difference between an appeal and a cross-objection. In a cross-objection, a legal issue which has not been raised before the lower authorities can be raised. The C.O. need not be confined to the points taken by the opposite party in the main appeal (DHL Operations 108 TTJ 152 (SB)(Mum) followed). (Cross Objections No. 138 to 142/ Del/2014, dt. 23-9-2014) (AY. 2004-05 to 2007-08)
ITO v. Jasjit Singh (2014) 52 taxmann.com 477 (Delhi)(Trib.); www.itatonline.org

2347 **S.253 : Appellate Tribunal – Stay – An appeal can be filed before the Tribunal against an order of the CIT(A) rejecting the stay application. [S.201(1), 250]**
During the pendency of an appeal before the CIT(A), the assessee filed a stay application. The CIT(A) dismissed the stay application. Against the said order, the assessee filed an appeal before the Tribunal. The Tribunal had to consider the preliminary point whether an appeal against a stay order of the CIT(A) is not maintainable. HELD by the Tribunal:
Section 253(1)(a) provides for an appeal to the Tribunal against an order passed by the CIT(A) under section 250 of the Act. The Act does not expressly provide power to the

CIT(A) to grant stay of demand. However, it is well settled on the principle laid down in *ITO v. M. K. Mohammad Kunhi 71 ITR 815 (SC)* that the CIT(A) has inherent power to stay the demand when the appeal is pending for disposal before him. The term 'order' has not been defined under the Act. It is judicially understood that the word 'order' is a noun and has been held equivalent to or synonymous with the word 'decision'. Therefore, held that the CIT(A) has passed the order u/s. 250 of the Act, in our opinion, the appeal is clearly maintainable under clause (a) of sub-section (1) of Section 253 of the Act. (AY. 2011-12 to 2013-14)

Employees Provident Fund Organization v. ACIT (2015) 39 ITR 607 / 153 ITD 642 / 172 TTJ 140 / 122 DTR 476 (Delhi)(Trib.)

S.253 : Appellate Tribunal – There is no judicial impropriety in the CIT filing an appeal before the Tribunal against his own order as CIT(A) deciding the appeal in favour of the assessee – Proportionate deduction in respect of housing project was allowed. [S.80-IB(10)] 2348

The department filed an appeal before the Tribunal against the order of the CIT(A). The CIT, who sanctioned the filing of the appeal, happened to be the same CIT(A) who had allowed the assessee's appeal. The assessee filed a C.O. claiming that the appeal was not maintainable as there was a violation of judicial propriety. It was claimed that the CIT(A) who had allowed the appeal could not, on becoming CIT, sanction the filing of an appeal against his own order as it violates the principle of "no man can be a judge in his own cause". The Tribunal dismiss the cross-objection stating:

(i) The plea of the assessee that there was judicial impropriety in the case was not established because the present Commissioner of Income Tax Administration as Commissioner of Income Tax (Appeals) had passed the order and decided the issues on the basis of various case laws. However, when acting as Commissioner of Income Tax Administration and in view of the facts that there was no legal precedent by the Hon'ble Supreme Court or by the Hon'ble jurisdictional High Court on the said issue, directed the Assessing Officer to file appeal against the impugned order. It is not a case where the present person was setting in judgment of the earlier order passed by him but was acting in the capacity of administrator wherein the issues were put before higher forum to adjudicate the same.

(ii) The reliance by the learned AR for the assessee on the ratio laid down by the Allahabad High Court in the case of Mohd. Chand And Another (supra) is misplaced as in the facts before the Hon'ble High Court, the person who had passed the basic order was later sitting in appeal and was hearing the appeal against his own order. In such circumstances, the Hon'ble High Court held that the principles of natural justice that no man can be a judge in his own cause, was attracted. Further the learned AR for the assessee placed reliance on the ratio laid down by the Hon'ble Supreme Court in the case of Ashok Kumar Yadav and Others (supra) wherein also similar principle of jurisprudence that no man can be a judge in his own cause was looked into and it was observed that where there was a reasonable likelihood of bias then such decision should not be taken. The Hon'ble Apex Court held that the basic principle underlying in this rule is that justice must not only be done but must also appear to be done and this rule has received wide recognition in several decisions of the Court. It is also important to note that this rule is not confined to cases where judicial power strictosensu is

exercised. It is appropriately extended to all cases where an independent mind has to be applied to arrive at a fair and just decision between the rival claims of parties.
(iii) The principle propounded by the Hon'ble Supreme Court was in respect of a decision between rival claims of the parties. However, in the facts of the present case, the situation was at variance where the CIT(A) had passed the impugned assessment order and then as Commissioner of Income Tax Administration had directed the Assessing Officer to file an appeal before the Tribunal against the said order and the decision on the rival claims of the parties had to be taken by the Tribunal and not by the Commissioner of Income Tax Administration. On merits proportionate deduction allowed by the CIT(A) in respect of housing project was affirmed. (AY. 2007-08)
ITO v. Paras Builders (2015) 40 ITR 507 / 69 SOT 82 (URO)(Pune)(Trib.)

Section 254 : Orders of Appellate Tribunal.

2349 **S.254(1) : Appellate Tribunal – Power – Tribunal has no power to enhance assessment, even though deduction allowed by lower authority is challenged before Tribunal.**
The Assessing Officer denied all the expenses claimed by the assessee except the expenditure with regard to maintenance of corporate office i.e. the salaries, remuneration to Directors, electricity charges, staff welfare, audit fees, the postage and telephone, printing and stationery and general expenditures. The Commissioner (Appeals) granted the relief insofar as expenses related to travelling and conveyance, legal and professional fees, repairs and maintenance the further directed the Assessing Officer to examine the issue with regard to carry forward of loss and depreciation and allow the same from the income. The Tribunal allowed the appeal filed by the revenue denying the deduction in respect of various expenditures and denied the deduction in respect of royalty. Further, the Tribunal held that the assessee was not entitled for set-off of brought forward unabsorbed depreciation. On appeal allowing the appeal the Court held that the Tribunal is not justified in law in holding that the expenditure allowed by the Assessing Officer as well as the First Appellate Authority towards the maintenance of corporate office is not deductible from the income of written back. The Revenue has not challenged the deduction allowed by the Assessing Officer as well as the First Appellate Authority. However, the Tribunal disallowed the said allowance made by the authorities below which is contrary to law. The Supreme Court in its judgment in *Mcorp Global (P.) Ltd. v. CIT [2009] 309 ITR 434* held that the Tribunal is not authorized to take back the benefit granted to the assessee by the Assessing Officer. The Tribunal has no power to enhance the assessment. In view of the judgment of the Supreme Court, the Tribunal has no power to enhance the assessment, even though the deduction allowed by lower authority is challenged before the Tribunal. Hence, the assessee is entitled deduction towards the maintenance of the corporate office. (AY. 2002-03)
Karnataka Instrade Corporation Ltd. v. ACIT (2015) 235 Taxman 374 (2016) 130 DTR 195 (Karn.)(HC)

2350 **S.254(1) : Appellate Tribunal – Power – The Income Tax Appellate Tribunal does not have the power to interfere in the prosecution proceeding at any stage. [S. 263]**
Assessee filed return of income declaring income of ₹ 26,24,296. The Assessing Officer assessed the income at ₹ 1033,26,17,030. The Commissioner noticed that certain claim

regarding various subsidy, statutory liability and depreciation were invalid hence, revised the assessment under section 263 directing the Assessing Officer to examine those issues afresh. The AO passed a fresh assessment order under section 143(3) making additions on all the counts. Subsequently, penalty under section 271(1)(c) was also levied. The appeals against all the orders were pending before the Tribunal. On 26-12-2014, a notice was issued asking assessee to show cause why prosecution under section 276C shall not be initiated. Assessee filed an application in the Tribunal for stay of prosecution proceedings. On writ petition, the High Court held that the Tribunal under section 254 does not have the inherent power to grant stay on prosecution as it is independent and distinct from assessment proceedings. Merely because the outcome of the appeal will have an impact on the prosecution does not empower it to stay the Prosecution. (AY. 2008-09)
PCIT v. Income Tax Appellate Tribunal (2015) 281 CTR 521 / (2016) 236 Taxman 39 (P&H) (HC)

S.254(1) : Appellate Tribunal – Duties – Tribunal remanding issue to Assessing Officer for fresh examination without indicating reason for not applying its earlier decision in assessee's own case – Tribunal cannot completely disregard its earlier order without specifying some reasons – Exercise of writ jurisdiction by High Court proper. [S. 10A, Constitution of India, Art. 226] 2351

Before the Tribunal, it was claimed that the disallowance made on account of claim for deduction under section 10A was covered in favour of the assessee by the decision of the Tribunal for the assessment year 2005-06 in the assessee's own case. The Department also accepted the position. In spite of the agreed position between the parties, the Tribunal remanded this issue to the Assessing Officer for fresh examination. On a writ petition:
Held, that the Tribunal remanded the issue to the Assessing Officer for fresh examination without indicating why and how its earlier decision would not apply to the facts of the case for the subsequent assessment year. The Tribunal ought not to have completely disregarded its earlier order without specifying some reasons. That was the minimum expected of a quasi-judicial or judicial authority. If the Tribunal failed to perform its basic judicial functions, the approach of the Tribunal was to be corrected to ensure that such lapses would not occur again. Therefore, the High Court was constrained to exercise extraordinary jurisdiction in view of the manner in which the order was passed by the Tribunal, even though an alternate remedy was available. The order of the Tribunal was to be set aside and the Tribunal was to consider the issue afresh in the light of its earlier order for the assessment year 2005-06. (AY. 2009-10)
Hinduja Global Solutions Ltd v. UOI (2015) 235 Taxman 476 / (2016) 381 ITR 518 (Bom.) (HC)

S.254(1) : Appellate Tribunal – Natural justice – Duty to pass reasoned order – Tribunal copying order of Commissioner (Appeals) verbatim at different places – No independent application of mind – Matter remitted to Tribunal for decision afresh. 2352

On appeal the Court held that the Tribunal had copied the order of the Commissioner (Appeals) verbatim at different places without even difference of punctuation. Thus, it could not be said that there had been independent application of mind. The Tribunal

being a final fact finding authority was required to discuss the evidence before arriving at the conclusions. The order passed by the Tribunal was violative of the principles of natural justice and did not satisfy the requirements of a reasoned order. The order passed by the Tribunal was set aside and the matter was remanded to the Tribunal to decide it afresh after hearing the parties in accordance with law. (AY. 2007-08)
Kewal Chaudhary v. CIT (2015) 378 ITR 52 / 128 DTR 20 (P&H)(HC)

2353 **S.254(1) : Appellate Tribunal – Remand – Remand was held to be justified. [Ss.14A, 144]**
Dismissing the appeal of revenue the Court held that the Tribunal found that the factual aspects including that of the availability of the free funds at the time of making investment required to be examined and, therefore, the discretion had been exercised by the Tribunal to send the matter back to the Assessing Officer. The discretion had not been perversely exercised.
CIT v. Akar Laminators Ltd. (2015) 377 ITR 394 (Guj.)(HC)

2354 **S.254(1) : Appellate Tribunal – Remand – Entire matter relating to assessments considered by Assessing Officer and Dispute Resolution Panel – Remand to be made to Dispute Resolution Panel and not Assessing Officer. [S. 263]**
In the course of the proceedings pending before the Dispute Resolution Panel for the other years (for which reassessment was directed) and the subsequent assessment year 2011-12, the Dispute Resolution Panel issued its directions after considering all the contracts – totalling six in number. Pursuant to these directions, the Assessing Officer framed a final assessment order. The Tribunal directed a remand to the Assessing Officer. On appeal to the High Court: Held, that in the circumstances and given the fact that the entirety of the circumstances were gone into at two stages, i.e., when the first draft assessment was made and subsequently under section 263, it would be in the fitness of things that the matter was remitted to the Dispute Resolution Panel rather than the Assessing Officer. (AY. 2010-11)
Shanghai Electric Group Co. Ltd. v. DIT (2015) 376 ITR 46 (Delhi)(HC)

2355 **S.254(1) : Appellate Tribunal – Duties – Duty of Tribunal to pass speaking order – Passing of non-speaking order on estimate without supportive reasons would tantamount to disobedience to the decisions of the Supreme Court and High Courts.**
On appeal, the High Court held that the Appellate Tribunal is bound to obey the decision of the Supreme Court and as well as High Court. Despite the specific observations and the directions, the Appellate Tribunal has continued to pass a non-speaking and unreasoned order. Passing of non-speaking order on estimate without supportive reasons would tantamount to disobedience to the decisions of the Supreme Court and High Court. In the instant case, the impugned order passed by the Tribunal is non-speaking and non-reasoned order and as such no reasons have assigned while restricting the disallowance to 10 per cent of the unexplained purchases. Therefore, matter is required to be remanded. However, on the request made by the respective parties, the matter is considered on merits. It has come on record and not disputed by the revenue that the GP rate was higher as compared to the subsequent assessment year. The GP disclosed at the rate of 1.11 per cent by the assessee is satisfactory as

compared to subsequent assessment year where the GP was of 0.98 per cent. Under these circumstance, in the peculiar facts and circumstance, the order passed by the Tribunal restricting the disallowance to 10 per cent of the unexplained purchases is confirmed considering the decision of the Division Bench of this Court in the case of *CIT v. Simit P. Sheth [2013] 38 taxmann.com 385 / 219 Taxman 85*, though not approving the method and manner in which the Tribunal has decided the appeal. (AY. 1999-2000)
CIT v. Premkumar B. Rathi (2015) 377 ITR 447 / 232 Taxman 638 / 126 DTR 270 (Guj.) (HC)

S.254(1) : Appellate Tribunal – Stay of prosecution proceedings – The ITAT has no jurisdiction to grant a stay of prosecution proceedings as such proceedings are not directly & substantially flowing from the orders impugned before it. [S. 276C] 2356

Allowing the appeal of revenue the Court held that proceedings for prosecution are independent of assessment and penalty, and the Tribunal is neither the appellate nor the revisional authority in a case where prosecution is launched, the mere fact that the decision in the appeal may have an impact on the prosecution, in our considered opinion, cannot be used to read into the expressions "pass such orders thereon as it thinks fit" or "any proceedings relating to an appeal", a power in the Tribunal to direct that prosecution or a show cause notice shall be kept in abeyance. There is another aspect of the case, namely, if such a power, as has been canvassed by the assessee, were available to the Tribunal, prosecution would have to await the final outcome of proceedings up to the Supreme Court. We are unable to discern any legislative intent or power as would confer upon the Tribunal power to stay consideration of a show cause notice proposing to initiate prosecution, by reading into Section 254, the power to stay independent proceedings merely because they may be affected by the decision of a pending appeal. The legislature having conferred power to grant stay in terms, used in Section 254(1) and the first proviso, we cannot add to or subtract from the words and expressions used in Section 254(1) or by a process of interpretation confer jurisdiction which legislature did not intend to confer. A prosecution being a consequence of infractions by an assessee cannot be said to be act of harassment or mischief so as to confer power upon the Tribunal, to order that prosecution shall be kept in abeyance. (AY. 2008-09)
Pr. CIT v. ITAT, & Jindal Steel & Power Ltd. (2015) 128 DTR 9 / 281 CTR 521 / (2016) 236 Taxman 39 / 382 ITR 321 (P&H)(HC)

S.254(1) : Appellate Tribunal – Cross objection – Cross appeal – Where the assessee is aggrieved against any disallowance by the order of the Commissioner (Appeals) which is not under challenge before the Tribunal at the behest of the Revenue, Rule 27 cannot be invoked. [S. 68, ITAT, Rule, 27] 2357

The assessee was a partnership firm engaged in the business of manufacturing and sale of knitted cloth. Consequent upon search and seizure, the Assessing Officer (AO) made certain additions after rejecting books of account u/s. 145(3). The major addition of ₹ 37.30 lakhs was made as cash credit u/s. 68. On appeal, the Commissioner (Appeals) partly allowed the appeal deleting the said addition of ₹ 37.30 lakhs and rejecting the other additions. Aggrieved by the CIT(A) order, the Revenue filed an appeal before the Tribunal. However, the assessee chose to file an application under Rule 27, to assail

that part of order passed by the Commissioner (Appeals) which was decided against it. The Tribunal allowed revenue's appeal and dismissed the application filed under Rule 27 by the assessee as not maintainable. In respect to Rule 27, the Tribunal held that the assessee is entitled to support the order appealed against and raise defense against the appeal filed by the Revenue on any of the grounds which have been decided against him. However, cannot invoke the said rule to claim any fresh relief which was denied by the Commissioner (Appeals) and which is not part of the ground so raised by the revenue. On an appeal, the High Court held that where the assessee is aggrieved against any disallowance or addition sustained by the Commissioner (Appeals) which is not under challenge at the behest of the revenue, the only remedy available with the assessee is to either file separate appeal or agitate the issue by way of cross objections impugning the disallowance or the addition sustained. Thus, The Tribunal had rightly not allowed the assessee to invoke Rule 27 of the ITAT Rules. (AY. 2005-06)
Self-Knitting Works v. CIT (2014) 227 Taxman 253 / (2015) 116 DTR 319 (P&H)(HC)

2358 **S.254(1) : Appellate Tribunal – Cross objection – Alternative claim – Respondent can support the claim, as long as it was not going to be adverse to the case of revenue before the Tribunal. [S.10, ITAT, R, 27]**
Assessee's cross objections claiming deduction under section 10A could not be rejected by the Tribunal and it was open to the assessee to seek support the order of the CIT(A) on the ground which was not urged before CIT(A) as long as it was not going to be adverse to the case of revenue before the Tribunal. (AY.2008-09, 2009-10)
Fast Booking (I) Pvt. Ltd. v. DCIT (2015) 378 ITR 693 / 128 DTR 139 (Delhi)(HC)

2359 **S.254(1) : Appellate Tribunal – Condonation of delay – Delay of four years – Ex parte order – Delay was not properly explained**
Ex parte order was passed. Assessee could not explain the delay of four years. No sufficient reason for long delay occasioned in challenging ex parte order of Tribunal. (AY. 1999-2000, 2000-01 & 2002-03)
Kerala Tourism Infrastructure Ltd. v. ACIT (2015) 229 Taxman 551 (Ker.)(HC)

2360 **S.254(1) : Appellate Tribunal – Condonation of delay – Delay of 1100 days – Tribunal declining to condone delay – Held to be justified. [S.254(2), Code of Civil Procedure, 1908, O. 41, r. 27]**
Tribunal declined the condonation of delay of 1100 days. The assessee filed Miscellaneous petition seeking to furnish additional documents in the form medical certificate. Tribunal dismissed the petition. On appeal, dismissing the appeal the Court held that there was no material to show Tribunal refused to admit documents or assessees could not produce such documents before Tribunal. Certificate not showing assessee seriously ill and continuously hospitalised as pleaded, however no sufficient cause shown for condoning delay. Tribunal justified in not condoning inordinate delay.
EVP Estates and Properties Development Ltd. v. ACIT (2015) 373 ITR 464 / 231 Taxman 415 (Mad.)(HC)
EVP Housing Chennai P. Ltd. v. ACIT (2015) 373 ITR 464 / 231 Taxman 415 (Mad.)(HC)
E.V. Perumaisamy Reddy v. ACIT (2015) 373 ITR 464 / 231 Taxman 415 (Mad.)(HC)
P.S. Rajeshwari (Mrs.) v. ACIT (2015) 373 ITR 464 / 231 Taxman 415 (Mad.)(HC)

S.254(1) : Appellate Tribunal – Res-judicata – Action of the ITAT in disregarding its own order without reason and remanding matter to AO for fresh consideration is "arbitrary" and "failure to perform basic judicial function" and a "lapse" which should not occur again – Order of Tribunal was set aside.[S.10A] 2361

The issue before the Tribunal was regarding disallowance made on account of claim for deduction under Section 10A of the Act. This very issue was covered in favour of the Petitioner by the decision of the Tribunal for A.Y. 2005-06 in the Petitioner's own case. The departmental representative before the Tribunal also accepted the position. Inspite of the agreed position between the parties, the Tribunal by the impugned order yet remands this very issue to the Assessing Officer for fresh examination/ determination. This is without in any manner even attempting to indicate why and how its earlier decision will not apply to the facts for the subsequent assessment year. The Tribunal should not completely disregard its earlier order without some reason. This is the minimum expected of any quasi-judicial / judicial authority. If the Tribunal has failed to perform its basic judicial functions in such arbitrary manner, the approach of the Tribunal must be corrected, so as to ensure that such lapses do not occur again. (AY.2009-10)

Hinduja Global solution Ltd. v. UOI (2015) 235 Taxman 476 (2016) 381 ITR 518 (Bom.) (HC)

S.254(1) : Appellate Tribunal – Non-speaking order – Reference to dispute resolution panel – Matter remanded. [S.144C] 2362

Where Tribunal in course of appellate proceedings, did not consider assessee's objection in relation to non-compliance of provisions of section 144C by authorities below and passed an ex parte non-speaking order of remand, order so passed was to be set aside and, matter was to be remanded back for disposal afresh on merits.(AY. 2007-08)

India Trimmings (P.) Ltd. v. ACIT (2015) 230 Taxman 185 (Mad.)(HC)

S.254(1) : Appellate Tribunal – Settlement Commission – Appeal withdrawn before Tribunal as the petition was filed before Settlement Commission – Petition was abated due to non-payment of tax – Appeal filed before the Tribunal was restored. [S. 158BC, 245D, 245HA] 2363

Assessee filed appeal before Tribunal against order made by Assessing Officer under section 158BC. Subsequently, he withdrew proceedings before Tribunal as matter was pending before Settlement Commission. Proceedings before Settlement Commission abated due to non-deposit of additional tax. Assessee sought restoration of appeal before Tribunal. Allowing the petition the Court held that if appeal was not restored to Tribunal, same would cause immense prejudice to assessee inasmuch as assessment order made under section 158BC would attain finality and would be binding upon assesse, therefore, in interest of justice appeal filed by assessee before Tribunal should be restored.

Pukhraj Bhabhutmal Shah v. ITO (2015) 230 Taxman 40 / 118 DTR 239 (Guj.)(HC)

2364 **S.254(1) : Appellate Tribunal – Additional ground – Grounds not raised before the CIT(A) can also be raised before the Tribunal. [S.253, ITAT Rule, 11]**
Assessee has right to raise additional ground before Tribunal and if same is beneficial to assessee, same should be considered by Tribunal even though said issue was not adjudicated before Commissioner (Appeals). (AY. 2002-03)
CIT v. Indian Bank (2015) 55 taxmann.com 372 / 230 Taxman 635 (Mad.)(HC)

2365 **S.254(1) : Appellate Tribunal – Adjournment – Medical grounds – Refusal of adjournment was held to be not justified.**
Allowing the petition the Court held that where Tribunal did not consider pray for adjournment sought on medical ground of assessee's advocate, order passed by Tribunal in absence of assessee was unjustified. *Board of Trustees of Martyrs Memorial Trust v. UOI (2012) 10 SCC 734 (Para 9)*
Panchmukhi Builders v. ITO (2015) 230 Taxman 314 (Karn.)(HC)

2366 **S. 254(1) : Appellate Tribunal – Adjournment – Medical ground of assessee's advocate – Order of tribunal was set aside.**
Allowing the petition the Court held that where Tribunal did not consider prayer for adjournment sought on medical ground of assessee's advocate there was denial of reasonable opportunity of hearing to assessee; thus, order passed by Tribunal in absence of assessee was unjustified. Referred *Board of Trustees of Martyrs Memorial Trust v. UOI (2012) 10 SCC 734* (Para 9). (AY. 2005-06 to 2007-08)
Jai Ganesh Builders & Developers v. ITO (2015) 230 Taxman 555 (Karn.)(HC)

2367 **S.254(1) : Appellate Tribunal – Precedent – Order of Special Bench – Binding – Appeal pending before High Court – Not a ground to direct Assessing Officer to redecide issue after disposal of appeal by High Court – Tribunal either to follow or not to follow Special Bench decision – Tribunal to decide matter afresh.**
Where the appeal against the order of a Special Bench of the Tribunal was pending adjudication before the High Court and the Tribunal passed an order of remand for redecision of the case of the assessee after disposal of the appeal by the High Court :
Held, allowing the appeal, that until and unless the decision of the Special Bench was upset by this Court, it would bind a Smaller Bench and a co-ordinate Bench of the Tribunal. Thus, it was not open to the Tribunal to remand on the ground of pendency of an appeal on the same issue before the court, overlooking and overruling, by necessary implication, the decision of the Special Bench. It was not permissible under quasi-judicial discipline. Therefore, the order of the Tribunal was to be set aside and the matter restored to the Tribunal to decide the issue in accordance with law. It would be open to the Tribunal either to follow the Special Bench decision or not to follow it. If the Special Bench decision was not followed, obviously the remedy lay elsewhere.
CIT v. Janapriya Engineers Syndicate (2015) 371 ITR 439 / 229 Taxman 366 / 274 CTR 71 (T&AP)(HC)

S.254(1) : Appellate Tribunal – Orders – ITAT's practice of routinely consolidating appeals is "most unfortunate, disturbing and dangerous" and leads to "pile-up" of cases. Such "elementary mistakes" should not be committed in future. ITAT is expected not to sign judgments and decisions unless they are checked thoroughly after transcription. It may be a boring task but it has to be performed by none other than the decision makers. [S. 253] 2368

Revenue has filed appeal against the order of Tribunal, in the course of admission the Honourable Bombay High Court has made the following observations.

Para 6 "As far as question No. 5 is concerned, we find the factual situation the backdrop of which this question is raised to be most unfortunate, disturbing and dangerous to say the least. The Tribunal as a matter of routine goes on consolidating appeals. …".

"We really fail to understand as to any finding and stated to be factual and rendered for which year has been applied and followed for the latter years. If by settled principles and sheer common sense latest must follow the former or earlier than which is latest or later and which is former and earlier is not clear from these two paragraphs. However, the Revenue has clearly conceded the position before the Tribunal. It must, therefore, suffer for having consented to the state of affairs and brought about by the Tribunal's orders and directions noted and reproduced above." In this regard, we cannot do anything better then invite the attention of all concerned to the judgment of the Hon'ble Supreme Court rendered in the case of *M/s. Chitivalasa Jute Mills v. M/s. Jaypee Rewa Cementreported in A.I.R. 2004 Supreme Court, 1687*. In the context of power of consolidation of suits, the Hon'ble Court held as under ….

(iii) Thus, what holds good for consolidation of suits would equally apply to appeals. We are not persuaded by the sincere efforts of Mr. Tejveer Singh in this case and the request made by him to still entertain this appeal so that once and for all the Tribunal can be guided by this Court. We think that our observations made above are enough to guide the Tribunal and we hope that such mistakes and elementary in nature are not committed in future. We also expect the Tribunal not to sign judgments and decisions unless they are checked thoroughly by them after their transcription. It may be a boring task but it has to be performed by none other than the decision makers. (AY.2001-02)

DIT v. Societe Generale (2015) 122 DTR 57 / (2016) 237 taxman 182 (Bom.)(HC)

S.254(1) : Appellate Tribunal – Power to admit additional evidence – 'Application for admission of additional evidence six years after assessment during penalty proceedings – No credible evidence and no explanation for delay in application – Rejection of application – Justified. [ITAT, R.29] 2369

Held, dismissing the appeal, that the application for permission to produce additional evidence in the form of certain documents so as to retract the statement was filed under rule 29 of the Income-tax (Appellate Tribunal) Rules, 1963, in 2012 after expiry of almost six years and that too during the course of the penalty proceedings at the stage of second appeal. The assessee had tried to produce affidavits of certain customers to show that it was their gold which was lying with the assessee. Further, through the additional evidence the stock of diamond jewellery lying with the assessee was sought to be established as belonging to suppliers. Not only these affidavits but also the statement of stock furnished by the suppliers were only a result of an afterthought.

Even during the penalty proceedings before the Assessing Officer and the Commissioner (Appeals) there was nothing to show that the jewellery found at the premises of the assessee on October 27, 2006, was accounted money with the assessee. No satisfactory explanation had been furnished to demonstrate why the material sought to be produced now could not be produced earlier. Therefore, the Tribunal was justified in rejecting the application for admission of additional evidence filed by the assessee.(AY. 2007-08)
Jawahar Lal Jain (HUF) v. CIT (2015) 370 ITR 712 / 118 DTR 177 / 276 CTR 487 (P&H) (HC)

2370 **S.254(1) : Appellate Tribunal – Order – Method of accounting – Lesser gross profit – Tribunal reversed the finding of Commissioner (Appeals) without giving any reasons – Matter remanded.[S. 145]**
Assessing Officer held that the assessee claimed lesser gross profit as compared to its books of account and accordingly, made addition .CIT(A) deleted addition on ground that revenue had not produced any relevant material in support of its claim. Tribunal reversed said findings of CIT(A) without assigning cogent reasons, matter was to be remanded back.
Bhaktiprasad Nagori Timber & Plywood (P.) Ltd. v. ACIT (2015) 229 Taxman 203 (Guj.) (HC)

2371 **S.254(1) : Appellate Tribunal – Delay of 715 days – No reasonable cause – Dismissal was held to be justified. [S. 253]**
Whether where assessee filed appeal before Tribunal with a delay of 715 days taking a plea of death of his parents, in view of fact that assessee's parents died even before passing order of Commissioner (Appeals), Tribunal was justified in dismissing assessee's appeal being bared by limitation. (AY. 2005-06)
Amolak Singh Kumar & Sons v. CIT (2015) 229 Taxman 182 (P&H)(HC)

2372 **S.254(1) : Appellate Tribunal – Ex parte order – Set aside after imposing reasonable cost of ₹ 5000, upon assessee.**
The Tribunal passed an *ex parte* order dismissing assessee's appeal in absence of assessee at the time of hearing.
Thereafter, the assessee preferred Miscellaneous Application to set aside *ex parte* order and to hear the appeal on merits. However by the impugned order, the Tribunal dismissed the said application.
On writ: allowing the petition the Court held that in absence of malafide intention on part of assessee to remain absent at the hearing of appeal, impugned order passed by Tribunal dismissing assessee's appeal *ex parte* was set aside after imposing cost of ₹ 5000.
Vision Corporation Ltd. v. Jt. CIT (2015) 229 Taxman 184 (Guj.)(HC)

2373 **S.254(1) : Appellate Tribunal – Tribunal's decision based on documents and evidence not presented to Assessing Officer or Commissioner (Appeals) – Matter remanded.**
The Commissioner (Appeals) as well as the Assessing Officer did not have the benefit of checking any of the records which were produced before the Tribunal as a paper

book. Some of the documents were part of the paper book produced before the Tribunal were placed before the High Court as additional documents by filing an interlocutory application. In the absence of these additional documents for consideration before the Assessing Officer and the Commissioner (Appeals), one could not conclude that the opinion of the Assessing Officer and the Commissioner (Appeals) were erroneous. Similarly, the Tribunal referred to several documents which persuaded reversal of the opinion of the Assessing Officer and the Commissioner (Appeals). Therefore, the matter was to be remanded to the Assessing Officer. (AY. 2006-07)
CIT v. Muthoot General Finance (2015) 370 ITR 543 / 232 Taxman 404 (Ker.)(HC)

S.254(1) : Appellate Tribunal – Natural justice – Advertisement – Sales Promotion expenses/Motor Car expenses – Order of Tribunal passed against assessee was in violation of natural justice and matter was to be remanded to decide issue afresh. [S. 37(3), 37(3A), 260A, 263] 2374
CIT in revision proceedings set aside the order passed by the AO who has allowed the commission. Appeal of assessee was dismissed by the Tribunal. On appeal:
The Court held that perusal of the order passed by the Tribunal shows that the documents and the data produced by the assessee as mentioned have not been taken into consideration. Therefore, the order does not satisfy the requirements as enunciated by the Apex Court in *Kranti Associates Pvt. Ltd. v. Masood Ahmed Khan [2010] 9 SCC 496*. Thus, the substantial question of law is answered accordingly and after setting aside the order of the Tribunal which is passed in violation of the principles of natural justice as per the law laid down by the Apex Court as mentioned above, the matter is remanded to the Tribunal to decide afresh after affording an opportunity of hearing to the parties in accordance with law. As a result, the appeal stands disposed off. (AY. 2001-02)
Gurcharan Kaur (Smt.) v. CIT (2015) 229 Taxman 71 (P&H)(HC)

S.254(1) : Appellate Tribunal – Opportunity of hearing – Request by assessee by letter for adjournment – Record not showing whether assessee put on notice about the date of hearing – Tribunal ought not to have heard appeals *ex parte* – To dispose of appeals afresh. [ITAT R. 25] 2375
The Assessing Officer did not allow the assessee's claim for certain deduction which the Commissioner (Appeals), allowed. On Revenue's appeal, the Tribunal set aside the orders passed by the Commissioner (Appeals). The assessee under Rule 25 of the ITAT Rules, filed petitions to set aside the order passed by the Tribunal contending that after the request for adjournment was acceded to, the Tribunal did not intimate any other date for hearing and that for want of information, the assessee could not appear before the Tribunal. The Tribunal dismissed the petitions. On writ petitions:
Held, allowing the petitions, that though it was stated that the date of hearing was adjourned from July 4, 2001, to August 29, 2001, it was not clear as to whether the assessee was put on notice about the date of hearing. Had it been a case where the adjournment was sought by the counsel being present before the Tribunal and the date was given to him, the necessity to issue fresh notice may not arise. The request for adjournment was made through a letter. Valuable rights had accrued to the assessee on account of the order passed by the Commissioner (Appeals). Before such valuable right

is taken away, the assessee deserves to be given an opportunity of placing its version before the Tribunal. The Tribunal shall hear the appeals afresh and dispose of the appeals in accordance with law. (AY. 1990-91, 1991-92, 1992-93)
Ananda Nilayam v. ITO (2015) 370 ITR 370 / 121 DTR 311 (T&AP)(HC)

2376 **S.254(1) : Appellate Tribunal – Additional ground – Search and seizure – No incriminating material was found – Additional ground was admitted and the matter was remanded. [S. 132, 153A]**
The Tribunal admitted the additional ground raised on behalf of the assessee, which was a pure legal ground, notwithstanding the fact that the same was not raised before the lower authorities. Tribunal followed the decision of Hon'ble Supreme Court in case of *National Thermal Power Company Ltd. v. CIT (1998) 229 ITR 383 (SC)* (AY. 2003-04)
Sanjay Aggarwal v. DCIT (2014) 150 ITD 692 / (2015) 169 TTJ 282 (Delhi)(Trib.)

2377 **S.254(1) : Appellate Tribunal – Additional grounds – Interest chargeable to tax – Relevant facts for adjudication of said ground are available on record – Additional ground was allowed to be raised.**
Allowing the appeal of assessee the Tribunal held that An assessee can raise a new ground in appeal for first time before Tribunal in case relevant facts for adjudication of said ground are available on record. (AY.2008-09)
Adani Power Ltd. v. ACIT (2015) 155 ITD 239 (Ahd.)(Trib.)

2378 **S.254(1) : Appellate Tribunal – Appeal of Revenue – Monetary limit does not exceed Rs. 10 lakh – Not maintainable. [S.268A]**
In view of CBDT's Circular No. 21/ 2015 dated 10-12-2015 appeals of the department where the monetary limit does not exceed ₹ 10 lakh have to be dismissed as a legal nullity. CBDT's decision termed as "paradigm shift", "unprecedented" and "possibly a game changing initiative heralding a new era in thoughtful litigation management".
DCIT v. Soma Textiles & Industries Ltd. (2016) 175 TTJ 1 / 45 ITR 147 / (2016) 129 DTR 12 (Ahd.)(Trib.)

2379 **S.254(1) : Appellate Tribunal – Commissioner (Appeals) – Fresh evidence – Matter remanded to AO. [S.250, R.46A]**
Assessee filing evidence before CIT(A), without filing petition under Rule 46A. Allowing the appeal the Tribunal held that, failure by authority to point out discrepancies and give opportunity to file application to admit fresh evidence. Matter remanded to AO to consider documents afresh. (AY. 2011-12)
SECOVA e Services P. Ltd. v. Dy. CIT (2015) 41 ITR 357 (Chenni)(Trib.)

2380 **S.254(1) : Appellate Tribunal – Housing projects – Dept's practice of filing appeals in a routine manner and without application of mind deprecated as it causes inconvenience to taxpayers – Appeal was filed by the Revenue without even verifying the year which was mentioned in the grounds of appeal – Appeal of Revenue was dismissed. [S. 80IB (10), 253]**
As could be noticed from the order of the learned CIT(A), when there is a specific direction to the AO by the ITAT to follow the Special Bench decision of ITAT it has

to be assumed that the direction is with reference to the issues which were originally objected to by the AO and the AO cannot take advantage of the order of ITAT for repeating the addition, defying the directions of the ITAT. At least the senior officer such as Commissioner of Income Tax should have carefully perused the record and CIT(A)'s order before granting authorisation. The very fact that the AO filed the appeals without even verifying the year, which was mentioned in the grounds of appeal, also indicates that the appeals were filed in a routine manner which causes lot of inconvenience to the taxpayers and such a practice should be deprecated. (AY. 2005-06 to 2007-08)
DCIT v. Prescon Builders Pvt. Ltd. (2015) 121 DTR 75 / 171 TTJ 788 / 44 ITR 175 (Mum.)(Trib.)

S.254(1) : Appellate Tribunal – Lack of preparation for hearing by departmental representatives – Departmental representative is duty bound to prepare the cases – Suggests guidelines to remedy the state of affairs. 2381

The learned CIT-DR, Smt. Madhu Vani, requested for adjournment in all the cases listed for hearing before 'D' Bench on the ground that regular CIT-DR is on leave and several details are required to be submitted for effective representation of the cases. Having regard to the factual matrix of the case we refused to grant adjournment with a direction to the CIT-DR to be ready to present the case on the part of the Department. However, by the time the cases were called upon for hearing the CIT-DR left the court room without informing anybody. She was hardly present in the court for about 30 minutes, i.e. from 10.30 a.m. to 11.00 a.m. only to seek adjournment in all the cases assigned to her on the ground that though she had got the intimation on Friday itself that she has to appear before 'D' Bench but due to intervening holidays she could not prepare the cases. This cannot be a valid reason for seeking adjournment. The DR is duty bound to prepare the cases and only in exceptional circumstances could seek adjournment. It is for the Chief Commissioner to engage some experienced Department Representatives who are aware of the Court procedures. In the recent past, it is noticed that some of the DRs had never had exposure to the functions of the Tribunal except the formal Court observation as part of their training programme, which sometimes result in not supporting the stand of the Revenue effectively and in turn may affect a genuine case of the Revenue for want of proper prosecution. We would take this opportunity to suggest that any official, on being assigned the duty of DR, should be made to sit in the Court room for observation at least for 15 days so that their services can be used effectively at a later stage. In the instant case it appears that on a temporary basis Department Representatives are posted; only in the previous week the fact of non-availability of DR could be made known to the CCIT who has to make an alternative arrangement and then it is for the nominated DR, who is a 24 hour Government servant, to collect the files from the office and go through the records properly to make an effective representation on Monday morning. Here is the situation where the CIT-DR sought adjournment in all the cases assigned to her on the ground that she was asked to represent the matters on Monday, only by sending intimation on Friday. It is for the Revenue to take appropriate steps in this regard for effective representation of the cases and it is not necessary for us to discuss more on this aspect. The fact is that none appeared on behalf of the Revenue. (AY. 2007-08 to 2010-11)
DCIT v. Reliance Communication Infrastructure Ltd. (2015) 120 DTR 329 / 171 TTJ 274 (Mum.)(Trib.)

2382 **S.254(1) : Appellate Tribunal – Adjournment – Affidavit – Contempt – Chartered accountant – The severity of accusations and fury emerging from their language is highly derogatory, defamatory and contemptuous, sent with a scheme and clear intention to intimidate judicial officers to desist from passing an unfavourable order – Matter referred to High Court to initiate contempt proceedings – Cost levied [ITAT, R. 10, 17A, 32A]**

Tribunal held that;

(i) Without even waiting for the order Shri K. C. Moondra sent intimidating letters on 30-4-15 received on 1-5-2015 & 2-5-2015 received on 5-5-2015, hurling all sorts of wild accusations about the presiding officer ld. JM and bench functioning. Such nasty and frivolous accusation can only be product of fit of furry. The barrage of indiscriminate allegations include misuse of official position, corruption, insulting him and son: colluding with retired income tax officers to harm his client so on and so forth. The severity of accusations and fury emerging from their language is highly derogatory, defamatory and contemptuous, sent with a scheme and clear intention to intimidate judicial officers to desist from passing an unfavorable order. The bench was taken aback at their venomous contents and decided to take suitable action on such baseless delinquent acts.

(ii) Without waiting for the order ld. Counsel prejudged the issues, though that Bench may pass an adverse order; in order to salvage his professional interest to willy nilly win the case, by a hideous scheme he sent letter dated 2-5-2015 to Hon'ble President ITAT and Hon'ble Law Secretary Govt. of India and Asst. Registrar, Jaipur making wild accusations of all sorts like corruption, collusion, insulting, bias, prejudice and what not. These contemptuous letters speak by themselves, frivolity of language, distorted contents and apparent self-contradictory contents of his letter demonstrate that it is a crude attempt to influence independent judgment process for petty professional ends.

(iii) It shall be noteworthy that till 28-4-2015 these professionals had no objection with the Bench as no grievance whatsoever was raised. The casual way of adjournment against final chance shows their casual attitude of taking the judicial process for granted. The emphatic demand that – if other matters were adjourned, our appeal should also have been adjourned, amounts to dictating the terms to the Court. It reflects their ineptitude in failing to appreciate the vital fact that thus adjournment was granted as a final chance which was agreed by them. "They keep 'holier than thou attitude'; if I commit wrong or disobey there is nothing wrong in it but if the Bench doesn't conduct itself in my desired way then Bench is by default wrong and I raise scandalous tirade against Bench." To show their might they shoot frivolous complaints, file litany of motivated RTIs proclaiming to be RTI activist. These brazenly scandalous acts have been unleashed by them with swagger of impunity and recklessness without realizing that when the appeal is pending orders such threats construe contempt of court.

(iv) The bench has no objection on sending any complaint to higher authorities; it's the right of every person in free and democratic India. The most important question is propriety of sending intimidating complaints when their appeal i.e. a judicial matter is heard on merits and is pending for orders.

(v) A litigant or his representative cannot directly or indirectly; by overt or covert means attempt to influence the process of judicial decision making by shooting intimidating and derogatory letters or to pressurize the judicial officers while deciding a heard appeal.

(vi) Where is prejudice, bias or insult on the part of bench or the presiding officer. Everything is on record, proceedings are in open court witnessed by counsels from both sides. The facts and record are sufficient to demonstrate that bench was impartial and fair to the ld. Counsels and assessee. There is nothing to even remotely suggest any reason on the part of Bench to show partiality, prejudice, bias or intention to insult Mr. K. C. Mundra or his son who are unknown to us as they come from a faraway place 'Sumerpur'' and are rarely seen in the ITAT proceedings. They were treated with deserving dignity by offering help and guidance in open Court proceedings.

(vii) Perhaps they are enraged on their own professional ineptitude which became visible in open Court proceedings, it requires self introspection and hard preparation of appeal; instead they have misdirected their self fury on the bench indiscriminately. Their own professional infirmities can be improved from their side by mending their unprofessional attitude. They cannot score brownie points by telling the world that they can get desired orders by threatening to harm judicial officers and their delinquent conduct is justified.

(viii) Mr. K. C. Moondra's misadventure doesn't stop here, camouflaging under the self proclaimed virtue of an RTI activist, motivated to bully the judicial officers, he deliberately filed various RTI applications asking for about 81 queries in respect of number of personal details about the judicial officers including their leave, HQ leaving permission, use of car, attendance in office, timings of holding courts, in whose case adjournments were granted or not granted, when officers go to Delhi, whom do they meet etc. etc. The above facts prove that RTI attack is not for any public purposes but to intimidate judicial officers, seized with his judicial matter. A trick to masquerade his blackmailing tactics for mean professional interest, to extract desired result in a sub-judice appeal. The RTI fiat unfolded by Mr. Moondra is an apparent colorable device, an attempt to influence/obstruct independent judicial process. The attempt amounts to a total misuse of professional position for dubious gains.

(ix) These acts amount to interfering and obstructing judicial process which apart from awarding of cost u/r. 32A of ITAT rules is liable for appropriate contempt of court proceedings as well. Such attempts need to be seriously deplored, firmly tackled and suitably dealt with to send a message in professionals fraternity to behave properly and conduct themselves as ordained by ITAT rules and standing orders; court rules, ICAI instructions, professional ethics and etiquettes; Bar Council of India guidelines in this behalf.

(x) In propriety they should have waited for the order to be pronounced instead of unfolding foul tactics to influence the pending judicial order. They started intimidating judicial officers to cover their professional ineptitude, misconduct and lapses. This type of intimidation amounts to interference in judicial proceedings which is emphatically forbidden to be exerted in direct or indirect manner.

(xi) It may be pertinent to mention that ld. Counsel Shri K. C. Moondra FCA and Mukul Moondra ACA, seem to be ignorant about filing a proper Power of Attorney, which is to be given on a NON JUDICIAL stamp paper. Whereas they have filed a plain printed paper with ₹ 10/- Court fee stamp which is not a valid and prescribed Power of Attorney. Thus their appearance could have been lawfully denied by the Bench. This again shows the lenient approach of the Bench bellying his wild allegations. Furthermore the ICAI guidelines provide that every chartered accountant shall mention his registration No. on the power. Sadly both of them i.e. S/Shri K. C. Moondra and Mukul Moondra have not mentioned their ICAI registration No. making their Power of Attorney again defective, inadmissible and in violation of ICAI guidelines.

(xii) Under these facts and circumstances, we find that the ld. Counsel for the assessee Shri K.C. Moondra and his son Shri Mukul Moondra are liable for suitable proceedings for their professional misconduct, misbehaviour, wasting the time of court and unlawfully attempting to interfere in the process of judicial dispensation.

(xiii) Considering all the facts, circumstances and material on record by invoking rule 32A of the ITAT Rules we hold that Shri K. C, Moondra and Shri Mukul Moondra are liable for levy of costs as prescribed by said Rule 32A. Consequently, we impose cost of ₹ 25,000/- on Shri K. C. Moondra and ₹ 10,000/- on Shri Mukul Moondra for their delinquencies as mentioned above. Separate proposal under Contempt of Court Act will be duly forwarded to Hon'ble Rajasthan High Court. The cost is recoverable u/r. 32A(2) of the ITAT Rules and shall be deposited in the 'Prime Minister Relief Fund. Copy of this order to be sent by registry to Institute of Chartered Accountants of India to take appropriate disciplinary action against them in terms of ICAI rules and guidelines. The progress may be communicated to bench through registry. (AY. 2008-09)

Mundra Woolen Mills (P) Ltd. v. ACIT (2015) 171 TTJ 245/120 DTR 433/69 SOT 280 (Jaipur)(Trib.)

2383 **S.254(1) : Appellate Tribunal Condition of delay – Affidavit of the Chartered Accountant – The affidavit and cavalier conduct of CA in support of application for condonation of delay raises serious questions on his professional competence and work ethics in giving such an affidavit which hides more than it explains**

The assessee filed an application seeking condonation of delay of 347 days in filing the appeal. In support of the application, the CA filed an affidavit accepting responsibility for the delay on the ground that he had gone on a tax audit and the filing of the appeal had skipped his mind. Reliance was placed on *Collector, Land Acquisition v. Mst. Katiji (1987) 167 ITR 471 (SC)* and it was pleaded that the assessee should not be made to suffer for the mistake committed by the CA. HELD by the Tribunal dismissing the application for condonation of delay and the appeal:

(i) The assessee has only filed a vague and general affidavit from the CA which utterly lacks any specific contentions and fails to explain day-to-day delay in reasonable manner. The assessee has neither filed any evidence nor the affidavit of Shri Malik Parvej to corroborate the vague affidavit by the C.A.. It does not conform to general human conduct in such circumstances, preponderance of probabilities and

surrounding circumstances which form *sine qua non* in the matters of condonation of delay;

(ii) It is unbelievable that an assessee, whose taxable income is claimed to be NIL is taxed for two years assessed at such a high income resulting in a huge tax and interest demand will not visit the C.A. office almost for a period of about one year to know about the filing of the appeals. There is no deposition in the affidavit that prior to TRO notice dated 2-3-2012, no other notice by way of telephone or writing was received either by assessee or the C.A. Thus, the depositions in affidavit remain vague, unsubstantiated and do not amount to explaining the sufficient cause;

(iii) The affidavit and cavalier conduct of Shri Kaushal Agarwal, C.A. raises serious questions on his professional competence and work ethics in giving such an affidavit which hides more than it explains. The burden is on the assessee to reasonably explain day-to-day delay and establish that there existed reasonable and sufficient cause in delaying the filing of appeals for about 1 year. If the proper dates or occasions are not mentioned with proper facts then the delay cannot be condoned. The law helps diligent and not the indolent as well as the axiomatic delay defeats equity. In our considered view that the condonation petitions filed by the assessee and material available on the record, fail to invoke any confidence, fail to explain reasonable and sufficient cause for condonation of long delay of 347 days in filing these appeals . The assessee has to come clean with all the relevant facts, which happened in the period of one year. The assessee has to explain all the events and be specific in the dates. The depositions made in the C.A. affidavit remain uncorroborated and there is no affidavit from the said Shri Malik Parvej in support of the affidavit of C.A.. Thus, the vague affidavit given by the C.A. remains uncorroborated and unreliable. In the entirety of facts and circumstances of the case, we decline to condone the delay of 347 days in filing these appeals. (AY. 2005-06, 2006-07)

K.G.N.M.M.W. Educational Research & Analysis Society v. ITO (2015) 38 ITR 623 / 68 SOT 247 / 170 TTJ 422 (Jaipur)(Trib.)

S.254(1) : Appellate Tribunal – Stay of proceedings – Collection and recovery – Transfer pricing – Recovery made by the AO contrary to the direction of Tribunal's order was directed to be refunded though the same was collected with the consent. [S. 225, 226] 2384

Tribunal held that where AO collected additional taxes contrary to Tribunal's stay order with specific directions not to collect tax till disposal of appeal, same had to be refunded as neither assessee nor revenue had a right to flout decision of Tribunal. AO being an officer functioning under Government of India it was his obligation to follow directions of superior authority and even if there was consent he should not have collected amount. (AY. 2009-10)

Johnson & Johnson Ltd. v. Addl. CIT (2014) 51 taxmann.com 1 / (2015) 67 SOT 127 / 170 TTJ 422 (Mum.)(Trib.)

2385 **S.254(2) : Appellate Tribunal – Rectification of mistake – Appeal – COD approval – Dismissal of appeal by Tribunal was held to be justified.**

The Tribunal dismissed appeal filed by Revenue on ground that no approval was taken from COD before filing said appeal. Subsequently, in another case the Supreme Court held that the mechanism of obtaining approval from the Committee on Disputes (COD) for prosecuting the appeals with regard to disputes *inter se* between the Government departments/undertakings had outlived its utility and it must be done away with.

On the basis of said decision the Revenue filed miscellaneous application before the Tribunal under section 254(2) seeking a recall of the earlier order.

The Tribunal dismissed the Revenue's application on ground that it had been filed beyond the statutory period of 4 years provided under the Act.

On writ:

It was noted that the Revenue had not made any application to obtain approval of the COD before it filed its appeal for assessment year 1996-98 to the Tribunal. This in spite of the COD mechanism being very much in force at that time. The necessity of obtaining approval from COD which was in practice at the relevant time cannot be done away with on the ground that the Supreme Court in *Electronic Corporation of India Ltd v. UOI* subsequently held that the said practice needs to be discontinued. In the above facts and circumstances, there is no reason to entertain the instant petition and, accordingly, it is dismissed. (AY. 1996-97)

CIT v. Central Bank of India (2015) 232 Taxman 396 (Bom.)(HC)

2386 **S.254(2) : Appellate Tribunal – Rectification of mistake – Gift – Statement – Tribunal limiting the scope of adjudication of rectification application to two issues is held to be justified.**

The Tribunal dismissed the assessee's appeal filed against the order of the Commissioner (Appeals) upholding the order of the Assessing Officer for the assessment year 1995-96 holding, *inter alia*, that gifts of ₹ 13.25 lakh received by the assessee from K were not genuine. The assessee filed an application for rectification under section 254(2), on the ground that the Tribunal had relied upon an order of the Supreme Court in the order without giving the assessee any notice thereof and also on the ground that the statement of the donor gifting ₹ 13.25 lakhs was not considered. The Tribunal dismissed the assessee's miscellaneous application on the ground that there was no mistake apparent on record warranting exercise of jurisdiction under section 254(2). On a Writ Petition the Tribunal was directed to decide it afresh after hearing the parties in accordance with law. Thereafter, the Tribunal dismissed the rectification application on the ground that there was no mistake apparent on record in the order warranting its rectification. On a Writ Petition once again the court allowed the petition and restored the assessee's application for rectification once again before the Tribunal with a direction. On the miscellaneous application for rectification being restored, the Tribunal held that the scope of examination in rectification application was confined only to considering the donor's statement and allowing an opportunity to the assessee to meet the reliance by the Tribunal on decision of the Supreme Court. The Tribunal after considering the statement of the donor and also the submissions of the assessee with regard to inapplicability of the decision of the Supreme Court concluded that it did not find any

mistake apparent from the record warranting interference with the order passed by the Tribunal under section 254(2). On a Writ Petition:
Held, dismissing the petition, that the Court only took a *prima facie* view that there appeared to be an error in the order of the Tribunal. However, the Court did not give any conclusive finding with regard to there being any error apparent on record in the order and restored the miscellaneous application for consideration by the Tribunal on the two issues of which grievance was made by the assessee before the Court. Therefore, the Tribunal had correctly understood and interpreted the orders of the Court that the miscellaneous application for rectification was restored to the Tribunal only in respect of two issues, namely, the donor's statement and opportunity to meet the decision of the Supreme Court. Therefore, the Tribunal correctly limited the scope of adjudication of the rectification application only on the two issues. (AY. 1995-96)
Naresh K. Pahuja v. ITAT (2015) 375 ITR 526 / 229 Taxman 252 / 277 CTR 289 / 116 DTR 390 (Bom.)(HC)

S.254(2) : Appellate Tribunal – Rectification of mistake – While recalling its order and placing it before a regular Bench to adjudicate/decide merits of appeal, Tribunal is not entitled to observe on merits of adjudication. [S. 158BD] 2387
Tribunal by order, dated 29-12-2010 set aside assessment made under section 158BD in case of assessee on ground that no satisfaction under section 158BD was recorded by Assessing Officer of searched person in respect of assessee. While doing so Tribunal did not consider letter of Assessing Officer of searched person recording satisfaction of undisclosed income in case of assessee. On Revenue's rectification application, Tribunal recalled order dated 29-12-2010 and placed matter before regular Bench for consideration by making observation that jurisdictional requirement to proceed against assessee was satisfied. The assessee challenged the said order by filing Writ Petition, the Court held that since there was an error apparent on record in Tribunal's order, dated 29-12-2010 as it did not consider communication recording satisfaction under section 158BD, Tribunal rightly recalled its order; however, while recalling its order it was impermissible for Tribunal to make observation on issue of jurisdiction and, therefore, such observation could not be upheld. Court also held that once an order is recalled and appeal is to be placed before regular Bench for fresh consideration, it restores status *quo ante*. Therefore, while recalling its order and placing it before a regular Bench to adjudicate/decide merits of appeal, Tribunal is not entitled to observe on merits of adjudication.
Gyan Construction Co. v. ITAT (2015) 231 Taxman 68 (Bom.)(HC)

S.254(2) : Appellate Tribunal – Rectification of mistake – Second application on same grounds not maintainable – Tribunal not justified in considering second application and rectifying its order. 2388
Held, when the first rectification application was rejected by the Tribunal, the second rectification application on the same issue was not maintainable at all. Under the circumstances, the Tribunal had materially erred in entertaining the second rectification application and passing the order recalling its earlier order in exercise of powers under section 254(2).

Also, the Tribunal had tried to consider the issue on the merits which had already been considered by the Tribunal earlier while deciding the appeal. Under the circumstances, even on the merits the Tribunal had materially erred in exercise of the powers under section 254(2) by passing the order. Questions referred is answered in favour of Revenue. (AY. 1984-85)
CIT v. Vasantben H. Sheth (2014) 226 Taxman 83 (Mag.) / (2015) 372 ITR 536 / 273 CTR 48 (Guj.)(HC)

2389 **S.254(2) : Appellate Tribunal – Rectification of mistake – Partial revival of appeal held to be not justified – Directed to hear afresh on merits of deduction and also invoking the jurisdiction u/s. 263 [S.263]**
Allowing the appeal the Court held that while recalling of appeal for hearing afresh on merits, the Tribunal was not justified to ignore the hearing of the case on merits i.e. deduction u/s. 36(1)(viia) including the jurisdictional issue under section 263 by the CIT. (AY. 2006-07)
State Bank of India v. CIT (2015) 370 ITR 438 / 274 CTR 118 (Bom.)(HC)

2390 **S.254(2) : Appellate Tribunal – Rectification of mistake – Second Rectification – Tribunal could not have considered the second rectification application – On merits, only when it is found that there was an error apparent on the face of the record, then and then only powers can be invoked.**
When the 1st rectification application was rejected by the Tribunal, second rectification application on the same issue was not maintainable at all. Under the circumstances, the Tribunal has materially erred in entertaining the second rectification and passing the impugned order in exercise of powers u/s. 254(2). Further, when the decision of the Tribunal on facts was against the assessee, thereafter, the Tribunal on facts was against the assessee thereafter, the Tribunal could not have considered the second rectification application, on merits, only when it is found that there was an error apparent on the face of the record, then and then only powers u/s. 254(2) can be invoked. (AY. 1984-85)
CIT v. Vasantben H. Sheth (Smt.) (2014) 226 taxman 83 / (2015) 372 ITR 536 / 273 CTR 48 / 113 DTR 244 (Guj.)(HC)

2391 **S.254(2) : Appellate Tribunal – Rectification of mistake – *Ex parte* order – Members of association on strike – Matter was set aside. [R. 24]**
The assessee's advocate remained to be present at the time of hearing due to Members of Association being on strike. An *ex parte* order was passed by Tribunal. On miscellaneous Application filed by the assessee, the Tribunal held that argument advanced by the counsel for the assessee that the members of the Association being on strike still passing order behind the back of the assessee' representatives is in violation of principles of natural justice was not convincing, matter was remanded back for rehearing. (A.Y. 2008-09)
Vimal Singhvi v. ACIT (2015) 370 ITR 275 / 230 Taxman 73 / 113 DTR 157 / 273 CTR 322 (Raj.)(HC)

S.254(2) : Appellate Tribunal – Rectification of mistake – Where Tribunal took its own time to dispose of miscellaneous petition filed by assessee for rectification order and passed said order after 4 years, was well within time limit as specified under section 254(2). 2392

The assessee filed a miscellaneous petition praying to recall and rectify the order of the Tribunal. The Tribunal, after hearing the matter at length and relying upon the decision of the Supreme Court in *Surana Steels (P.) Ltd. v. Dy. CIT [1999] 237 ITR 777* the Board Circular No. 68, dated 17-11-1971 passed the order that there had been apparent mistake in the order of the Tribunal and recalled the original order.

On Revenue's appeal, the High Court allowed the appeal and held that order passed by the Appellate Tribunal was barred by limitation.

On further appeal, the Supreme Court restored the matter for fresh decision.

On Revenue's appeal to the High Court:

The assessee took the matter on appeal before the Supreme Court. The Supreme Court was of the view that the miscellaneous petition filed by the assessee for rectification was well within the time limit prescribed under section 254(2). However, the Supreme Court observed that it was the Tribunal which took its own time to dispose of the miscellaneous petition and, therefore, this Court erred in holding that the miscellaneous petition could not have been entertained by the Tribunal beyond four years.

In view of the above finding rendered by the Supreme Court, the question of law raised before this Court does not survive for its consideration.

It is found from the order passed by the Tribunal that the Tribunal was guided not only by the decision of the Supreme Court in *Apollo Tyres Ltd. v. CIT [2002] 255 ITR 273* which was rendered subsequently at the time of disposal of the miscellaneous petition seeking rectification, but also followed the decision in Surana Steels (P.) Ltd. (supra) and the Board Circular No. 68, dated 17-11-1971.]

Therefore, the question of law raised by the revenue is based on a misconception of fact, as the Tribunal had not only relied upon the decision of the Supreme Court in Apollo Tyres Ltd. case but also relied on the decision of Surana Steels (P.) Ltd., and the Board Circular No. 68, dated 17-11-1971, which were very much available before the Tribunal at the time of passing the rectification order. In such view of the matter, the substantial question of law was answered against the revenue. (AY. 1989-90)

CIT v. Sree Ayyanar Spinning & Weaving Mills Ltd. (2015) 229 Taxman 243 (Mad.)(HC)

S.254(2) : Appellate Tribunal – Rectification of mistake – Power – Pendency of an appeal filed in the High Court is no bar to the maintainability of a rectification application before the Tribunal – Principle of judicial propriety has no application. [S. 260A] 2393

The assessee filed an appeal u/s. 260A to the High Court against the order of the Tribunal. During the pendency of the appeal, the assessee filed a Miscellaneous Application (MA) before the Tribunal u/s. 254(2) to request it to rectify certain mistakes apparent from the record. The Tribunal dismissed the MA on the ground that "judicial propriety does not allow the assessee to seek efficacious remedy simultaneously before two authorities and in particular where the issue is seized by a higher judicial forum, even if pending admission". On a Writ Petition filed by the assessee to challenge the order of the Tribunal dismissing the MA, HELD by the High Court:

The least that can be said about the understanding of the legal provision by the Tribunal is that it is *ex facie* incorrect and erroneous. Merely because the assessee has challenged the order of the Tribunal in an Appeal under section 260A of the Income Tax Act, 1961 before the High Court does not mean that the power under section (2) of section 254 cannot be invoked either by the assessee or by the Revenue/Assessing Officer. Such a power enables the Tribunal to rectify any mistake apparent from the record and make amendments. That in a given case would not only save precious judicial time of the Tribunal but even of the higher Court. Only when the assessee or the Assessing Officer calls upon the Tribunal to undertake an exercise which is not permissible within the meaning of section (2) of section 254 that the Tribunal can rely on the principle of judicial propriety or its reluctance or refusal to take upon itself the powers of the higher Court of Appeal. We can understand if the Tribunal had passed an order after considering the application made by the petitioner-assessee on its merits and in accordance with law. However, the refusal of the Tribunal to go ahead and reject the application only on the ground that the petitioner-assessee has invoked the appellate powers of higher Court cannot be sustained. That is contrary to the plain language of the two statutory provisions and which have been brought to our notice. Nothing contrary having been pointed out and such a view of the Tribunal may affect and prejudicially the interest of the Revenue that all the more we cannot sustain the impugned order. The Writ Petition is allowed. The petitioner's misc. application seeking to invoke the powers under sub-section (2) of section 254 of the Income-tax Act, 1961 shall now be heard by the Tribunal and it shall be decided in accordance with law. (AY. 2007-08)

R. W. Promotion P. Ltd. v. ITAT (2015) 376 ITR 126 / 119 DTR 134 / 277 CTR 401 / 233 Taxman 125 (Bom.)(HC)

2394 **S.254(2) : Appellate Tribunal – Duty of Tribunal – Rectification of mistake – Administration of justice – Presiding officers of Courts and Tribunals should refrain from making adverse comments and remarks on the conduct of parties or their representatives or pleaders – Adverse remarks against assessee and his representative and imposition of cost was held to be not justified. [S.254(1), 254 (2B)]**

The Tribunal dismissed the Miscellaneous Application filed by the assessee with the remarks that "the learned counsel … proceeded to make stale and sterile submissions in an attempt to somehow support and justify the miscellaneous applications filed by the assessees. This attempt, in our opinion, clearly amounts to misuse of process of Law. The filing of these frivolous miscellaneous applications by the assessees seeking rectification of the order of the Tribunal which is clearly beyond the scope of section 254(2) and the stale and sterile submissions made by the learned counsel for the assessee in support thereof thus have resulted in wastage of the precious time of the Tribunal which, in our opinion, justify imposition of cost on the assessee. We, therefore, dismiss these miscellaneous applications filed by the assessee being devoid of any merit and impose a cost of ₹ 5,000/- on each of the assessee." On a Writ Petition filed by the assessee HELD by the High Court:

(i) Repeatedly, the Hon'ble Supreme Court cautioned the Presiding Officer of the Courts and Tribunals from adversely commenting and remarking on the conduct of parties or

their representatives or pleaders. If these comments and remarks, adversely affecting them are not required for the decision of a case and it could be justly and fairly reached on the basis of material produced and the arguments canvassed, then, the Courts and Tribunals should refrain from passing any adverse remarks or making harsh comments on the conduct of the parties. Sobriety and restraint in judicial conduct is of paramount importance. Even if the Presiding Officer, members of the Tribunal are agitated by prolong arguments and often needless, still they must not lose patience and to an extent as to comment upon the conduct of the Advocates or representatives. That must be avoided as it would be a reflection on the working of the Tribunal as a whole. While not making any further reference to the judgments of the Hon'ble Supreme Court, we would only invite attention of the members of the Income Tax Appellate Tribunal to the following observations in the judgment of the Hon'ble Supreme Court in the case of *The State of Uttar Pradesh v. Mohammad Naim reported in A.I.R. 1964 Supreme Court, 703*. These read as under ……

(ii) In the light of above, we delete and expunge all the remarks which have been made against the representative and the parties. Thus, the above reproduced passage or lines from the order particularly para 17 above shall stand expunged and deleted. This would also include deletion of the direction to pay costs. The imposition thereof is accordingly set aside.

Madhukar B. Thakoor v. ITAT (2015) 374 ITR 1 / 119 DTR 308 / 277 CTR 518 / 233 Taxman 344 (Bom.)(HC)

Sunita Samir Sao v. ITAT (2015) 374 ITR 1 / 119 DTR 308 / 277 CTR 518 (Bom.)(HC)

Mohan B. Thakoor v. ITAT (2015) 374 ITR 1 / 119 DTR 308 / 277 CTR 518 (Bom.)(HC)

S.254(2) : Appellate Tribunal – Rectification of mistake – Order cannot be recalled on the ground that on the date of hearing assessee could not produce documents relied upon by it before lower authorities. 2395

Scope of section 254(2) was very limited under which an order can be amended or rectified by Tribunal where there is a mistake apparent on record of order. However, from perusal of impugned order, there appears no mistake apparent on record. Ground that assessee could not produce relevant documents relied upon by assessee before lower authorities in our view not a ground which can be considered to be a mistake apparent on record. Even it was discretion of Tribunal either to accept or reject adjournment application and when it is case of the assessee itself that same was rejected and even learned representative of assessee was duly heard on merits, under such circumstances it cannot be said that there was any mistake committed by Tribunal which is apparent in order dated 24-7-13. If representative of assessee had not filed documents relied upon by it before date of hearing itself, then he himself is responsible for lapse or lack of due diligence on his part but it cannot be said to be a case of any mistake apparent on record. (AY. 2008-09)

Poona Galvanizers Pvt. Ltd. v. DCIT. (2014) 150 ITD 780 / (2015) 167 TTJ 677 (Mum.) (Trib.)

2396 **S.254(2) : Appellate Tribunal – Rectification of mistake – Capital gains – Stamp valuation – Rectification of rectification order was dismissed. [S.50C]**
Dismissing the application the Tribunal held that where Tribunal had considered not only argument of assessee but all other factors and materials on record while coming to its conclusion at time of disposal of appeal as well as first miscellaneous application, instant rectification application was to be dismissed. (AY.2008-09)
Bhavya Anant Udeshi v. ITO (2015) 68 SOT 192 (URO)(Hyd.)(Trib.)

2397 **S.254(2) : Appellate Tribunal – Rectification of mistakes – Issue is debatable in view of contradictory judgments – Order cannot be rectified. [S.2(22)(e)]**
The assessee was a director of a company from whom he received some amounts. The assessee showed these amounts as loans and advances. The AO taxed the payments under section 2(22)(e) of the Act. The CIT(A) and the Tribunal confirmed the decision of the AO. The assessee thereafter filed a miscellaneous petition under Section 254(2) stating that the Tribunal had wrongly decided the issue. The Tribunal dismissed the petition holding that in view of contradictory judgments, the issue arising from the miscellaneous petition was a debatable one and it could not be rectified under Section 254(2). Only a mistake from the face of record could be rectified under Section 254(2) and not a debatable issue. (AY. 2011-12)
P.K Jayagopal v. ACIT (2015) 44 ITR 567 (Chennai)(Trib.)

2398 **S.254(2) : Appellate Tribunal – Rectification of mistake – Strictures passed against ICAI by ITAT for alleged "deteriorating standards" and "losing its grip over the Income tax matters" toned down on the basis that they were made in the context of a "hypothetical situation" and were not "intended to criticize the functioning of the ICAI"**
In *Vijay V Meghani v. DCIT*, the ITAT Mumbai had passed severe strictures and lamented the alleged fall in standards in the CA profession. The Tribunal pointed out several factors which, according to it, show "signs of deteriorating standards" amongst Chartered Accountants. The Tribunal also expressed the fear that the CA profession is "losing its grip over the Income tax matters". The ITAT advised the ICAI to tackle the issues on a war footing so as to bring back the high standards, confidence, quality, prestige, reputation etc. enjoyed by the C.A. profession.
In response to the said order, the Council of the ICAI issued a statement that the comments made by the ITAT on the profession and functions of the ICAI are not warranted. It is also stated that the "sweeping observations" made by ITAT about the Institute and the profession of Chartered Accountancy in a matter relating to a particular tax payer, are out of context.
The ICAI filed a Miscellaneous Application u/s. 254(2) before the Tribunal to seek expunging the aforesaid remarks made by the ITAT against the CA profession.
By an order dated 4th September 2015, the ITAT modified its earlier order and stated that they were made in the context of a "hypothetical situation" and were not "intended to criticize the functioning of the ICAI" (AY. 1994-95, 1996-97)
Vijay V. Meghani v. ACIT (2015) 155 ITD 623 / 125 DTR 274 / 173 TTJ 502 (Mum.)(Tirb.)
Editorial: Vijay V. Meghani v. ACIT (Mum)(Tib) (2014) 35 ITR 320 / 165 TTJ 289 (2015) 153 ITD 687 (Mum.)(Trib.)

S.254(2) : Appellate Tribunal – Rectification of mistake – Order of Tribunal pronounced beyond 60/90 days as prescribed in rule 34(5)(c) cannot validly be challenged in rectification petition. [ITAT, R. 34(5)(c)] 2399

Powers of rectification Tribunal has no jurisdiction to recall or review its order passed on merits while dealing with an application u/s. 254(2) Appellant filed instant petition seeking recall of impugned order contending that impugned order suffered from certain mistakes which were apparent on record. Order of Tribunal pronounced beyond 60/90 days as prescribed in rule 34(5)(c) cannot validly be challenged in a petition. (AY.1993-94)

Times Guaranty Ltd. v. ACIT (2015) 153 ITD 655 / 171 TTJ 387 (Mum.)(Trib.)

S.254(2) : Appellate Tribunal – Rectification of mistake – Charitable purposes – Applicability of proviso – Matter referred to President to constitute a larger Bench. [S. 2(15), 12A, 12AA] 2400

Tribunal held that it has not decided the first ground of appeal against withdrawal of registration granted under section 12A, for the reason that in its view whether the conditions precedent for withdrawal of registration under section 12AA(3) stand satisfied or not *de hors* section 2(15), need to be determined first. It restored the matter back to the DIT(E) as there were no facts on records for determination of the said issue, therefore it is incorrect to say that the Tribunal proceeded to decide ground No 2. Without addressing the ground No. 1.; however assessing authority having been incorporated with the principal object of development of Mumbai Metropolitan Region, same involves a number of interrelated activities from which it is generating revenue, and therefore assessee's activities are covered by the proviso to section 2(15); however the issue of the legal consequence(s) of the applicability of proviso to section 2(15) on the registration of an entity as a charitable institution matter referred to the Hon'ble President for constituting a larger Bench to decide the issue. (A.Y. 2009-10)

Mumbai Metropolitan Region Development Authority v. DIT(E) (2015) 155 ITD 314 / 40 ITR 60 / 119 DTR 393 / 170 TTJ 607 (Mum.)(Trib.)

Editorial: Original order in ITA No. 625/M/2012 is reported in Mumbai Metropolitan region Development Authority v. DIT(E) (2015) 170 TTJ 621 (Mum.)(Trib.)

S.254(2) : Appellate Tribunal – Rectification of mistake – Lease of property – Rent received from leasing of business centre was treated as 'income from house property', claim for deduction of depreciation and administrative expenses against rental income could not be allowed – Rectification application was rejected. [S. 24, 32, 37(i)] 2401

Dismissing the rectification applications of assessee the Tribunal held that; Rent received from leasing of business centre was treated as 'income from house property', claim for deduction of depreciation and administrative expenses against rental income could not be allowed. (AY.1999-2000 to 2004-05)

Rolta Holding & Finance Corporation Ltd. v. Dy. CIT (2015) 153 ITD 6 (Mum.)(Trib.)

S.254(2) : Appellate Tribunal – Rectification of mistake – Assessee could not point out any specific mistake in said order, petition was to be dismissed. 2402

Rectification petition was filed by assessee against order of Tribunal. Assessee contended that while passing order Tribunal had not considered grounds raised by it in its entirety

and further facts were also not considered in manner explained by assessee. Facts had already been summarized and considered by lower authorities, it was not necessary for Tribunal to reproduce each and every sentence in its order. Grounds raised by assessee in said petition were general in nature and assessee could not point out any specific mistake in said order of Tribunal. Grievance of assessee that decision of Tribunal was against it, was unjustified. Rectification application was dismissed. (AY. 1998-99 to 2005-06)
Mahaveerchand Jain v. Dy. CIT (2015) 153 ITD 108 (Chennai)(Trib.)

2403 **S.254(2) : Appellate Tribunal – Rectification of mistake – Scientific research expenditure – Expenditure on research and development for production of new drugs – Mistake apparent – Non-consideration or improper consideration of issue – Matter remanded.[S.35(3)]**

Tribunal in Revenue's appeal while rejecting the claim of assessee under section 35(1) failed to consider the applicability of section 35(3) even though not raised in appeal or cross objection by assessee, there was mistake apparent rectifiable under section 254(2). If any mistake pointed out or is found apparent from the record apparent from the record. If Tribunal has failed to give issue directions or failed to pass such orders as are required to be passed under section 254(1) then it shall amounts to a mistake apparent from the record and for rectifying such mistakes the Tribunal "shall make such amendments" in its orders as are necessary for correcting such mistake. Thus in view of the language adopted in sub clause (2) it is mandatory obligation on the part of the Tribunal to amend its order if the mistake or error so requires. Matter was listed for further hearing on the limited issue of applicability of section 35(3) of the Act. (AY. 2006-07, 2007-08, 2008-09)
Bharat Biotech International Ltd. v. Dy. CIT (2014) 151 ITD 747 / (2015) 33 ITR 750 / 169 TTJ 148 (Hyd.)(Trib.)

2404 **S.254(2A) : Appellate Tribunal – Stay – Power of Tribunal to grant stay beyond 365 days.**

Allowing the petition the Court held that the assessee's appeal listed for hearing but not taken up for reasons not attributable to assessee. Court held that stay continued till disposal of appeal. Tribunal was directed to expedite disposal of appeal. (AY.2009-10)
New Delhi Television Ltd. v. Dy. CIT (2015) 376 ITR 51 (Delhi)(HC)

2405 **S.254(2A) : Appellate Tribunal – Order – Third proviso cannot be interpreted to mean that extension of stay of demand should be denied beyond 365 days even when the assessee is not at fault. ITAT should make efforts to decide stay granted appeals expeditiously.**

The Tribunal passed an order extending stay of recovery of demand beyond the period of 365 days. The department filed a Writ Petition to challenge the said order on the ground that in view of the third proviso to section 254(2A) of the Act, the Tribunal has no jurisdiction to extend the stay of demand beyond 365 days. HELD by the High Court dismissing the Petition:

(i) It is true that as per third proviso to section 254(2A) of the Act, if such appeal is not so disposed of within the period allowed under the first proviso i.e. within 180 days from the date of the stay order or the period or periods extended or allowed

under the second proviso, which shall not, in any case, exceed three hundred and sixty-five days, the order of stay shall stand vacated after the expiry of such period or periods, even if the delay in disposing of the appeal is not attributable to the assessee. Therefore, as such, legislative intent seems to be very clear. However, the purpose and object of providing such time limit is required to be considered. The purpose and object of providing time limit as provided in section 254(2A) of the Act seems to be that after obtaining stay order, the assessee may not indulge into delay tactics and may not proceed further with the hearing of the appeal and may not misuse the grant of stay of demand. At the same time, duty is also cast upon the learned Tribunal to decide and dispose of such appeals in which there is a stay of demand, as early as possible and within the period prescribed under first proviso and second proviso to section 254(2A) of the Act i.e. within maximum period of 365 days. However, one cannot lose sight of the fact that there may be number of reasons due to which the learned Tribunal is not in a position to decide and dispose of the appeals within the maximum period of 365 days despite their best efforts. Some of the reasons due to which the learned Tribunal despite its best efforts is not in a position to dispose of the appeal/appeals at the earliest are stated herein above. There cannot be a legislative intent to punish a person/ assessee though there is no fault of the assessee and/or appellant. The purpose and object of section 254(2A) of the Act is stated herein above and more particularly with a view to see that in the cases where there is a stay of demand, appeals are heard at the earliest by the learned Tribunal and within stipulated time mentioned in section 254(2A) of the Act and the assessee in whose favour there is stay of demand may not take undue advantage of the same and may not adopt delay tactics and avoid hearing of the appeals. However, at the same time, all efforts shall be made by the learned Tribunal to see that in the cases where there is stay of demand, such appeals are heard, decided and disposed of at the earliest and periodically the position/ situation is monitored by the learned Tribunal and the stay is not extended mechanically.

(ii) By section 254(2A) of the Act, it cannot be inferred a legislative intent to curtail/ withdraw powers of the Appellate Tribunal to extend stay of demand beyond the period of 365 days. However, the aforesaid extension of stay beyond the period of total 365 days from the date of grant of initial stay would always be subject to the subjective satisfaction by the Tribunal and on an application made by the assessee / appellant to extend stay and on being satisfied that the delay in disposing of the appeal within a period of 365 days from the date of grant of initial stay is not attributable to the appellant/assessee. For that purpose, on expiry of every 180 days, the appellant/assessee is required to make an application to extend stay granted earlier and satisfy the Appellate Tribunal that the delay in not disposing of the appeal is not attributable to him/it and the Appellate Tribunal is required to review the matter after every 180 days and while disposing of such application of extension of stay, the Appellate Tribunal is required to pass a speaking order after having satisfied that the assessee/appellant has not indulged into any delay tactics and that the delay in disposing of the appeal within stipulated time is not attributable to the assessee/appellant. However, at the same time, it may not be

construed that widest powers are given to the Appellate Tribunal to extend the stay indefinitely and that the Appellate Tribunal is not required to dispose of the appeals at the earliest. One of the objects and purpose is to see that in a case where stay has been granted by the Tribunal, the Tribunal is required to dispose of the appeal within total period of 365 days, as ultimately Revenue has not to suffer and all efforts should be made by the Tribunal to dispose of such appeals in which stay has been granted as far as possible within total period of 365 days from the date of grant of initial stay and the Tribunal shall grant priority to such appeals over appeals in which no stay is granted. For that even the Tribunal and/ or registrar of the Tribunal is required to maintain separate register of the appeals in which stay has been granted fully and/or partially and the appeals in which no stay has been granted.

(iii) The Tribunal is also directed to see that the appeals of a particular assessee with respect to same or similar issue involved in earlier years/with respect to respective years are clubbed together and heard and decided and dispose of together, may be with respect to a particular year, it is not a stay granted matter. The registry of the Tribunal to draw the attention of the learned Vice President of the Tribunal with respect to such appeals, so that all the appeals are clubbed together and decided and disposed of together, as it is reported that the powers of clubbing of the matters are only with the Vice President of the Tribunal. Registry also may insist that the paper books are filed by the assessee/department as early as possible and preferably within a period of three months from filing of the appeals so as to see that the purpose and object of section 254(2A) of the Act is achieved i.e., appeals in which the stay of demand has been granted by the Tribunal are decided and disposed of by the Tribunal at the earliest and within stipulated time and the Tribunal shall not grant unnecessary adjournments frequently due to non-availability of the advocate of the assessee and or the department's representative, unless strong case for adjournment is made out, more particularly in a case where there is stay of demand during the pendency of the appeal.

(iv) It is also observed and held that while disposing of the application for extension of stay granted earlier, the Tribunal is required to pass a speaking/reasoned order or not (Sic). As observed hereinabove, the Tribunal can extend the stay granted earlier beyond the period of 365 days from the date of grant of initial stay, however, on being subjectively satisfied by the Tribunal and on an application made by the assessee / appellant to extend stay and on being satisfied that the delay in disposing of the appeal within a period of 365 days from the date of grant of initial stay, is not attributable to the appellant/assessee and that the assessee is not at fault and therefore, while considering each application for extension of stay, the Tribunal is required to consider the facts of each case and arrive at subjective satisfaction in each case whether the delay in not disposing of the appeal within the period of 365 days from the date of initial grant of stay is attributable to the appellant – assessee or not and/or whether the assessee/appellant in whose favour stay has been granted, has cooperated in early disposal of the appeal or not and/ or whether there is any delay tactics by such appellant/assessee in whose favour stay has been granted and/or whether such appellant is trying to get any undue

advantage of stay in his favour or not. Therefore, while passing such order of extension of stay, Tribunal is required to pass a speaking order on each application and after giving an opportunity to the representative of the Revenue – Department and record its satisfaction as stated hereinabove. Therefore, ultimately if the revenue – Department is aggrieved by such extension in a particular case having the view that in a particular case the assessee has not cooperated and/or has tried to take undue advantage of stay and despite the same the Tribunal has extended stay order, Revenue can challenge the same before the higher forum/High Court. (AY. 2008-09, 2009-10)

DIT v. Vodafone Essar Gujrat Ltd. (2015) 376 ITR 23 / 279 CTR 482 / 233 Taxman 35 / 124 DTR 93 (Guj.)(HC)

S.254(2A) : Appellate Tribunal – Stay – The Third Proviso which restricts the power of the ITAT to grant stay beyond 365 days "even if the delay in disposing of the appeal is not attributable to the assessee" is arbitrary, unreasonable and discriminatory. It is struck down as violative of Article 14. The ITAT has the power to extend stay even beyond 365 days. [Constitution of India, Article 14] 2406

The third proviso to section 254(2A) was amended by the Finance Act, 2008, with effect from 1-10-2008 to provide that the Tribunal shall not have the power to grant stay of demand for a period exceeding 365 days "even if the delay in disposing of the appeal is not attributable to the assessee". The said amendment was inserted to overcome the judgment of the Bombay High Court in *Narang Overseas Private Limited v. ITAT 295 ITR 22.* The Petitioners filed a Writ Petition to challenge the said amended third proviso to section 254(2A) on the ground that it is arbitrary and contrary to the provisions of the Article 14 of the Constitution of India. HELD by the High Court upholding the challenge:

(i) U/s. 254, there are several conditions which have been stipulated with respect to the power of the Tribunal to grant stay of demand. First of all, as per the first proviso to Section 254(2A), a stay order could be passed for a period not exceeding 180 days and the Tribunal should dispose of the appeal within that period. The second proviso stipulates that in case the appeal is not disposed of within the period of 180 days, if the delay in disposing of the appeal is not attributable to the assessee, the Tribunal has the power to extend the stay for a period not exceeding 365 days in aggregate. Once again, the Tribunal is directed to dispose of the appeal within the said period of stay. The third proviso, as it stands today, stipulates that if the appeal is not disposed of within the period of 365 days, then the order of stay shall stand vacated, even if the delay in disposing of the appeal is not attributable to the assessee. While it could be argued that the condition that the stay order could be extended beyond a period of 180 days only if the delay in disposing of the appeal was not attributable to the assessee was a reasonable condition on the power of the Tribunal to the grant an order of stay, it can, by no stretch of imagination, be argued that where the assessee is not responsible for the delay in the disposal of the appeal, yet the Tribunal has no power to extend the stay beyond the period of 365 days. The intention of the legislature, which has been made explicit by insertion of the words – 'even if the delay in disposing of the appeal is not attributable to the assessee'– renders the right of appeal

granted to the assessee by the statute to be illusory for no fault on the part of the assessee. The stay, which was available to him prior to the 365 days having passed, is snatched away simply because the Tribunal has, for whatever reason, not attributable to the assessee, been unable to dispose of the appeal. Take the case of delay being caused in the disposal of the appeal on the part of the revenue. Even in that case, the stay would stand vacated on the expiry of 365 days. This is despite the fact that the stay was granted by the Tribunal, in the first instance, upon considering the *prima facie* merits of the case through a reasoned order;

(ii) The petitioners are correct in their submission that unequals have been treated equally. Assessees who, after having obtained stay orders and by their conduct delay the appeal proceedings, have been treated in the same manner in which assessees, who have not, in any way, delayed the proceedings in the appeal. The two classes of assessees are distinct and cannot be clubbed together. This clubbing together has led to hostile discrimination against the assessees to whom the delay is not attributable. It is for this reason that we find that the insertion of the expression – 'even if the delay in disposing of the appeal is not attributable to the assessee'– by virtue of the Finance Act, 2008, violates the non-discrimination clause of Article 14 of the Constitution of India. The object that appeals should be heard expeditiously and that assesses should not misuse the stay orders granted in their favour by adopting delaying tactics is not at all achieved by the provision as it stands. On the contrary, the clubbing together of 'well behaved' assesses and those who cause delay in the appeal proceedings is itself violative of Article 14 of the Constitution and has no nexus or connection with the object sought to be achieved. The said expression introduced by the Finance Act, 2008 is, therefore, struck down as being violative of Article 14 of the Constitution of India. This would revert us to the position of law as interpreted by the Bombay High Court in Narang Overseas (supra), with which we are in full agreement. Consequently, we hold that, where the delay in disposing of the appeal is not attributable to the assessee, the Tribunal has the power to grant extension of stay beyond 365 days in deserving cases.

Pepsi Foods Pvt. Ltd. v. ACIT (2015) 376 ITR 87 / 119 DTR 373 / 277 CTR 470 / 232 Taxman 78 (Delhi)(HC)
Pepsi Foods Pvt. Ltd. v. Dy. CIT (2015) 119 DTR 373 / 277 CTR 470 (Delhi)(HC)
Aspect Software Inc v. ACIT (2015) 119 DTR 373 / 277 CTR 470 (Delhi)(HC)
Ericsson AB v. ADIT (2015) 119 DTR 373 / 277 CTR 470 (Delhi)(HC)

2407 **S.254(2A) : Appellate Tribunal – Power – Stay – Tribunal has power to stay the prosecution proceedings initiated under section 276C(1). [S. 271(1)(c), 276C(1)]**

The stay application has been filed by the assessee for keeping in abeyance the launching of prosecution proceedings. The Tribunal held that the Tribunal has power to stay proceedings initiated by the AO by issuing show cause notice for launching prosecution under section 276C(1) in view of the proviso to section 254(2A). Outcome of the appeals pending before the Tribunal relating to the validity of the additions made by the AO in the assessment made pursuant to the order passed under section 263 and penalty imposed under section 271(1)(c) in respect of the said additions will

have a direct bearing on the question whether prosecution is to be launched or not and therefore, stay is granted against the proceedings initiated by issuing show cause notice for launching prosecution under section 276C(1) till the disposal of appeals. (AY. 2008-09)
Jindal Steel & Power Ltd. v. ACIT (2015) 169 TTJ 704 (Delhi)(Trib.)

Section 255 : Procedure of Appellate Tribunal.

S.255 : Appellate Tribunal – Powers of President to constitute Special Bench – The CBDT for seeking to constitute Special Bench for non-judicial reasons and on grounds of "political sensitivity" – The collection of tax and the adjudication must move unconcerned with political identity – It is also necessary to send a strong signal to all the litigants, including the State, to make no attempts to influence a judicial body by non-judicial methods – Constitution of Special Bench on the recommendation of CBDT in other State was strongly condemned by the Court. [S.254(1), 255(3)] 2408

(i) Having rejected the contention that the Regular Bench had recommended a Special Bench and that it constituted sufficient material for the president, we now come to the second material placed before the president, that is the recommendation of the vice president.

(ii) This is the most distressing part. The president forwarded the letter of the Board to the vice president for his comments. This was purely an internal movement of the file. It was not that the matter was judicially assigned to the vice president and notified on his board. There was no indication for any litigant to know that the file was now before the vice president. In spite of this position, the Special counsel who was to be engaged by the Revenue met the vice president and explained him the need for a Special Bench. How the Special counsel knew that the file of the matter was before the vice president, is a mystery. This was a private meeting and the Petitioner was not informed. The matter was seized before the regular bench and the Revenue was a contesting party. The Petitioner was completely unaware that any such private meeting had taken place between the counsel and the Vice president. Permitting a party to the litigation to meet privately in absence of other side in respect of an ongoing litigation and then base an opinion on such meeting, was most improper on the part of the vice president. The vice president did not even find it improper and he has proceeded to place the said private meeting on record as if nothing was wrong about the same. Not only holding such private meetings is opposed to judicial conduct, but not knowing that it is an improper judicial conduct, makes the matters worse.

(iii) The vice president had played a major role in the decision making process to constitute the Special Bench. After he received the file from the president for his opinion, he suggested that the regular Bench should give their opinion. He asked them to consider formation of a Special Bench and for that purpose hold a hearing, if necessary. When the opinion was received from the Regular Bench, he gave his own comment that the Bench had recommended a Special Bench, omitting to mention that the Bench had recommended a bench outside Andhra Pradesh. The Vice president, therefore, was an integral part and in fact played a major role in a decision to constitute a Special Bench.

(iv) It is true that the final order of the president is not a judicial order. Nevertheless, even when a judicial body acts in administrative capacity, in midst of the litigation, which order will have effect on the ultimate outcome, the judicial body, must act with fairness, and not allow itself to be influenced. This is a fundamental principle. We will be failing in our duty if we do not uphold this most important principle. No attempts to influence a judicial body by non-judicial methods can be permitted and tolerated. If a litigant, be it the State, indulges in such acts, it shall not derive any benefit therefrom. Such tainted process must be obliterated and undertaken again. This course of action is necessary to retain the faith of litigants in the quality of justice rendered by the Tribunal. It is also necessary to send a strong signal to all the litigants, including the State, to make no attempts to influence a judicial body by non judicial methods.

(v) What is further troubling is that is the introduction of 'political sensitivity'. In fact, the request letter of the Board does not specifically invoke this concept. It is the vice president who has introduced this concept. This concept is then carried forward by the Regular Bench and during the arguments before us. We fail to understand how 'political sensitivity' is relevant in tax litigation. Tax is levied and collected under the sovereign power of the State. The Revenue is entrusted with collecting the tax and employ all legitimate methods to bring the tax evaders to book. The Tribunal is established to adjudicate disputes arising from the application of the Act. In the scheme of the Act, political affiliation of an assessee is irrelevant. The vice president thought the case was politically sensitive. This was after the private meeting with the representative of the Board. So are we to presume that politics was discussed in the meeting? The vice president has sown a seed of an irrelevant and potentially dangerous concept in the income tax litigation. Consider a converse scenario. There could be situation where an assessee may send its representative to hold a private meeting to refer the entire matter to Special Bench because the result before regular Bench may affect his political career or that the issue in his case is politically sensitive. We therefore strongly deprecate the invocation of this criterion. The collection of tax and the adjudication must move unconcerned with political identity

Jagati Publication Ltd. v. President, ITAT (2015) 377 ITR 31 / 279 CTR 271 / 124 DTR 131 /234 Taxman 523 / (Bom.)(HC)

2409 **S.255 : Appellate Tribunal – Single Member Bench – Single Member Bench has powers to hear any case whose total income as computed by Assessing Officer does not exceed ₹ five lakh irrespective of quantum of additions or disallowances impugned in appeal.** SMC Bench has the powers to hear such an appeal, it is only a corollary to these powers that this Bench has a duty to hear such appeals as well. The reason is simple. All the powers of someone holding a public office are powers held in trust for the good of public at large. There is, therefore, no question of discretion to use or not to use these powers. It is so for the reason that when a public authority has the powers to do something, he has a corresponding duty to exercise these powers when circumstances so warrant or justify.

Therefore, as the law stands its assessed income which matters and not the tax effect or the quantum of disallowances or additions, impugned in appeal. All that is relevant to decide the jurisdiction of the SMC Bench is thus the assessed income and nothing other than that. (AY. 2003-04)

ACIT v. Krafts Palace (2015) 68 SOT 338 (URO) / 40 ITR 158 / 154 ITD 275 (Agra)(Trib.)

S.255 : Appellate Tribunal – Third member – Binding precedent – Even if Third Member's verdict is shown to be "unsustainable in law and in complete disregard to binding judicial precedents", Division Bench has no choice but to give effect to it [S. 255(4) 2410

On a question relating to the levy of penalty, there was a difference of opinion between the Judicial Member and the Accountant Member. The Third Member, to whom the difference was referred, agreed with the Accountant Member and confirmed the levy of penalty. At the stage of giving effect to the order of the Third Member, the assessee claimed that the said order could not be given effect to as it was "unsustainable in law and in complete disregard to binding judicial precedents". The assessee claimed that the matter of whether effect could be given to such an order was required to be referred to a Special Bench. HELD by the Tribunal:

(i) A larger Bench decision binds the Bench of a lesser strength because of the plurality in the decision making process and because of the collective application of mind. What three minds do together, even when the result is not unanimous, is treated as intellectually superior to what two minds do together, and, by the same logic, what two minds do together is considered to be intellectually superior to what a single mind does alone. Let us not forget that the dissenting judicial views on the Division Benches as also the views of the third member are from the same level in the judicial hierarchy and, therefore, the views of the third member cannot have any edge over views of the other members. Of course, when division benches itself also have conflicting views on the issues on which members of the Division Benches differ or when majority view is not possible as a result of a single member Bench, such as in a situation in which one of the dissenting members has not stated his views on an aspect which is crucial and on which the other member has expressed his views, it is possible to constitute Third Member benches of more than one member. That precisely could be the reason as to why even while nominating the Third Member under section 255(4), Hon'ble President of this Tribunal has the power of referring the case "for hearing on such point or points (of difference) by one or more of the other members of the Appellate Tribunal". Viewed from this perspective the Third Member is bound by the decisions rendered by the benches of greater strength. That is the legal position so far as at least the jurisdiction of Hon'ble Gujarat High Court is concerned post *CIT v. Vallabhdas Vithaldas [(2015) 56 taxmann.com 300 (Guj.)*, but, even as held so, the fact that Hon'ble Delhi High Court had, in the case of *P. C. Puri v. CIT [(1985) 151 ITR 584 (Del.)]*, expressed a contrary view on this issue which held the field till we had the benefit of guidance from Hon'ble jurisdictional High Court. The approach adopted by the learned Third Member was quite in consonance with the legal position so prevailing at that point of time.

(ii) At the time of giving effect to the majority view under section 255(4), it cannot normally be open to the Tribunal to go beyond the exercise of giving effect to the majority views, howsoever mechanical it may seem. In the case of dissenting situations on the Division Bench, the process of judicial adjudication is complete when the Third Member, nominated by Hon'ble President, resolves the impasse by expressing his views and thus enabling a majority view on the point or points of difference. What then remains for the Division Bench is simply identifying the majority view and dispose of the appeal on the basis of the majority views. In the course of this exercise, it is not open to the Division Bench to revisit the adjudication process and start examining the legal issues (*B T Patil & Sons Belgaum Constructions Pvt. Ltd. v. ACIT* (ITA Nos, 1408 and 1409/PN/2003; order dated 28th February 2013 distinguished). (AY. 1995-96, 1996-97)

Juiter Corporation Service Ltd. v. DCIT (2015) 40 ITR 328 (Ahd.)(Trib.)

Section 256 : Statement of case to the High Court.

2411 **S.256 : High Court – Reference – Question of law – Legal inference to be drawn from facts – Question of law – Business expenditure – Commission. [S. 37(1)]**

The legal inference that should be dawn from the primary facts is eminently a question of law.

Premier Breweries Ltd. v. CIT (2015) 372 ITR 180 / 230 Taxman 575 / 116 DTR 233 (SC)

2412 **S.256 : High Court – Reference – Low tax effect – When reference was called at the instance of High Court – Question of law framed has to be answered on merit.**

Once a reference application of Revenue has been allowed by Court and reference is called at instance of Court, question of law framed has to be answered on merits and, in such a case, matter cannot be disposed off merely because tax effect is minimal.(AY. 1973-74)

CIT v. Udaipur Mineral Development Syndicate (P.) Ltd. (2015) 232 Taxman 393 / 275 CTR 533 (Raj.)(HC)

2413 **S.256 : High Court – Reference – Powers – Amortisation of preliminary expenses – Power to consider all aspects of questions referred. [S. 32, 35D]**

There is no limitation restricting a reference to those aspects of questions which were argued before the Tribunal or decided by the Tribunal and all aspects may be argued and considered where the question involves more than one aspect. (AY. 1980-81, 1981-82)

International Computers Indian Manufacture v. CIT (2015) 374 ITR 243 / 276 CTR 57/ 117 DTR 24 / 230 Taxman 428 (Bom.)(HC)

Section 259 : Case before High Court to be heard by not less than two Judges.

2414 **S.259 : High Court – Case before High Court to be heard not less than two judges – Third Judge – Division Benches similar issue would be binding on referral Third Judge.**

On appeal to the High Court, Justice M. S. Shah, following the decision of the Supreme Court in the case of *CIT v. Shree Manjunathesware Packing Products & Camphor*

Works [1988] 231 ITR 53, held that exercise of power by the Commissioner under section 263(1) was obviously in respect of the assessee's case but for the purpose of exercising that power, the examination by the Commissioner was not required to be confined to the record of that assessee's case as such record could be any record relating to any proceeding under the Act. Since the Tribunal had set aside the order of the Commissioner only on this ground, in his opinion, the matter would have to be remanded before the Tribunal for consideration on merits. On the other hand, Justice, D. A. Mehta held that the term 'record' used in section 263 would not include the statement of the son of the assessee since there was nothing on the record to show that these statements had come on record of the assessee. In his opinion, words 'any proceedings under the Act' would not extend to a proceeding not relating to the assessee who was subjected to action under section 263. He, therefore, upheld decision of the Tribunal.

On reference to Third Judge:

The revenue submitted that the issue has now been concluded by virtue of the decisions of this Court in the case of *CWT v. Lalitchandra M. Patel [2003] 258 ITR 232/123 Taxman 682* and in the case of *CIT v. Arunaben Sumankumar [2003] 259 ITR 386/[2002] 124 Taxman 57 (Guj.)* and that, therefore, this reference to the Third Member may be returned unanswered.

The assessee, on the other hand, submitted that since the ultimate exercise would result into declaration of legal proposition by three Judges, the Division Bench judgments would not be binding.

The Court held that the law of precedent heavily relies on the collective decision making process where multiple legal minds are simultaneously applied assisted by legal research and presentation of legal arguments. When such materials and legal contentions are processed by several Judges, the decision that is rendered even if not unanimous has the advantage of input from larger number of legally trained minds. In the present case, unlike a case of larger Bench where three or more judges would be simultaneously hearing a question of law, with the assistance of same set of arguments, a referral judge is left to choose between one of the two opinions of the differing judges which, is closer to the correct legal position. This completely robs the process of plurality in the decision making which is the foundation of law of precedent where a judgment of a Bench would bind the Bench of equal or lesser number of Judges even if it is not a unanimous opinion. Under the circumstances, the decisions of the later Division Benches on the point which arises directly in the present reference would be binding on the Third Member.

CIT v. Vallabhdas Vithaldas (2015) 232 Taxman 57 (Guj.)(HC)

Section 260A : Appeal to High Court.

S.260A : Appeal – High Court – Power of review – High Courts, being Courts of Record under Article 215, have the inherent power of review. There is nothing in section 260A(7) to restrict the applicability of the provisions of the CPC to S. 260A appeals.[S. 260A(7), Constitution of India, Art. 215] 2415

In an appeal under s. 260A, the Guwahati HC passed an order (332 ITR 91) in which it held that transport subsidies and other incentives were not eligible for relief u/s.

80-IB. The assessee filed a review petition (358 ITR 551) in which it contended that the High Court had gone on to answer the questions without first framing substantial questions of law. The High Court allowed the review petition and recalled the judgment. Thereafter, it passed a judgment (*CIT v. Meghalaya Steels Ltd. [2013] 356 ITR 235*) in which it held that the said transport subsidies and other incentives were eligible for relief u/s. 80-IB. The Department argued before the Supreme Court that under section 260A (7), only those provisions of the Civil Procedure Code could be looked into for the purposes of Section 260A as were relevant to the disposal of appeals, and since the review provision contained in the Code of Civil Procedure is not so referred to, the High Court would have no jurisdiction under section 260A to review such judgment. HELD by the Supreme Court dismissing the appeal:

High Courts being Courts of Record under Art. 215 of the Constitution of India, the power of review would in fact inhere in them. This was in fact so decided in a slightly different context while dealing with the power of review of Writ Petitions filed under Article 226 by a judgment reported in AIR 1963 SC 1909 5 (*Shivdeo Singh & Ors. v. State of Punjab and Ors*.). It is also clear that on a cursory reading of Section 260A(7), the said section does not purport in any manner to curtail or restrict the application of the provisions of the Code of Civil Procedure. Section 260A(7) only states that all the provisions that would apply *qua* appeals in the Code of Civil Procedure would apply to appeals under Section 260A. That does not in any manner suggest either that the other provisions of the Code of Civil Procedure are necessarily excluded or that the High Court's inherent jurisdiction is in any manner affected.

CIT v. Meghalaya Steels Ltd. (2015) 377 ITR 112 / 279 CTR 189 / 124 DTR 33 / 234 Taxman 523 (SC)

Editorial: Meghalaya Steels Ltd. v. CIT (2015) 279 CTR 193 (Gau.)(HC) is affirmed.

2416 **S.260A : Appeal – High Court – Instructions – Monetary limits – CBDT Instruction No. 3/2011 dated 9-2-2011 specifying monetary limits for filing appeals by the department applies only to appeals filed after that date and not to pending appeals. [S.253, 268A]**

The Supreme Court had to consider whether Instruction No. 3/2011 dated 9-2-2011 issued by the Central Board of Direct Taxes setting out limits for filing appeals to the ITAT and the High Courts applied even to appeals filed before the date of the Instruction. The High Court dismissed the appeals of the Department on the ground that the said Instruction applied even to appeals filed before that date. On appeal by the Department to the Supreme Court HELD reversing the High Court:

The appeals and review petitions preferred by the department before the High Court, were disposed of on the basis of the instructions issued by the Central Board of Direct Taxes dated 9-2-2011. It is not a matter of dispute, that all the appeals were preferred prior to 2011, whereas, the instructions dated 9-2-2011 clearly indicate in paragraph 11 thereof, that they shall not govern cases which have been filed before 2011, and that, the same will govern only such cases which are filed after the issuance of the aforesaid instructions dated 9-2-2011. In view of the above, the instant appeals are allowed, the impugned orders passed by the High Court hereby set aside. The matters are remitted back to the High Court for re-adjudication of the appeals on merits, in accordance with law.

CIT v. Suman Dhamija (2015) 279 CTR 329 / 124 DTR 169 / 60 taxmann.com 460 (SC)

S.260A : Appeal – High Court – Bound by facts recorded by Tribunal, unless the same is shown as perverse. [S. 37(1)] 2417

Apex court held that the High Court is bound by findings of fact recorded by the Tribunal, however the High Court can disturb the facts only on upon specific question being raised as to their being perverse. (AY.1995-96)

Mangalore Ganesh Beedi Works v. CIT (2015) 378 ITR 640 / 280 CTR 521 / 126 DTR 233 (SC)

S.260A : Appeal – High Court – It will not be permissible for either the Revenue or the assessee to take up the issues which were not raised before the Tribunal. [S.254(1)] 2418

It will not be permissible for either the Revenue or the assessee to take up the issues which were not raised before the Tribunal.

CIT (TDS) v. Maharashtra State Electricity Distribution Co. Ltd. (2015) 375 ITR 23 / 277 CTR 376 / 119 DTR 278 / 232 Taxman 373 (Bom.)(HC)

S.260A : Appeal – High Court – Delay of 1876 days – No reasonable cause was explained – Appeal was dismissed. 2419

Delay of 1876 days and 426 days in filing and refiling the appeals was not satisfactorily explained and hence applications for condonation of delay as well as appeals were dismissed.

CIT v. Arvinder Singh (2015) 128 DTR 273 (2016) 380 ITR 179 (Delhi)(HC)

S.260A : Appeal – High Court – monetary limits for appeals – Questions of law – High Court can ignore circulars fixing the monetary limits for appeals and consider questions of law. 2420

The Court held that the Central Board of Direct Taxes has issued circulars fixing the monetary limits for appeals to the High Court. However the Court can ignore the circulars and proceed to decide the statutory appeals on merits if the questions involved is a substantial one. Followed *CIT v. Surya Herbal Ltd. (2013) 350 ITR 300 (SC*). (AY. 1991-92 to 1996-97, 2002-03)

CIT v. South Travancore Distilleries and Allied Products (2015) 379 ITR 56 / 127 DTR 20 /(2016) 285 CTR 70 (Ker.)(HC)

S.260A : Appeal – High Court – Public sector companies – Voluntary retirement scheme – Earlier decision of Tribunal was not challenged by revenue – On identical facts the appeal of Revenue was held to be not maintainable. [S.10(10C)] 2421

Assessee claimed exemption in respect of amount received by him on his voluntary retirement from State Bank of India (SBI). Assessing Officer rejected assessee's claim but Tribunal allowed exemption relying upon its earlier decision in case of ex-employee of SBI. Revenue filed appeal against Tribunal's order. Dismissing the appeal of Revenue the Court held that when jurisdictional Tribunal had decided issue by following its earlier decision and no appeal from earlier decision was filed by Revenue, then in an identical matter, it was not open to Revenue to challenge a subsequent order without giving reasons for taking a different view, unless the memo of appeal or an affidavit filed prior to the hearing indicates the reasons for taking a different view, the Court shall be constrained to not only dismiss the appeal but also impose costs on the Commissioner

who continues to press such appeals. *Prima facie* assessee is entitled to benefit. (AY. 2007-08)
CIT v. Vijay G. Patil (2015) 235 Taxman 36 (Bom.)(HC)

2422 **S.260A : Appeal – High Court – Review petition – Review petition was dismissed – DTAA-India-USA. [S.9(1)(i), Art. 5(2)(j)]**
A question came up for consideration before Court was whether assessee operating rig had a Permanent Establishment in India. Court agreed with Tribunal's finding that unless rig owned by assessee was actually used for a period of 120 days, it would not be sufficient to attract Article 5(2)(j) of India-USA DTAA. It was not found sufficient that rig was entered for maintenance and it was ready for use. Dismissing the review petition the Court held that; since there was no error apparent on face of record in Court's order.
CIT v. R&B Falcon Offshore Ltd. Co. (2015) 235 Taxman 457 / (2016) 285 CTR 202 / 133 DTR 269 (Uttarakhand)(HC)

2423 **S.260A : Appeal – High Court – No appeal filed from order of Special Bench of Tribunal – Appeal from order following Special Bench not to be filed without special justification – Mark-to-market loss – Unmatured foreign exchange contacts. [S.37(1), 43(5)]**
Revenue has raised the question as to whether the Tribunal was correct in holding that notional loss arising from unmatured foreign exchange contracts is allowable as mandated by the Supreme Court in the case of Bharat Movers (2000) 245 ITR 428 (SC). Dismissing the appeal of Revenue the Court held that the Tribunal followed the decision of the Special Bench in *Dy. CIT v. Bank of Baharain and Kuwait (2010) 5 ITR 301(SB) (Mum.) (Trib.)*, against which no appeal was filed. There was no ground made out in the appeal memo or in any affidavit why the Revenue was preferring an appeal against the order of the Tribunal when an identical question decided by the Special Bench of the Tribunal had been accepted by the Revenue. Therefore, the notional loss arising from unmatured foreign exchange contracts was allowable. High Court also referred *CIT v. Bank of India (1996) 218 ITR 371 (Bom.)(HC)*. (AY 1999-2000)
DIT(IT) v. Citibank N.A. (2015) 377 ITR 69 (Bom.)(HC)

2424 **S.260A : Appeal – High Court – Delay of 395 days – Budgetary constrains and change of standing counsel – Not a reasonable cause to condone the delay.**
Dismissing the appeal of revenue the Court held that Budgetary constrains and change of standing counsel is not a reasonable cause to condone the delay.
CIT v. Dion Global Solutions Ltd. (2015) 377 ITR 213 (Delhi)(HC)

2425 **S.260A : Appeal – High Court – High Court has power to consider substantial question of law relating to issue not raised before or considered by Tribunal. [S.44BB]**
Held, the contention regarding applicability of section 44BB was not raised before the appellate authority or before the Tribunal. The question raised essentially, appeared to be a pure question of law and it was substantial in the sense that it had a direct and substantial impact on the destiny of the assessee's case and, hence, it could be considered by the High Court.
B.J. Services Co. Middle East Ltd. v. ACIT (2015) 234 Taxman 604 / (2016) 380 ITR 138 (Uttarakhand)(HC)

S.260A : Appeal – High Court – Disallowance of expenditure – Exempt income – Matter was restored – No question of law. [S.14A] 2426

Dismissing the appeal of revenue, when the Tribunal restored the issue of disallowance to Assessing Officer for fresh consideration in view of Bombay High Court decision, no question of law arises. (AY.2006-07)

CIT v. Firestone International P. Ltd. (2015) 378 ITR 558 / 234 Taxman 141 (Bom.)(HC)

S.260A : Appeal – High Court – Delay of 1,845 days – Delay was condoned subject to revenue is paying cost to the assessee. 2427

High Court passed a conditional order giving time to revenue to remove objections failing which its appeal would stand dismissed – Income Tax Officer assigned to attend Court was not present in Court. On that day as Income Tax Department was closed on Saturday. Appeal was dismissed due to failure of revenue to remove objections within time. This fact came to notice of revenue at time of admission of appeal for subsequent assessment year and then it filed notice of motion seeking restoration of appeal and condonation of delay. In case revenue fails to be present in Court, then they must accept consequence of their failure to attend Court. However, since it was an unintentional lapse on part of revenue and condonation of delay for considering appeal for admission would not, by itself, cause any prejudice to assessee, delay was to be condoned subject to revenue paying certain cost to assessee. (AY. 2007-08)

CIT v. K F Bioplants (P.) Ltd. (2015) 233 Taxman 74 (Bom.)(HC)

S.260A : Appeal – High Court – Substantial question of law – Business expenditure – Contribution to clubs – Dispute whether the expenditure was incurred by the Company or reimbursement – Notional sales tax exemption is capital receipt or revenue receipts – Question of law was admitted. [S. 37(1), 40(A)(9] 2428

Assessee company claimed deduction on contribution made to various clubs ran by and meant for staff and their family at various places. Assessee stated that this expenditure was incurred to facilitate management of various activities of employees or their families and these were not matters where it could be said to be incurring any expenses. There being a dispute as to whether expenditure was incurred for business or it was merely reimbursement appeal was to be admitted on this point and also on the issue of whether notional sales tax exemption is capital receipt or revenue receipts. (AY. 2003-04, 2004-05)

CIT v. Indian Petrochemicals Corporation Ltd. (2015) 378 ITR 569 / 233 Taxman 89 (Bom.) (HC)

S.260A : Appeal – High Court – Competency of appeal – Rule of consistency – Decision of Tribunal on identical issues relating to section 92B – No appeal from decisions – Presumption that decisions had been accepted – Appeal on similar issues to High Court – Not maintainable [S. 92B, 260A] 2429

Held, dismissing the appeal, that the order of the Tribunal, *inter alia*, had followed the decisions of the Bombay Bench of the Tribunal to reach the conclusion that the arm's length price in the case of loans advanced to associate enterprises would be determined on the basis of the rate of interest being charged in the country where the loan is

received/consumed. The Revenue had not preferred any appeal against those decisions of the Tribunal on the above issue. No reason had been shown as to why the Revenue sought to take a different view in the present case from that taken in those decisions of the Tribunal. The Revenue not having filed any appeal against those decisions, had in fact accepted the decisions of the Tribunal. The appeal was not maintainable. (AY. 2007-08)
CIT v. Tata Auto Comp Systems Ltd. (2015) 374 ITR 516 / 276 CTR 481 / 230 Taxman 649 (Bom.)(HC)

2430 **S.260A : Appeal – High Court – Delay was not condoned due to contradictions in affidavits of director.**
Where material contradictions were found in both affidavits filed by assessee-company for condonation of delay and director of assessee-company had not given true and correct facts about service of order of Tribunal, delay in filing appeal could not be condoned.
Director Sagar Maize Products Ltd. v. ITO (2015) 231 Taxman 417 (MP)(HC)

2431 **S.260A : Appeal – High Court – Substantial question of law – Condonation of delay – Appeal filed beyond time by Revenue in 2010 – Matter coming up before court in 2015 – Revenue taking no steps and not pursuing matter seriously – No proof showing Revenue prevented any cause from preferring application – Delay should not be condoned. [Limitation Act, 1963, S.5]**
The appeal filed by the Revenue was in the year 2010, was a still-born appeal because it was barred by limitation. The Revenue did not even make an application under section 5 of the Limitation Act, 1963, for condonation of delay. The matter came up before the court on April 9, 2015. Till then no steps were taken. The Revenue as a matter of fact woke up after counsel for the assessee was requested by the court on April 9, 2015, to give a notice to the advocate for the Revenue. Thereafter, copy of the application for condonation was served upon him. After consideration of the grounds for condonation, the ground in substance was that the Revenue did not pursue the matter seriously. There was no allegation far less any proof of the fact that the Revenue was prevented by any cause far less sufficient cause from preferring the appeal within the prescribed period of limitation. There was as such no reason why the delay should be condoned. The application for condonation of delay was, therefore, dismissed. (AY. 2005-06)
CIT v. Golden Corporation Services (2015) 375 ITR 581 (Cal.)(HC)

2432 **S.260A : Appeal – High Court – Rectification of order by Tribunal – Not an order passed in appeal – Not appealable. [S. 254(2)]**
The Tribunal while passing an order in an appeal did not notice the decision of the Supreme Court. Hence, it corrected a mistake and recorded that the applicability of the decision could not be adjudicated under the provisions of section 254(2) of the Income-tax Act, 1961, as the issue was covered under section 254(1). The assessee agreed that as and when an order was ultimately passed under section 254(1) in accordance with the order under section 254(2), the order would be appealable under section 260A. The Revenue filed an appeal against the order under section 254(2) which was dismissed. On appeal :

Held, dismissing the appeal, that the Revenue was not without a remedy in the event of the order under section 254(1) being adverse to it. An appeal under section 260A was not maintainable against the order passed by the Tribunal under section 254(2).
CIT v. Saroop Tanneries Ltd. (2015) 374 ITR 20 (P&H)(HC)

S.260A : Appeal – High Court – Monetary ceiling limits – Instructions mandatory and binding on Revenue – National Litigation Policy, 2011 – Instruction No. 3 apply pending cases also – No cascading effect involved in appeal – Appeal only filed because tax effect above monetary limit – Appeal not maintainable. [S.119, 268A] 2433
Dismissing the appeal of revenue the Court held that instruction No. 1979, dated 27-3-2000 and Instruction No. 3 of 2011, dated 9-2-2011 (2011) 332 ITR 1 (St.) is binding on revenue. If the issue involved does not have cascading effect appeal filed by the revenue is not maintainable only because the tax effect is above monetary limit. (AY. 1993-94)
CIT v. Shyam Biri Works (2015) 374 ITR 68 / 231 Taxman 543 / 279 CTR 40 (All.)(HC)

S.260A : Appeal – High Court – Lack of proper assistance to Court – It would be proper that the Revenue brief counsel in their panel across the board so as to ensure that the counsel have time to properly prepare themselves to render proper assistance to the court. 2434
By the court : Unmindful of the fact that the petition was listed only to accommodate the Revenue, it was after about 5 to 7 minutes of calling out the petition shown as part-heard, that the counsel for the Revenue walked into the court and mentioned that he was busy in another court. Thereafter, we heard the Revenue. We find that the Revenue brief only a few selected counsel in all matters. This consequently results in the counsel briefed for the Revenue not being completely prepared as it is humanly impossible for a counsel to adequately prepare oneself in more than a couple of matters on an average per day. This results in lack of proper assistance to the court. It would be proper that the Revenue brief counsel in their panel across the board so as to ensure that the counsel have time to properly prepare themselves to render proper assistance to the court.
Rallis India Ltd. v. CIT (2015) 374 ITR 462 / 276 CTR 351 / 230 Taxman 483 / 116 DTR 217 (Bom.)(HC)

S.260A : Appeal – High Court – Strictures passed regarding the "casual and callous" and "frivolous" manner in which senior officers of the dept. authorize filing of appeals. Strictures also passed against counsel for acting as a "mouthpiece" of the Dept. in persisting with unmeritorious appeals. CBDT directed to take appropriate action – Question decided by Tribunal based on concession by Department or on agreed position that questions covered by decision of Court – Appeals not to be filed in such matters. Registry is directed to forward the copy of the judgment to CBDT for necessary action and to provide an in-house committee of senior Officers of the revenue to review decisions taken in respect of appeals already filed and pending. [S. 10(15), 14A, 37(1), 44C, 244A] 2435
The manner in which the appeal has been filed and prosecuted with regard to the proposed questions 1, 2 and 3 was casual and callous, as the following facts would demonstrate:

(i) In respect of Question No.1 the Revenue sought to agitate an issue contrary to its stand before the Tribunal. The Revenue's prayer before the Tribunal, was to declare that interest income earned on NOSTRO account is taxable. The impugned order of the Tribunal granted the Revenue's prayer and held that interest earned on NOSTRO account is taxable. Before us, the question framed/agitated was that the Tribunal erred in granting interest on NOSTRO account. It is beyond comprehension as to how a party can be aggrieved by an order that grants its prayer.

(ii) Question Nos. 2 and 3 as framed, were conceded by the Revenue at the hearing before the Tribunal. Nevertheless, the Revenue sought to challenge what has not been contested before the Tribunal. This without even a whisper as to why the concession made before the Tribunal was not correct or that subsequent decisions of Court makes the concession before the Tribunal not sustainable in law.

(iii) The Appeal memo has been signed by a senior officer of the Revenue viz. Director of Income-tax (IT) and he has also directed the Asst. Director of Income-tax (IT) I(2), Mumbai to file this appeal. Either there is no application of mind to the order of the Tribunal before filing of this appeal or the Revenue is deliberately seeking to keep the pot boiling, so that uncertainty is kept alive. It shows the casual attitude of the Revenue in filing appeals. This is not the first of its kind. We had earlier also passed orders disapproving this conduct of the revenue, but there is no improvement. If filing of such appeals on questions (1), (2) and (3) by the Revenue without justification is unacceptable, the counsel for the Revenue persisting in arguing those questions of law taking valuable time of Court is further objectionable. Such frivolous appeals add to the burden of the Court and thoughtless prosecution of these takes time of the Court which could be utilised for more meritorious (debatable) cases.

(iv) The manner in which sometimes the unmeritorious appeals are persisted by the advocates for the Revenue reminds us of the famous observations of *Mr. Justice Crampton in R v O'Connell (1844) 7 ILR 261* @ 312 "Another doctrine broached by another eminent counsel I cannot pass by without a comment. That learned counsel described the advocate as the mere mouthpiece of his client, he told us that the speech of the counsel was to be taken as that of the client; and thence seemed to conclude that the client only was answerable for its language and sentiments. Such, I do conceive, is not the office of an advocate. His office is a higher one. To consider him in that light is to degrade him. I would say of him as I would say of a member of the House of Commons – he is a representative, but not a delegate. He gives to his client the benefit of his learning, his talents and his judgment; but all through he never forgets what he owes to himself and to others. He will not knowingly misstate the law – he will not wilfully misstate the facts, though it be to gain the cause for his client. He will ever bear in mind that if he be the advocate of an individual, and retained and remunerated (often inadequately) for his valuable services, yet he has a prior and perpetual retainer on behalf of truth and justice; and there is no Crown or other licence which in any case, or for any party or purpose, can discharge him from that primary and paramount retainer."
(Emphasis supplied)

(v) Undoubtedly, an Advocate has to fearlessly put forth his client's point of view, however the same has to be tempered /guided by truth and justice of the dispute. In matters of tax, justice requires that there must be certainty of law which presupposes equal application of law. Thus where the issue in controversy stands settled by decisions of this Court or the Tribunal in any other case and the Revenue has accepted that decision, then in that event the Revenue ought not to agitate the issue further unless there is some cogent justification such as change in law or some later decision of an higher forum etc. then in such cases appropriately the appeal memo itself must specify the reasons for preferring an appeal failing which at least before admission the officer concerned should file an affidavit pointing out the reasons for filing the appeal. It is only when the Court is satisfied with the reasons given, that the merits of the issue need be examined of purposes for admission.

(vi) Filing of appeal under Section 260A of the Act is a serious issue. The parties who seek to file such appeals (which are normally after two tires of appeal before the Authorities under the Act) must do so after due application of mind and not raise frivolous/concluded issues. This is certainly expected of the State.

The Registry has informed us that out of 4,784 appeals from the order of the Tribunal filed in this Court during the period 1-1-2014 to 1-6-2014 the appeals filed by the Revenue are 3,968 and only 816 by the class of assessee as a whole.

(vii) We direct the Registry and also the Counsel appearing for the Revenue to forward a copy of this order to CBDT. What could possibly be done is to provide an in house committee of senior officers of the Revenue to review decisions taken in respect of appeals already filed and pending. If it is found that questions raised are covered by any decision of this Court or Apex Court or it relies upon an earlier decision of the Tribunal which has been accepted by the Revenue as no appeal there from has been filed then they could be separately classified. On completion of the above exercise such appeals could be either withdrawn and/or dismissed as not pressed. Question decided by Tribunal based on concession by Department or on agreed position that questions covered by decision of Court, appeals not to be filed in such matters.(AY.1997-98)

DIT v. Credit Agricole Indosuez (No.1) (2015) 377 ITR 102 / 280 CTR 491 (Bom.)(HC)

S.260A : Appeal – High Court – Coercive proceedings against assessee would be kept in abeyance for a period of two weeks. 2436

Allowing the petition the Court held that where assessee was willing to pursue remedy as provided in section 260A, coercive proceedings against assessee would be kept in abeyance for a period of two weeks on condition that assessee satisfied 1/3rd of balance liability. (AY. 2006-07, 2007-08)

Thomas George Muthoot v. ACIT (2015) 230 Taxman 313 (Ker.)(HC)

S.260A : Appeal – High Court – Tax effect low – Case not falling within exceptions – Appeal dismissed. 2437

The tax effect in the present appeals was less than ₹ 4 lakhs and that the assessee's case did not fall within the exceptions specified in Instruction No.1979, dated March 27,

2000. Therefore, the appeals were dismissed without going into the merits. Instruction No. 2 of 2005, dated 24-10-2005 – Instruction No. 5 of 2007, dated 16-7-2007.
CIT v. Dr. C.T. Kiruba (2015) 373 ITR 507 (Mad.)(HC)

2438 **S.260A : Appeal – High Court – Search and seizure – Block assessment – Tribunal deleted the addition based on facts – No substantial question of law. [S.69, 153A]**
Dismissing the appeal of revenue, the Court held that on given the fact-intensive nature of the matter, and, as noted by the Commissioner (Appeals), the rare instance where cash transactions were indeed reflected in the books of one of the persons which had an intimate connection with the assessee, any further enquiry would involve more weighing of evidence rather than interpretation of law. Barring exceptional cases where the findings were based on no evidence or after overlooking material evidence, the scope of appeal under section 260A involves examination of substantial questions of law. There was none in respect of this transaction. Accordingly the order of Tribunal was confirmed.
CIT v. Tilak Raj Anand (2015) 373 ITR 1 / 232 Taxman 653 (Delhi)(HC)

2439 **S.260A : Appeal – High Court – Appeal by department – Tribunal following the jurisdictional High Court – Must be accompanied by reasons for appeal – Counsel should review the appeal already filed on identical issues.**
Tribunal following the decision of jurisdictional High Court in *CIT v. Geoffrey Manners and Co Ltd. (2009) 315 ITR 134 (Bom.)(HC)*, held that expenses for production of television films and commercials is revenue expenditure. On appeal by the Department without indicating any reason why it was seeking to appeal against the order which was already concluded in favour of the assessee. Dismissing the appeal the Court held that in all cases including where appeals are filed, the officers instructing the counsel should review whether the appeals are filed, the officers instructing the counsel should review whether the appeal should at all be pressed in view of the Revenue having accepted the jurisdictional High Court's order on an identical issue and take necessary instructions from the Commissioner to withdraw or not press the appeal. Alternatively, in case a conscious decision is taken to press the appeal, the memorandum of appeal should contain an averment to the effect that either the case is distinguishable or an appeal has been preferred from the decision of the Court to the Supreme Court or a further affidavit in support should be filed indicating the reasons. In the absence of the above, exemplary costs were to be personally paid by the jurisdictional Commissioner under whose jurisdiction, the appeal was being filed and passed in spite of the issue being settled by the Court and the ruling having been accepted by the Revenue.
CIT v. Proctor & Gamble Home Products Ltd. (2015) 377 ITR 66 / 229 Taxman 383 / 280 CTR 487 / 126 DTR 166 (Bom.)(HC)

2440 **S.260A : Appeal – High Court – Disallowance of deferred guarantee commission – Matter sent back – No substantial question of law. [S.254(1)]**
Dismissing the appeal of revenue the Court held that, Tribunal having sent back the matter relating to disallowance of deferred. (AY.2001-02)
DIT v. Societe Generale (2015) 122 DTR 57 (2016) 237 taxman 182 (Bom.)(HC)

S.260A : Appeal – High Court – Delay of four years – Appeal filed by revenue was dismissed. 2441

If explanation for delay in filing appeal is found to be concocted or demonstrates thorough negligence in prosecuting cause, then it would be legitimate exercise of discretion not to condone delay. Where revenue filed appeal after four years against order passed by Tribunal on ground that said order was not served and, thus, not within knowledge of revenue, and when that was found to be a false explanation, then, it was urged that order was known to revenue but it was never served and brought to knowledge of Director of International Taxation, explanation of revenue could not be held to be *bona fide* and, therefore, delay in filing appeal could not be condoned.(AY. 2003-04)

DIT v. Airlines Rotables Ltd. (2015) 229 Taxman 380 (Bom.)(HC)

S.260A : Appeal – High Court – Cross-objections – No right to file cross – Objection. [ITAT, R. 22, Civil Procedure Code, 1908., O.42, S.100, 108] 2442

An appeal being a creature of a statute and a cross-objection in terms of rule 22 of the Income-tax Rules, 1962, being barred with an appeal, the implication or a right of cross-objection could not be read into either the provisions of Order 42 read with sections 100 and 108 of the Code of Civil Procedure, 1908, or under the provisions of sub-section (7) of section 260A of the IT Act. That the cross-objection was not maintainable under section 260A. Followed, J*yoti Kumari (Smt.) v. Asst. CIT [2012] 344 ITR 60 (Karn.)(HC)*
CICB – Chemicon P. Ltd. v. CIT (2015) 371 ITR 78 (Karn.)(HC)

S.260A : Appeal – High Court – Co-operative Housing Society – Mutuality – Condonation of delay – Limitation – Appeal after five years after favourable decision by jurisdiction High Court – Delay could not be condoned-Entire law on condonation of delay explained. [Indian Limitation Act, S.5] 2443

(i) Having considered the rival submissions, the issue which falls for our consideration is whether the applicant has shown sufficient cause so as to become entitled for condonation of delay of five years in preferring the appeal against the order dated 31-10-2008 passed by the Tribunal. Admittedly at the relevant time the applicant had accepted the orders passed by the Tribunal on the ground that three Authorities have decided against it. The applicant was completely conscious of the fact that there was no decision of the Jurisdictional High Court in regard to the said issue. This was more a reason for the applicant to pursue the proceedings. The applicant, however, accepted the orders passed by the Tribunal and decided not to pursue the proceedings. In the meantime this Court had decided the same in favour of the applicant in the case of *"Sind Cooperative Housing Society Ltd. v. ITO (2009)." 317 ITR 47 (Bom) (HC)* and *"Mittal Court Premises Co-operative Society Ltd. v. ITO (2010) "320 ITR 414 (Bom) (HC).* The Tribunal applying the law laid down in these decisions decided in favour of the applicant by an order dated 11-1-2013 passed for the Assessment Year 2007-08. In our opinion the Tribunal deciding in favour of the applicant for the subsequent years, applying the decisions of this Court, would not endure to the benefit of the applicant to reopen the issue concluded by the Orders dated 31-10-2008 passed by the Tribunal and accepted by the applicant. The delay is inordinate.

(ii) We are of the opinion that the reasons as shown by the applicant cannot fall within the parameters of sufficient cause so as to confer a benefit of condonation to the applicant. This is for the reason that the applicant had taken a well considered decision not to move further proceedings against the order dated 31-10-2008. Applying the test of a prudent litigant it cannot be held that once the applicant by his own volition had decided to accept a judicial order, the applicant can at any time assail the same may be for the reason that subsequently new decisions are rendered on that issue. Section 5 of the Limitation Act cannot be stretched to bring about a situation of unsettling judicial decisions which stood accepted by the parties. If the contention of the applicant is accepted, it would create a situation of chaos and unsettling various orders passed from time-to-time by the Tribunal as accepted by the parties. The legislative mandate in stipulating a limitation to file an appeal within the prescribed limitation cannot be permitted to be defeated when a litigant has taken a decision not to pursue further proceedings. A new ruling is no ground for reviewing a previous judgment. If this is permitted, the inevitable consequence is confusion, chaos, uncertainty and inconvenience as then no orders can ever attain finality though accepted by parties.

Somerset Place Co-operative Housing Society Ltd. v. ITO (2015) 374 ITR 307 / 116 DTR 345 / 231 Taxman 806 / 279 CTR 146 (Bom.)(HC)

2444 **S.260A : Appeal – High Court – Rule of consistency – Transfer pricing – Department is not entitled to challenge the ITAT's decision to determine the interest rate ALP of funds advanced to AE as per EURIBOR if the earlier ITAT judgements relied upon by ITAT have not been challenged by the Department – Appeal of revenue was dismissed. [S. 92B, 92C]**

The assessee advanced funds to its wholly owned subsidiary in Germany on interest-free terms. The TPO held that the transaction was an "international transaction" and held that the assessee ought to have received interest at 10.25% being the lending rate charged by the banks in India (Arm's length price). The DRP enhanced the rate of interest to 12%. On appeal, the Tribunal followed its earlier view in *VVF Ltd. v. DCIT (ITA No.673/Mum/06)* and *DCIT v. Tech Mahindra Ltd. (46 SOT 141)* and held that as the amount was advanced to an AE in Germany, the ALP rate of the interest had to be determined by adopting the EURIBOR rate of interest i.e. rates prevailing in Europe. The Department challenged the said finding of the Tribunal in the High Court on the basis that the EURIBOR does not govern the monetary markets or interest rates in India, which is the residence country of assessee and EURIBOR rate is not applicable to the loans for which foreign currency has to be purchased by the Lender. HELD by the High Court dismissing the appeal:

We find that the impugned order of the Tribunal *inter alia* has followed the decisions of the Bombay Bench of the Tribunal in cases of *"VVF Ltd. v. DCIT"* (supra) and *"DCIT v. Tech Mahindra Ltd." (2011) 46 SOT 141 (Mum.)(Trib.)* to reach the conclusion that ALP in the case of loans advanced to Associate Enterprises would be determined on the basis of rate of interest being charged in the country where the loan is received/consumed. Mr. Suresh Kumar the learned counsel for the revenue informed us that the Revenue has not preferred any appeal against the decision of the Tribunal in *"VVF Ltd. v. DCIT" and "DCIT v. Tech Mahindra Ltd."* on the above issue. No reason has been shown to us

as to why the Revenue seeks to take a different view in respect of the impugned order from that taken in "*VVF Ltd. v.. DCIT*" and "*DCIT v. Tech Mahindra Ltd.*" The Revenue not having filed any appeal, has in fact accepted the decision of the Tribunal in "*VVF Ltd. v. DCIT*" and "*DCIT v. Tech Mahindra Ltd.*". In view of the above we see no reason to entertain the present appeal as in similar matters the Revenue has accepted the view of the Tribunal which has been relied upon by the impugned order. (AY. 2007-08)
CIT v. Tata Autocomp Systems Ltd. (2015) 374 ITR 516/ 117 DTR 457 / 276 CTR 481 / 230 Taxman 649 (Bom.)(HC)

S.260A : Appeal – High Court – Uniformity in treatment is the basic premise of rule of law. The Department cannot arbitrarily pick and choose which orders of the ITAT should be challenged in the High Court. If ITAT has followed an order which is not challenged by the Dept. then an affidavit must be filed explaining the distinguishing features which warrants the different view. [S. 36(1)(viii), 263] 2445

When the Revenue challenges the order of the Tribunal which in turn relies upon another decision rendered by it on the same issue, then in cases where the Revenue has accepted the order by not preferring any Appeal against the earlier order, the Revenue should not challenge the subsequent order on the same issue. In case an appeal is preferred from the subsequent order, then the Memo of appeal must indicate the reasons as to why an appeal is being preferred in later case when no appeal was preferred from the earlier order of the Tribunal which has merely been followed in the later case. In any case, the Officer concerned must at least file an Affidavit before the matter comes up for admission, pointing out distinguishing features in the present case from the earlier case, warranting a different view in case the appeal is being pressed. The absence of this being indicative of non-application of mind, does undoubtedly give an opportunity to the Revenue to arbitrarily pick and chose the orders of the Tribunal which they would challenge in the Appeal before the this Court. Uniformity in treatment at the hands of law is a basic premise of Rule of Law. We trust that the Revenue would take appropriate steps to ensure that the aforesaid directions be implemented in all subsequent matters which are pending Admissions before this Court. If this exercise is done by the Officers of the Revenue, precious time of all concerned would be saved.
CIT v. State Bank of India (2015) 375 ITR 20 / (2016) 237 Taxman 252 (Bom.)(HC)

S.260A : Appeal – High Court – Interim order – Miscellaneous application – Appeal against interim order of Tribunal is not maintainable. [S.254(1), 254(2)] 2446

It is apparently clear, that the words "an appeal shall lie to the High Court from every order passed in appeal" has to be given purposeful meaning. The words "passed in appeal" means an order finally deciding an appeal. An order passed by the Tribunal on a Miscellaneous Application is not an order passed in an appeal. Similarly, an order passed by the Tribunal deciding one ground in the appeal is not a final order and, consequently, the appeal is not maintainable against an interlocutory order.
The instant appeal against an interim order of the Tribunal is not maintainable under Section 260-A and is dismissed with the observation that it would be open to the assessee to question the interim order of the Tribunal in an appeal after final orders are passed by the Tribunal by raising it as a ground in the memo of appeal (AY. 2005-06)
Rajesh Agarwal HUF v. CIT (2015) 228 Taxman 143 (Mag.)(All.)(HC)

Section 261 : Appeal to Supreme Court.

2447 **S.261 : Appeal – Supreme Court – Block assessment – Undisclosed income of ₹ 3.85 lakhs only – Tax effect much less – Appeal was not entertained. [S. 58BC]**
On appeal against the decision of the High Court affirming a block assessment both on the ground of jurisdiction and on the merits:
Held, dismissing the appeal, that since by the assessment in question, an addition of only ₹ 3.85 lakhs to the income of the assessee was made and the tax effect thereof would still be much less, the appeal was liable to be dismissed. (BP. 1989-90 to 1999-2000)
Shirish Madhukar Dalvi v. ACIT (2015) 379 ITR 329 / (2016) 283 CTR 236 (SC)
Editorial: Decision of the Bombay High Court in Shirish Madhukar Dalvi v. Asst. CIT [2006] 287 ITR 242 (Bom.) was affirmed on ground of low tax effect.

2448 **S.261 : Appeal – Supreme Court – Company wound up and no person to pursue the appeal – Appeal dismissed. [S.260A]**
Against the order of the High Court dismissing the assessee's appeal on the question of allowance of depreciation for the block period, holding that the Tribunal had arrived at findings of fact after appreciating the evidence on record, including material seized during the course of search and seizure proceedings, and no substantial question of law arose out of the order of the Tribunal, on appeal to the Supreme Court :
The Supreme Court, taking note of the information that the assessee-company had been wound up and there was nobody to pursue the appeals, dismissed the appeals.
Patira Food Products P. Ltd. v. ACIT (2015) 373 ITR 165 / 278 CTR 315 / 120 DTR 312 (SC)
Editorial: Refer Patira Food Products Pvt. Ltd. v. ACIT (2004) 267 ITR 621 (Guj.)(HC)

2449 **S.261 : Appeal – Supreme Court – Assessment – Valuation Officer – Whether report of, called for by Assessing Officer, can be made basis for assessment – Appeal dismissed leaving question open. [S. 131(1)(d)]**
Against the decision of the High Court dismissing the Department's appeal against the order of the Tribunal holding that the Assessing Officer could not have relied upon the report of the Valuation Officer called for on a commission under section 131(1)(d), the Department appealed to the Supreme Court : The Supreme Court dismissed the appeal in view of the meagreness of the amount involved in the appeal, keeping the question of law open.
CIT v. Om Prakash Bagadia (HUF) (2015) 373 ITR 670 / 233 Taxman 131 / (2016) 282 CTR 240 (SC)

2450 **S.261 : Appeal – Supreme Court – Cash credit – Tax effect low and no substantial question of law. [Ss.68, 260A]**
The Assessing Officer treated a sum claimed to be a loan as unexplained cash credit and the Commissioner (Appeals) upon examination of the documentary evidence sustained the addition and this was upheld by the Tribunal, and the High Court, holding that the finding of the Tribunal being based on cogent material could not be said to be perverse and no substantial question of law arose from the order of the Tribunal, on appeal to

the Supreme Court : The Supreme Court dismissed the appeal, holding that the tax effect was very nominal and that even otherwise, there was no substantial question of law which arose for consideration. (AY. 1998-99)

Krishan Kumar Aggarwal v. Assessing Officer, Income Tax (2015) 373 ITR 679 / 124 DTR 288 / 280 CTR 35 (SC)

Editorial: Decision in Krishan Kumar Aggarwal v. AO [2004] 266 ITR 380 (Delhi) is affirmed.

S.261 : Appeal – Supreme Court – Small tax effect – Matter has a cascading effect – Circular dated 9th Feb., 2011, should not be applied *ipso facto* – Liberty is given to the department to move High Court. [S.260A] 2451

Allowing the appeal of revenue the Court held that; where the matter has a cascading effect, there are cases in which common principle may be involved in subsequent group matters or large number matters, in such cases attention of High Court has to be drawn. Circular dt 9th Feb, 2011 (2011) 332 ITR 1 (St.), should not be applied *ipso facto*. Liberty is given the department to move High Court.

CIT v. Century Park (2015) 373 ITR 32 / 278 CTR 110 / 120 DTR 308 / (2016) 236 Taxman 5 (SC)

S.261 : Appeal – Supreme Court – Depreciation – Studio – Plant – Low tax effect – Appeal not entertained. [S. 32] 2452

The assessee, engaged in the production of cinematograph films, claimed higher depreciation on its studio which was situated in a big landscape. The building was designed in such a way that the wooden partitions could be removed for creating different settings or scenes. On the question whether a part of the studio building constituted plant, the High Court held that part of the studio building would come within the term "plant" entitled to depreciation at the rate applicable to plant and machinery. On appeal to the Supreme Court :

Having regard to the fact that the tax effect was minimal, the court refused to interfere with the appeals and dismissed them, leaving the question of law open. Refer *CIT v. Navodaya [2004] 271 ITR 173 (Ker.)(HC).*

CIT v. Navodaya (2015) 373 ITR 637 / (2016) 283 CTR 116 /130 DTR 221/67 taxmann.com 180 (SC)

S.261 : Appeal – Supreme Court – Business expenditure – Fines and penalties – Tax effect low – Appeal not entertained. [S.37(1)] 2453

Penalty of ₹ 10,61,698 imposed on the assessee-bank by the Reserve Bank of India for committing violation of provisions of the Reserve Bank of India Act, 1934, and the Banking Regulation Act, 1949, was claimed as business expenditure by the assessee-bank in respect of the assessment years 1984-85 to 1991-92. The High Court allowed it. On appeal :

The Supreme Court dismissed the appeals without going into the merits, having regard to the pettiness of the amount, but left the question of law open. (AY. 1984-85 to 1991-92)

CIT v. Dhanalakshmi Bank Ltd. (2015) 373 ITR 526 / 124 DTR 228 / 279 CTR 439 (SC)

2454 **S.261 : Appeal – Supreme Court – Small tax effect – Appeal was dismissed solely on the ground that the tax effect thereof is ₹ 422830. [S. 260A, 268A]**
Appeal filed by the assessee is not entertained and is entertained and is dismissed solely on the ground that the tax effect is ₹ 422,830/ only. The issue involved was taxability of capital gain in respect of sale of agricultural land. (AY. 1986-87)
Alexander George v. CIT (2015) 373 ITR 49 / 278 CTR 112 / 120 DTR 310 (SC).
Editorial: Alexander George v. CIT (2003) 262 ITR 367 (Ker.)(HC)

2455 **S.261 : Appeal – Supreme Court – Intercorporate dividends – Estimated expenditure – Tax effect low and matter being old appeal was not entertained. [Ss.20, 80M]**
From the judgment of the High Court answering in favour of the assessee the question whether the Department was entitled to import the rule of proportionate expenditure and interest contemplated by section 20 of the Income-tax Act, 1961, as it then stood into section 80M of the Act, the Department appealed to the Supreme Court:
The Supreme Court refused to entertain the appeals holding that the tax effect was nominal and the matter was very old. (AY. 1970-71)
CIT v. Central Bank of India (2015) 373 ITR 524 (SC)
Editorial: Refer, CIT v. Central Bank of India [2003] 264 ITR 522 (Bom.)(HC)

Section 263 : Revision of orders prejudicial to revenue.

2456 **S.263 : Commissioner – Revision of orders prejudicial to revenue – Deduction at source – Initiation of penalty proceedings – Revision held to be bad in law. [Ss. 132, 153A, 271(1)(c)]**
Dismissing the appeal of revenue the Court held that proceedings for levy of penalty either u/s. 271(1)(a) or u/s. 273(b), were proceedings independent of and separate from assessment proceedings. Though expression "assessment" was used in statute with different meanings in different contexts, so far as s. 263 was concerned, it referred to particular proceeding that was being considered by Commissioner. Exercise of S. 263 was not possible when Commissioner was dealing with assessment proceedings. Assessment order was sought to be revised, in order to expand scope of these proceedings and to view penalty proceedings also as part of proceedings. Penalty proceedings did not form part of assessment proceedings and failure of ITO to record in assessment order his satisfaction or lack of it in regard to leviability of penalty could not be said to be factor vitiating assessment order in any respect. Accordingly, initiation of proceedings u/s. 263 was not justified. Order of Tribunal cancelling revisional order passed by CIT, was upheld. (AY. 2008-09)
CIT v. Rakesh Nain Trivedi (2015) 128 DTR 309 / (2016) 282 CTR 205 (P&H)(HC)

2457 **S.263 : Commissioner – Revisional order prejudicial to the interest of revenue – Assessing Officer not considering relevant material – Commissioner can revise order.**
Held, dismissing the appeal the Court held that the Commissioner had found several materials which were not taken into consideration by the Assessing Officer and which were incriminating in nature and which caused huge loss to the Revenue. The order of revision was valid.
Bhagheeratha Engineering Ltd. v. ACIT (2015) 379 ITR 244 (Ker.)(HC)

S.263 : Commissioner – Revision of orders prejudicial to the interest of revenue – Business expenditure – Capital or revenue – Buyback of shares – Extra amount over and above face value of shares paid to shareholders in terms of direction of CLB was held to be allowable as revenue expenditure. [S. 37(1)] 2458

There was a dispute between two groups of shareholders in assessee-company. In terms of direction issued by CLB, assessee-company paid certain extra amount over and above face value of shares to departing group of shareholders which was debited as revenue expenditure. Assessing Officer allowed assessee's claim for deduction – Commissioner taking a view that amount in question was in nature capital expenditure, passed a revisional order setting aside assessment. Tribunal, however, restored order passed by Assessing Officer. On appeal by revenue dismissing the appeal the Court held that since amount paid by assessee to buy-back shares of one group of shareholders was only for purpose of ensuring that it could run its business smoothly and more profitably, Tribunal was justified in quashing the order of Commissioner. (AY. 2006-07)

CIT v. Bramha Bazar Hotels Ltd. (2015) 235 Taxman 195 (Bom.)(HC)

S.263 : Commissioner – Revision of orders prejudicial to revenue – Contribution to recognized provident fund – Held to be allowable – Revision was held to be not justified. [S.36(1)(iv)] 2459

Commissioner initiated revision proceedings by observing that assessee had not made application to Jurisdictional Commissioner/Chief Commissioner for recognition of Pension Fund Trust and, therefore, said payment made was to be disallowed. On appeal Tribunal set aside the order of Commissioner. On appeal by revenue dismissing the appeal of revenue, the Court held that Pension Fund Scheme was jointly floated by State Transport Corporations and said fund was recognised by Commissioner, Chennai. Further, as per section 36(1)(iv) it is nowhere mentioned that pension fund should be recognised only by Jurisdictional Commissioner and that approval of Jurisdictional Commissioner is mandatory hence the contribution made by assessee towards pension fund would be allowed.

CIT v. Tamil Nadu State Transport Corporation (Salem) Ltd. (2015) 234 Taxman 663 (Mad.)(HC)

S.263 : Commissioner – Revision of orders prejudicial to revenue – Commissioner discovering errors and passing order of revision after hearing assessee – Order valid. [S. 254(1)]. 2460

Allowing the appeal the Court held that a *prima facie* perusal of the order of the Commissioner showed that he was satisfied that there were errors which had effect on the interests of the Revenue and needed a further probe by the Assessing Officer. The order passed by the Commissioner was proper and he had validly exercised the powers conferred on him under section 263. The order of the Tribunal setting it aside was not valid. (AY.1999-2000)

CIT v. Varanasi Khanta Rao, Prop. Sri Sai Srinivasa Modern Rice Mill (2015) 377 ITR 602 / 234 Taxman 454 (T&AP)(HC)

2461 **S.263 : Commissioner – Revision of orders prejudicial to revenue – Project completion method – Method cannot be rejected because another method is preferable – Revision was not valid. [S. 145]**

Dismissing the appeal of revenue the Court held that the Revenue had accepted the project completion method in respect of the G project of the assessee. Further, the assessee had offered to tax the income earned on the L project by following the project completion method in the subsequent assessment year 2008-09. The assessee had chosen the project completion method of accounting and had been consistently following it over the years. The Revenue could not reject the method because, according to the Commissioner, another method was preferable. Thus, no fault could be found with the order of the Tribunal.

Where the Revenue has accepted a particular method of accounting over several years, the method is not to be lightly substituted unless the Revenue is able to show that the method distorts the profit for a particular year. The choice of the method of accounting is of the assessee. The most appropriate method of accounting to correctly reflect the true financial statement is a matter of opinion and debate. Issues of debate are not amenable to the revisional jurisdiction under section 263. (AY. 2007-08)

CIT v. Aditya Builders (2015) 378 ITR 75 (Bom.)(HC)

Editorial : Order in Aditya Builders v. CIT [2013] 25 ITR (Trib.) 77 (Mum.) is affirmed.

2462 **S.263 : Commissioner – Revision of orders prejudicial to revenue – Business expenditure – Two views possible – Revision was held to be not valid. [S. 36(1)(viia), 36(vii)]**

The Tribunal held that on the question whether the total income for the purposes of section 36(1)(viia)(c) should be computed after allowing the deduction under section 36(1)(viii) there were at least two possible views as reflected in the orders of the Delhi and Chennai Benches of the Tribunal. On appeal, Held, dismissing the appeal, that independent of the two decisions, the stand of the Revenue as set out in its memorandum of appeal and that of the assessee that both deductions (under section 36(1)(viia)(c) and section 36(1)(viii)) were independent of each other, gave rise to two further possible interpretations were possible. The view taken by the Assessing Officer was a possible one and there was no occasion for the Commissioner to have exercised the jurisdiction under section 263. (AY 2007-08)

CIT v. Power Finance Corporation Ltd. (2015) 378 ITR 619 (Delhi)(HC)

2463 **S.263 : Commissioner – Revision of orders prejudicial to revenue – Statement recorded at the time of search of assessee's son can form basis for exercising revisional jurisdiction.**

The assessment in the case of the assessee was completed under section 143(3). Prior thereto search operations under section 132 were carried out at the residential premises of the son of the assessee. Upon scrutiny of the record of assessment, the Commissioner noted that the Income-tax Officer had not taken into consideration the explanation of son of the assessee and further that he had not considered the various statements of the persons which were recorded at the time of the search. He, therefore, exercising his powers under section 263, set aside the order of assessment and directed

the ITO to make fresh assessment. On appeal, the Tribunal set aside revision order holding that the Commissioner could intervene only on the basis of the record of the assessment proceedings of the assessee, and that the statements recorded at the time of search of the premises of the son of the assessee could not form the basis of any action under section 263. On appeal allowing the appeal the Court held that after amendment in section 263(1) by insertion of Explanation, power of Commissioner is wide enough to take into account any record relating to any proceedings under Act and it is not confined to record of assessee which was before assessing authority, therefore, statements recorded at time of search of premises of assessee's son can form basis of any action under section 263 against assessee.
CIT v. Vallabhdas Vithaldas (2015) 232 Taxman 57 (Guj.)(HC)

S.263 : Commissioner – Revision of orders prejudicial to revenue – Details considered by the Assessing Officer – Revision was held to be not valid. [S.80HHC, 80-IA, 143(3)] 2464
In assessment order, after setting out facts and amounts under various heads Assessing Officer restricted benefit of provision of sections 80-IA(a) and 80HHC claimed by assessee. Subsequently, Commissioner initiated revision proceeding under section 263 on ground that certain expenses such as raw material, power and fuel, stores and spares etc., were prorated. Tribunal set aside the order of Commissioner. On appeal by revenue dismissing the appeal of revenue the Court held that since assessing authority had already considered all details mentioned in computation statement which was taken from books of account maintained by assessee, Tribunal was justified in setting aside revision order passed by Commissioner. (AY. 2001-02)
CIT v. Kurlon Ltd. (2015) 232 Taxman 107 (Karn.)(HC)

S.263 : Commissioner – Revision of orders prejudicial to revenue – Unexplained expenditure – Seized papers – Revision was held to be not justified. [S. 69C, 153C] 2465
Seized papers indicated unaccounted expenditure of assessee. Assessing Officer raised query and sought reply. Assessee prepared cash flow statement and explained source and application of income. Detailed inquiries had been made by Assessing Officer with regard to nature of expenditure. Assessing Officer on being satisfied with explanation of assessee, passed assessment order. Commissioner revised the order. On appeal Tribunal allowed the appeal of assessee. On appeal by revenue dismissing the appeal, the Court held that; Commissioner did not make reference to total and complete material before Assessing Officer. He had not referred to exercise undertaken by Assessing Officer of referring matter to Investigation Branch seeking further clarification, and initiated revision proceedings - Whether since order of assessment made by Assessing Officer could not be held erroneous, same could not to be revised. (AY. 2000-01 to 2006-07)
CIT v. Kiran Hirji Shah (2015) 231 Taxman 670 (Bom.)(HC)

S.263 : Commissioner – Revision of orders prejudicial to revenue – Accrual of income – Membership fee – Card holders – Spreading the membership fee was held to be justified- Revision was held to be not valid. [S.5] 2466
Dismissing the appeal of revenue the Court held that;where the assessee received membership fee from card holders and membership varied between one to fifteen

years, revenue is to shown as proportionate to the degree of completion of service and therefore the assessee was justified in spreading over the amount of membership fee and expenses. Accordingly the Tribunal was justified in setting aside the revisional order passed by Commissioner. (AY. 1997-98 to 1998-99, 2000-01)
CIT v. Unique Mercantile Service (P) Ltd. (2015) 122 DTR 277 / 232 taxman 13 (Guj.)(HC)

2467 **S.263 : Commissioner – Revision of orders prejudicial to revenue – Export business – Hire/lease of vehicle/barges etc. as part of business income – Possible view revision was held to be not valid. [S.80HHC]**
Assessing Officer while passing the assessment order had considered the income on account of hire/lease of vessels etc. as part of the assessee's business income as it formed a part of its composite business income under the head of Profits and gains of business and this being possible view revision was held to be not valid. (AY. 1995-96/1996-97).
CIT v. V. S. Dempo & Co. Ltd. (2015) 122 DTR 273 / 233 Taxman 417 (Bom.)(HC)

2468 **S.263 : Commissioner – Revision of orders prejudicial to revenue – Claim that notional interest on funds placed by the S. 10A eligible unit with the H.O. is allowable as a deduction to the H.O. and is exempt in the hands of the S. 10A unit is an "unsustainable view" justifying revision action. [S.10A, 80HHC]**
The assessee credited interest on the surplus generated from its undertaking at NEPZ, NOIDA in the books of account maintained for that undertaking. Correspondingly, a contra entry was passed by the assessee in the books of account maintained in respect of its Head Office. The assessee included the notional interest as income in computation of profits and gains derived by its undertaking from export of articles or things, for the purposes of claiming deduction under Section 10A of the Act. The Assessing Officer did not reject the inclusion of such interest as the profits and gains of the undertaking, which were deducted by the assessee from its total income for computing its taxable income. The CIT considered the assessment order passed by the AO to be erroneous as prejudicial to the interest of the Revenue. Consequently, the CIT passed orders under Section 263 of the Act, which were upheld by the Tribunal. On appeal by the assessee HELD dismissing the appeal:

(i) The claim of the assessee for including notional interest as profits and gains derived from the eligible undertaking for the purposes of Section 10A of the Act is not sustainable in law. It follows from a plain reading of Section 10A(1) that only those profits and gains of an assessee which have a direct nexus with an undertaking to which Section 10A of the Act applies would be excluded from the income of an assessee. In the present case, the interest credited by the assessee in the books of the eligible undertaking is notional and practically unconnected with the eligible undertaking; the interest has been credited on the surplus generated, which has been transferred from the accounts of the eligible undertaking to the head office. Concededly, the interest credited does not represent any real inflow of funds to the assessee. The assessee merely reflects inflow of funds in separate books maintained with respect to the eligible undertaking with a corresponding outflow of funds in the books maintained with respect to the head office (i.e. non-eligible undertaking). In view of the aforesaid, the interest cannot be considered as

profits and gains derived by the assessee from the eligible undertaking as it does not bear a direct nexus with the activities of the eligible undertaking.

(ii) In the present case, the assessee has not derived any interest income. Therefore, reducing such notional income – which has neither been accrued nor received – from the assessee's total income is completely alien to the scheme of the Act. Such notional interest could never form a part of the assessee's income and thus the assessee's claim that the same is to be excluded under Section 10A of the Act is flawed and wholly unsustainable in law. The view as canvassed on behalf of the assessee is not, even remotely, plausible and we find no infirmity with the CIT's exercise of jurisdiction under Section 263 of the Act.

(iii) We are also unable to accept the contention that since in the preceding year, no issue has been raised with regard to charging of interest by one unit to another, the same could not be picked up by the CIT under Section 263 of the Act. Merely because an issue remained unchecked in a preceding year does not mean that the CIT is estopped from exercising its powers under Section 263 of the Act. It is well established that the principles of *res judicata* do not apply to income tax proceedings and an error in the preceding year need not be repeated or ignored in the subsequent years. In the present case, the issue was not picked up in the preceding year. Further, the claim of the assessee cannot be stated to be of a nature which has been consistently accepted in past several preceding years since the entry in relation to notional interest had been passed by the assessee only in one preceding year and had remained undebated. (AY.1991-92, 1992-93)

Thomson Press (India) Ltd. v. CIT (2015) 379 ITR 222 / 281 CTR 271 / 127 DTR 209 (Delhi)(HC)

S.263 : Commissioner – Revision of orders prejudicial to revenue – Book profit – Provision made for diminution in value of investment-though amendment is retrospective, revenue could not have benefit of same because only that portion of law could be taken which stood as on date when assessment was done – Revision was held to be not proper. [S. 115JB] 2469

The Assessing Officer did not add back to book profit, the provision made by the assessee of ₹ 3.21 crore representing the provision for diminution in the value of investment, viz., shares/assets.

The Commissioner found the order passed by the assessing authority erroneous and prejudicial to the interest of the revenue because such add back was to be made as per clause (c) of the Explanation to section 115JB(2). He revised the order.

On appeal, the Tribunal held that the provisions which amounted to diminution in the value of asset could not be added back to the book profit.

In the instant appeal, the revenue contended that in view of the amendment to section 115JB by way of Explanation (i) which was brought into the statute book on 1-4-2001 by the Finance (No. 2) Act, 2009 even if clause (c) was not attracted, clause (i) was attracted and the order of the Tribunal was erroneous.

Dismissing the appeal the Court held that in *CIT v. Max India Ltd. [2007] 295 ITR 282 (SC)*, the Supreme Court held that the revenue has to take into account the position of law as it stood on the date when the order was passed. Though the amendment is retrospective in this case, the revenue cannot have the benefit of the same while

proceeding under section 263. Accordingly, without going to the substantial question of law, the appeal is dismissed. (AY. 2003-04)
CIT v. Sasken Communication Technologies Ltd. (2015) 231 Taxman 47 (Kan.)(HC)

2470 **S.263 : Commissioner – Revision of orders prejudicial to revenue – Method of bifurcation of expenses – Revision was held to be not valid.**
Method of bifurcation of expenses in proportion in which agricultural and non-agricultural income bifurcated accepted in past years. Assessment order not showing non-application of mind. Commissioner not observing anything concrete about irrelevance of method or apportionment. Revision was held to be not valid. (AY. 2004-05)
CIT v. Forest Development Corporation of Maharashtra Ltd. (2015) 374 ITR 538 (Bom.) (HC)

2471 **S.263 : Commissioner – Revision of orders prejudicial to revenue – Merger – Order of revision to recompute special deduction is held to be not valid. [S.80-IB(10)]**
Assessing Officer denied deduction. CIT(A) allowed the deduction in appeal. Commissioner passed the revision order, which was set aside by Tribunal. On appeal dismissing the appeal of revenue the court held that order of Assessing Officer merged in appellate order hence order of revision to recompute special deduction is held to be not valid. (AY. 2007-08)
CIT v. Fortaleza Developers (2015) 374 ITR 510 (Bom.)(HC)

2472 **S.263 : Commissioner – Revision of orders prejudicial to revenue – Doctrine of merger – No power to decide matters considered and decided in appeal by Commissioner (Appeals) – Commissioner revising and revisiting matters very much part and parcel of Commissioner (Appeals) order and dealt with extensively therein – Impermissible. [R.9A]**
On appeal : Held, dismissing the appeal, that not only did the Commissioner purport to revise the Assessing Officers order but he purported to deal with the same direction which was issued in the order of the Commissioner (Appeals) and which was given effect to by the Assessing Officer. Meaning thereby, the contents of the remand report, giving effect to the order of the Commissioner (Appeals), as submitted by the Assessing Officer, were reconsidered and revisited. In addition thereto, one more aspect of the sale of theatrical rights of the film to RGV was considered. Naturally, therefore, the doctrine of merger was invoked by the assessee and it was applied by the Tribunal to uphold the objection raised by the assessee. The claim of the cost of production of the film was a subject matter of appeal before the Commissioner (Appeals) and after consideration of the remand report of the Assessing Officer he gave his findings. Therefore, the order of the Assessing Officer undisputedly had merged with the order of the Commissioner (Appeals) as far as the claim of the cost of production of the film was concerned. Similarly, the Tribunal found that the question that the applicability of rule 9A was also very much before the authorities and even in relation thereto, it could not be said that the Assessing Officer at the time of making the assessment order did not consider the applicability of rule 9A vis-a-vis the claim of the assessee on the aspect of the cost of production of the film. Therefore, on both grounds, the order of the Commissioner was not valid. (AY. 2006-07)
CIT v. K. Sera Sera Productions Ltd. (2015) 374 ITR 503 / 119 DTR 153 (Bom.)(HC)

S.263 : Commissioner – Revision of orders prejudicial to revenue – Inadequate inquiry by the AO which led him to believe incorrect facts was prejudicial to the Revenue. 2473

The CIT held that the assessment made by the AO was prejudicial to the revenue since he had failed to consider the fact that creditors, from whom loans were obtained by the assessee, were not creditworthy and the entries were accommodating in nature. The report of the Inspector deputed by the AO was preliminary in nature and did not look into the source of the deposits in the bank accounts of the creditors. The Tribunal quashed the order of the CIT. On appeal by the Revenue, it was held by the HC that mere inadequate inquiry did not make an order prejudicial to the revenue, but if it was proved that inadequate inquiry led the AO to assume incorrect facts, then the order was prejudicial to the revenue. The order of the CIT was upheld because the AO failed to look into the source of the apparent source which was a relevant enquiry and thus the AO failed to apply his mind properly. (AY. 2004-05)

CIT v. Maithan International (2015) 375 ITR 123 / 117 DTR 401 / 231 Taxman 381 / 277 CTR 65 (Cal.)(HC)

S.263 : Commissioner – Revision of orders prejudicial to revenue – Damages received by assessee for breach of agreement to purchase property could not be taxed as capital gains. [S. 4] 2474

The assessee had entered into an oral agreement with 'ECL' to purchase factory premises to give it on lease and earn lease rent. At the time of finalizing the sale agreement, ECL backed out of said oral agreement. The assessee filed suit before Trial Court of 'specific performance' and to grant of damages for breach of said agreement. The Court passed consent decree, under which ECL agreed to pay ₹ 5 crores to assessee by way of damages. The AO held that said receipt of damages was not taxable in the hands of the appellant. The CIT exercising his powers under section 263 passed a revisional order and held that the compensation was chargeable to capital gains tax.

The High Court observed that there was enough doubt in the case and the legal position was not clear and hence the CIT could exercise his power u/s. 263. However, the High Court held that the agreement for sale of immovable property in itself did not create any right, title or interest in it but only created a right to obtain performance which was substituted by the Trial Court for compensation and hence no capital gains were attracted in the case of the assessee. (AY. 1995-96)

Sterling Construction & Investments v. ACIT (Inv.) (2015) 374 ITR 474 / 118 DTR 265 / 232 Taxman 185 / 277 CTR 202 (Bom.)(HC)

S.263 : Commissioner – Revision of orders prejudicial to revenue – Loss on purchase and sale of non-convertible portion of debentures – Assessee not only answering questionnaires but producing books of account and other records – Loss accepted after close scrutiny – Revision was not justified. [S. 143(3)] 2475

The assessees were engaged in the business of purchase and sale of shares, debentures and other securities. They suffered loss on account of purchase and sale of non-convertible portion of debentures. The Assessing Officer did not accept the returns in a mechanical manner but took them up for close scrutiny. Notices were issued under sections 143(2)/142(1) with necessary questionnaires to the assessees. The assessees appeared before the Assessing Officer through their representatives and participated

in the proceedings, stretching over a period of few years. The assessees not only answered the questionnaires but produced the books of account and other records before the Assessing Officer to reinforce their stand. The Assessing Officer accepted the loss suffered by the assessees. The Commissioner exercising the powers under section 263 set aside the assessment orders and directed the Assessing Officer to re-examine the matters and deal with the issues raised in his orders after giving the assessees reasonable opportunity to bring all relevant facts and evidence to the notice of the Assessing Officer. Revision was held to be invalid.
CIT v. Green Fields Commercial P. Ltd. (2015) 372 ITR 740 / 231 Taxman 529 / 119 DTR 303 (J&K)(HC)
CIT v. Rangers Commercial P. Ltd. (2015) 372 ITR 740 / 231 Taxman 529 / 119 DTR 303 (J&K)(HC)

2476 **S.263 : Commissioner – Revision of orders prejudicial to revenue – Assessing Officer raising certain queries and assessee responding – Failure to discuss or mention this in assessment order – Revision on the ground Assessing Officer did not apply his mind or that he had not made inquiry on the subject was held to be not justified.**
Once inquiry was made, a mere non-discussion or non-mention thereof in the assessment order could not lead to the assumption that the Assessing Officer did not apply his mind or that he had not made inquiry on the subject and this would not justify interference by the Commissioner by issuing notice under section 263. Revision was held to be not justified. (AY. 2008-09)
CIT v. Krishna Capbox (P) Ltd. (2015) 372 ITR 310 (All.)(HC)

2477 **S.263 : Commissioner – Revision of orders prejudicial to revenue – Where two views possible and Assessing Officer chooses one – No power to revise – Whether a particular unit can be used independently or in tandem with similar units – Question of fact – Revision was held to be not justified. [S.260A]**
The Assessing Officer was satisfied with the claim of the assessee for depreciation on the cages meant to carry birds that were produced in the hatchery. The Commissioner issued notice under section 263 on the view that though the cost of each cage purchased by the assessee during the assessment year 1992-93 was less than ₹ 5,000, the cages were not put to use independently and they were utilised in fabrication of a bigger compartment with common facilities of lighting, feeding, watering, etc. Accordingly, he denied the depreciation. The Tribunal held in favour of the assessee. Held, dismissing the appeal, that where two views of a particular aspect are possible for an Income-tax Officer, and he has chosen one, the Commissioner cannot reopen the matter on the ground that another view is possible. The second ground where the power can be exercised is that the order passed by the assessing authority is patently illegal. The Revenue was not able to demonstrate as to how the order passed by the Tribunal was erroneous. At any rate, the question as to whether a particular unit can be used independently or in tandem with similar units, is a pure question of fact and the question cannot be dealt with in an appeal under section 260A. (AY.1992-93)
CIT v. Srinivasa Hatcheries (P) Ltd. (2015) 372 ITR 378 (T&AP)(HC)

S.263 : Commissioner – Revision of orders prejudicial to revenue – Neither proper books of account produced before Assessing Officer nor examination and scrutiny of documents and papers carried out – Failure to show that there was wrong exercise of revisional powers – Sufficient material to conclude that Assessing Officer's order was erroneous and prejudicial to revenue. 2478

The Assessing Officer accepted the return apparently without proper verification of the expenses stating that the expenses were unverifiable. He came to the conclusion that such unverifiable expenses were inadmissible but without properly quantifying the expenses, disallowed only a paltry sum of ₹ 60,000 and that too without giving details and basis of the disallowances. Thereafter, a survey was conducted in the premises of the assessee wherein it was found that the books of account had not been maintained by the assessee in due course of business, and proceedings under section 263 were initiated.

Held, that in the order passed by the Assessing Officer under section 143(3) there was mention of examination of the books of account. When the entire attending facts were gone through, it transpired that the version of the Assessing Officer in his order that he had gone through the books of account of the assessee was factually incorrect and wrong and was not supported by any record. Had the books of account been made available to the Assessing Officer and had those been actually examined by him, such perfunctory assessment was not to follow. From the statement of the president of the assessee, recorded during the course of these survey proceedings, it was abundantly clear that every effort was made by the assessee to dodge the authorities. Though the assessee was ready to produce a copy of the audited accounts it was not at all interested to produce the account books. Instead of producing the books of account, the assessee surrendered a sum of ₹ 2 crores.

The Commissioner had rightly come to a firm finding that the assessment framed by the Assessing Officer as also later under section 143(3) both were erroneous and prejudicial to the interests of the revenue as the Assessing Officer had not made requisite inquiry with regard to the aspect of maintenance of proper books of account while completing the assessment. There was no infirmity in the order of the Tribunal as well, as it had rightly rejected the appeal of the assessee. (AY. 2006-07)

Mattewal Labour and Construction Co-op. Soc. Ltd. v. CIT (2015) 372 ITR 665 (P&H)(HC)

S.263 : Commissioner – Revision of orders prejudicial to revenue – Exempt income – Rule 8D being not applicable for the relevant assessment year revision order by the Commissioner was held to be not valid. [S. 14A, R. 8D] 2479

Assessing Officer had made an addition under section 14A towards interest and administrative expenditure for earning exempt income. Commissioner invoked section 263 to hold that order passed by Assessing Officer was erroneous because rule 8D was not invoked. Tribunal allowed the appeal of revenue. On appeal by revenue dismissing the appeal of revenue the Court held that Rule 8D being not applicable for relevant year, Commissioner was not justified to hold order passed by Assessing Officer to be erroneous and prejudicial to interest of revenue. (AY. 2006-07)

CIT v. Aura Securities (P.) Ltd. (2015) 230 Taxman 241 (Guj.)(HC)

2480 **S.263 : Commissioner – Revision of orders prejudicial to revenue – Deduction – Possible view – Principle of consistency – Revenue cannot pick and choose the orders of Tribunal to file appeals – Officer must file an affidavit before matter comes up for admission – Revision was held to be not valid.[S. 36(1)(viii), 260A]**

The Assessing Officer granted deduction under section 36(1)(viii) of the Act to the assessee a Government bank. Commissioner revised the order. Tribunal held that there was no occasion for the Commissioner to exercise his power under section 263 on the question of deduction claimed under section 36(1)(vii). This conclusion was reached following its decision holding that the deduction under section 36(1)(vii) was to be allowed to Government banks even for the years prior to the assessment year 2007-08 and that the amendment in the assessment year 2007-08 included banking companies. On appeal: Held, dismissing the appeal that there was no occasion for the Commissioner to exercise his powers under section 263 as the view taken by the Assessing Officer was a possible view. This possible view was further fortified by the decision of the Tribunal which had also been accepted by the Revenue. Besides even under the Explanation to section 36(1)(vii), as existing at the relevant time, a financial corporation has been defined to include a public company and a Government company. The assessee would be covered by definition of financial corporation as stated in the Explanation to section 36(1)(viii). Revenue cannot pick and choose the orders of Tribunal to file appeals. Officer must file an affidavit before matter comes up for admission.

CIT v. State Bank of India (2015) 375 ITR 20 /(2016) 237 Taxman 252 (Bom.)(HC)

2481 **S.263 : Commissioner – Revision of orders prejudicial to revenue – Search and seizure – Once proceedings is initiated under section 153A, Commissioner has no jurisdiction to initiate revision jurisdiction. [S. 132, 153A]**

Once the proceeding initiated u/s. 153A by virtue of search u/s. 132, the Assessing Officer gets the jurisdiction to reopen and reassessee the declared and undisclosed incomes and pass the orders accordingly. Hence, the CIT has no jurisdiction to initiate proceeding u/s. 263. (AY. 2005-06 to 2008-09)

Canara Housing Development Company v. Dy. CIT (2015) 274 CTR 122 (Karn.)(HC)

2482 **S.263 : Commissioner – Revision of orders prejudicial to revenue – Revision was held to be not justified. [S.43(1)]**

Assessment made after queries and satisfaction with assessee's reply regarding applicability of Explanation 3 to s. 43(1) could not be revised by CIT on the ground of lack of enquiry by AO. It was also held that it was an accepted position that explanation 4A to s. 43(1) would not apply to the year in question as it was inserted by the Finance (No.2) Act, 1996, w.e.f. 1st October, 1996. Tribunal was there right in its view that s. 263 was not applicable to the facts of the present case. (AY. 1995-95)

CIT v. SRF Ltd. (2015) 114 DTR 61 / 230 Taxman 422 (Delhi)(HC)

2483 **S.263 : Commissioner – Revision of orders prejudicial to revenue – Depressed sales and 60 per cent discount offered on account of ongoing sealing drive conducted by municipal authorities – Insufficient to take a different view – Revision was held to be invalid.**

The assessee's premises were subjected to survey and discrepancies noticed between its books of account, the stocks and the excess cash was surrendered by it. These

were reflected in the books of account presented during the course of assessment. On the ground sales for the period March 24, 2006, and March 30, 2006, were depressed and stock was valued at ₹ 17 lakhs, but was ultimately sold for ₹ 1.37 lakhs, the Commissioner exercised his power of revision rejecting the assessee's explanation that the threat of ongoing sealing drive drove it to sell the stock at throwaway prices. Held, dismissing the appeal, that the Commissioner, in his order, cited an instance of goods worth ₹ 1,900 being sold for ₹ 200. Whilst a consistent behaviour, of disclosing a pattern, might justify a conclusion which warrants rejection of the books of account, the explanation of the assessee that but for such sales, the stocks would have been inaccessible for an inordinately long period of time, thus considerably risking its business, as against which it chose to liquidate its stocks, could not be characterised as unreasonable. Therefore, to seize upon this or the circumstance that a 60 per cent discount was offered *ipso facto* was insufficient to take a different view. Thus, the revision was invalid.(AY. 2006-07)
CIT v. Garg Cheap Cut Piece House (2015) 371 ITR 291 (Delhi) (HC)

S.263 : Commissioner – Revision of orders prejudicial to the interest of revenue – Cash credits – Revision of order was held to be not justified. [S.68, 143(3)] 2484
Where in assessment proceedings, assessee furnished confirmations from all debtors and creditors having balance in excess of ₹ One lakh in their bank account as directed and said fact was duly verified by Assessing Officer, Commissioner was not justified in passing revisional order setting aside assessment with a direction to consider issue of addition to be made under section 68 afresh in respect of amount received from aforesaid parties. (AY. 2008-09)
CIT v. Ankit Garments Manufacturing Co. (2015) 229 Taxman 258 (Delhi)(HC)

S.263 : Commissioner – Revision of orders prejudicial to revenue – Capital or revenue receipt – Capital gains – Business income – Termination of agency business – Assessing Officer wrongly treating receipt as capital gains and applying section 54EC to grant exemption – Consideration for transfer of goodwill received in nature of compensation – Taxable under head "Profits and gains of business or profession" – Revision applying section 28(ii)(c) was held to be valid. [S.4, 28(ii)(c), 45, 54EC] 2485
The assessee was a recipient of certain amount for holding an agency in India for the activities relating to the business of another company and it was only in connection with the termination of the agency, that the assessee received certain payment by transferring such rights covered by the sub-agency to another party. Therefore, section 28(ii)(c) would come into play and the income received by the assessee had to be certainly treated as profits and gains of business. It could not partake of the character of transfer of capital asset, as what was transferred was the sub-agency and goodwill attached. If it was a case of transfer simpliciter of the asset, without reference to the sub-agency, the assessee would be entitled to invoke section 45. But, the impugned agreement would clearly fall within the ambit and scope of section 28(ii)(c). The Assessing Officer had not applied the correct provision of law and the Commissioner was justified in invoking section 263 to revise the erroneous order. In so far as prejudice to the interests of the Revenue was concerned, it was apparent on the face of the record that but for the application of section 28(ii)(c) of the Act, the assessee would be entitled

to the benefit of claiming the receipt of the amount as capital gains under section 45 and the consequent exemption. Therefore, the claim of the assessee would certainly be prejudicial to the interests of the Revenue. Revision was held to be valid. (AY. 2001-02) *Chakiat Agencies P. Ltd. v. ACIT (2015) 370 ITR 502 / 231 Taxman 773 / 122 DTR 381 (Mad.)(HC)*

2486 **S.263 : Commissioner – Revision of orders prejudicial to Revenue – Cash credits – Assessment order showing non-application of mind by Assessing Officer – Assessment order erroneous and prejudicial to the interests of Revenue – Revision was held to be valid. [S.68]**

The assessee received ₹ 61 lakhs in the form of loans. The Commissioner noted that whereas on the one hand loans were advanced to the assessee at or about a proximate point in time, gifts in similar amounts had also been advanced. The Commissioner observed that these loans were unquestioningly accepted by the Assessing Officer despite the fact that the identity and capacity of the persons to whom the loans had been given had not been established. Letters which were addressed to the lenders had been returned unserved and the assessee expressed his inability to furnish their current addresses. The Commissioner made a detailed enquiry and summarised the evidence which was gathered in the group of cases pertaining to the family of the assessee during the course of the order in the form of a tabulated statement. The Commissioner observed that the persons who were advancing the gifts or the interest-free loans were individuals with a marginally taxable income, whereas the assessees were persons with a high income and substantial assets. The ultimate conclusion was that the loans or gifts were orchestrated to deposit moneys in family concerns or for investment in property. The Commissioner made a reference to the entries in the bank accounts and noted that balances were built up mostly in the form of cash and were taken out instantaneously by cheques and drafts which was a symptom of a hawala transaction. The Commissioner held that the identity and capacity of as many as 12 lenders were not established and the Assessing Officer was directed to modify his order adding an amount of ₹ 61 lakhs obtained from the loans. The Tribunal set aside the revisional order holding that the Assessing Officer had conducted an enquiry and had taken a possible view in law and was satisfied with the quality of evidence produced by the assessee. On appeal:

Held, allowing the appeal, that the order of the Assessing Officer did not indicate that there had been an application of mind by the Assessing Officer. There was nothing to indicate from the order that the Assessing Officer had brought his mind to bear upon the identity and capacity of the alleged lenders who had furnished loans to the assessee in the amount of ₹ 61 lakh. This, indeed, was a material circumstance which would have a bearing on the applicability of the provisions of section 68. It could not be deduced merely on the basis of the order-sheets of the Assessing Officer that there was a due and proper application of mind to the fundamental issue which had been raised by the Commissioner while exercising jurisdiction under section 263. Evidently, therefore, the requirement of section 263 has been established and the Commissioner was justified in coming to the conclusion that the order passed by the Assessing Officer without application of mind was both erroneous and prejudicial to the interests of the Revenue. The Tribunal has manifestly acted in excess of its jurisdiction in interfering

with the order of the Commissioner. The Assessing Officer was directed to decide issue afresh. (AY. 2003-04)
CIT v. Anand Kumar Jain (2015) 370 ITR 140 / 231 Taxman 534 (All.)(HC)

S.263: Commissioner – Revision of orders prejudicial to Revenue – Unaccounted purchases and sales – Addition by Commissioner on basis of statement before excise authorities in context of levy of excise duty on unaccounted production – Excise authority deleting addition and deletion affirmed by Tribunal – Revision was held to be not valid. 2487

Held, that the addition was sought to be made by the Income-tax Department on the basis of the statement made by the director before the Central Excise authorities in the context of levy of excise duty on unaccounted production. The Central Excise Department had deleted the addition of excise duty levied and this had been upheld by the CESTAT which had held that there was no evidence to show that there was clandestine manufacture and clearance of the ingots. The Income-tax Department had not collected any independent material to arrive at the conclusion that there were unexplained sales or purchases made by the assessee. It was only on the basis of the statement of the director before the excise authorities in which the Tribunal had noticed various contradictions and gaps. In the facts and circumstances, on the basis of the statement made by the director before the excise authorities alone which did not find corroboration from any other material, no addition could have been validly made. Revision was held to be not valid. (AY. 2005-06)
CIT v. Arora Alloys Ltd. (2015) 370 ITR 732 (P&H)(HC)

S.263 : Commissioner – Revision of orders prejudicial to Revenue – Recording of satisfaction before issuing notice – Commissioner signing on order-sheet for putting up draft notice under section 263 as well as issuing notice – Sufficient compliance in the matter of calling for, examining records of assessment to consider necessity of issuing notice – Revision was held to be valid. 2488

Held, affirming the decision of the Single Judge, that having put the signature of the Commissioner in approval of the draft notice put up with the file and having issued the show-cause notice there was sufficient compliance by the Commissioner. He had complied with the provisions contained in section 263 in the matter of calling for, examining the records of the assessment proceedings to consider the necessity of issuing such show-cause notice. The assessee had challenged the issuance of the show-cause notice itself before "making of the order". It is only upon "making of the order" the assessee might, from the face of it, show whether there was consideration or not.
Zigma Commodities P. Ltd. v. ITO (2015) 370 ITR 318 / 232 Taxman 356 (Cal.)(HC)
Editorial: Zigma Commodities P. Ltd. v. ITO (2014) 365 ITR 276 (Cal.)(HC) is affirmed.

S.263 : Commissioner – Revision of orders prejudicial to Revenue – Fact that assessment order is silent on a point does not mean that there is no application of mind by AO if he has raised a query during the assessment proceedings and assessee has replied. [S.143(3)] 2489

The Tribunal records the fact that specific queries were made during the assessment proceedings with regard to details of expenditure claimed under the head "miscellaneous

expenses" aggregating to ₹ 2.94 crore. The assessee responded to the same and on consideration of response of the assessee, the AO held that of an amount of ₹ 17.98 lakhs incurred on account of repairs and maintenance out of ₹ 2.94 cores is capital expenditure. This itself would be indication of application of mind by the AO while passing the impugned order. The fact that the assessment order itself does not contain any discussion with regard to the balance amount of expenditure of ₹ 1.76 crore i.e. ₹ 2.94 crores less ₹ 17.98 lakh claimed as Revenue expenditure would not by itself indicate non-application of mind to this issue by the AO in view of specific queries made during the assessment proceedings and the assessee's response to it. In fact this Court in the case of "*Idea Cellular Ltd. v. Deputy Commissioner of Income Tax & Ors., [(2008) 301 ITR 407 (Bom.)*]" has held that if a query is raised during assessment proceedings and responded to by the assessee, the mere fact that it is not dealt with in the assessment Order would not lead to a conclusion that no mind had been applied to it. (AY. 2006-07)
CIT v. Fine Jewellery (India) Ltd. (2012) 372 ITR 303 / 230 Taxman 641 (Bom.)(HC)

2490 **S.263 : Commissioner – Revision of orders prejudicial to Revenue – Free trade zone – Export turn over – Telecommunication charges – Direction of Tribunal to follow the law laid down by Special Bench of Tribunal and Jurisdictional High Court – Direction was held to be valid.**
Commissioner, while exercising jurisdiction under section 263, set aside assessment order with a direction to Assessing Officer to recompute deduction under section 10A, by excluding telecommunication charges from 'export turnover'. On appeal, Tribunal upheld exercise of jurisdiction by Commissioner but sent matter back to him to modify his direction in light of decisions of its Special Bench and Division Bench of jurisdictional High Court. On appeal by Revenue dismissing the appeal the Court held that Tribunal had done nothing but inviting attention of Commissioner to principles of law laid down in its Special Bench decision and equally Division Bench of jurisdictional High Court, merits of claim could not be and need not be considered. (AY. 2004-05)
CIT v. Larsen & Toubro Infotech Ltd. (2015) 228 Taxman 65 (Mag.)(Bom.)(HC)

2491 **S.263 : Commissioner – Revision of orders prejudicial to Revenue – Cash credits – Business income – Income from other Sources – Revision was held to be not justified. [S.28(i), 68, 143(3)]**
Assessee businessman received an unsecured loan. Assessee could not give satisfactory explanation regarding source of creditor. AO made addition invoking section 68 under head 'business income'. However, Commissioner opined that it should have been assessed under head 'income from other sources' and, thus, revised assessment. Tribunal has quashed the revision order. On appeal by Revenue the Court held that view of AO was a possible view and, hence, there was no reason for Commissioner to invoke section 263 so as to arrive at a different findings. (AY. 2005-06)
CIT v. P.D. Abraham (2015) 228 Taxman 67 (Mag.)(Ker.)(HC)
Editorial: SLP of Revenue is dismissed. (SLA(C) Nos. 18130/31 of 2014 dated 17-11-2014) CIT v. P. D. Abraham (2015) 232 Taxman 336 (SC)

S.263 : Commissioner – Revision of orders prejudicial to Revenue – Deduction at source – Revision valid if the AO had neither applied any mind nor has he applied the law correctly. [S. 194C] 2492

The Assessee paid hire charges to 20 parties and labour charges to 100 contractors on which tax was not deducted. However, the AO did not look into the same, and allowed the expenses. There were certain cash credits which was also not looked into by the AO. The CIT invoked his powers u/s. 263. The ITAT observed that the revision by the CIT u/s. 263 was valid since there was no proof whether the AO had applied any mind on the issue of whether tax was deducted at source. (AY.2008-09)

Prabhat Construction Company v. CIT (2015) 155 ITD 813 / (2016) 176 TTJ 501 (Pat.) (Trib.)

S.263 : Commissioner – Revision of orders prejudicial to Revenue – Business income or deemed income – Plausible view – Revision was held to be not valid. [S. 69A] 2493

The Assessing Officer passed the assessment order after considering the explanations filed by the assessee mere non-mention of the enquiries and the explanations given by the assessee in the assessment order by itself does not give a right to CIT to pass order under section 263. The Tribunal set aside the order passed by the CIT under section 263 and held that the Assessing Officer has taken a plausible view and the power exercised by the CIT is not as per settled law. Income earned is business income and not the income under section 69A. (AY. 2010-11)

Dev Raj High Tech Machines Ltd. v. Dy. CIT (2015) 174 TTJ 9 (UO)(Asr.)(Trib.)

S.263 : Commissioner – Revision of orders prejudicial to Revenue – Revision – Direction to disallow deduction without giving any opportunity – Revision was held to be bad in law. 2494

The Tribunal held that the CIT was supposed to indicate the omissions/commissions of the AO while passing the revisionary order. In this case he has taken over the role of AO. Besides he has violated the basic principles of natural justice by directing the AO not to give opportunity of hearing to the assessee. Thus on both the counts the order of CIT is invalid. (AY. 2005-06)

Manas Salt Iodisation Industries (P) Ltd. v. ACIT (2015) 169 TTJ 172 / 38 ITR 502 (Gau.) (Trib.)

S.263 : Commissioner – Revision of orders prejudicial to revenue – While giving effect relief was given, revision was held to be not valid Refund form ITNS 150 being part of assessment order would be subject matter of revision. [S.11, 12A, 13] 2495

Assessing Officer disallowed claim of exemption under sections 11 and 12 because registration was already cancelled under section 12AA(3). In meantime assessee's appeal against cancellation of registration was decided by Tribunal and registration granted to assessee was restored. Applicability of relevant sections was not only examined by Assessing Officer but also by Commissioner (Appeals). While giving appeal effect, Assessing Officer granted relief to assessee in ITNS 150. Revision was held to be not justified. However refund Form ITNS 150 being part of assessment order has to be

considered under any proceeding under Income-tax Act and would be subjected to revision. (AY. 2001-02, 2005-06)
Board of Directors, Allahabad Agricultural Institute v. CIT (2014) 165 TTJ 561 / (2015) 68 SOT 301 (URO)(All.)(Trib.)

2496 **S.263 : Commissioner – Revision of orders prejudicial to Revenue – Allowing claim under section 10B without making an enquiry will indicate that order is erroneous and prejudicial to interest of revenue. [S. 10B]**
The assessee is a public limited company engaged in the business of mining, production and export of iron ore, manufacture and sale of metallurgical coke and pig iron, shipping and ship building. The assessee claimed deduction under section 10B which was allowed by the AO. Thereafter, the Commissioner of Income-tax invoked jurisdiction under section 263, on the ground that on the basis of the survey, the assessee is not entitled for deduction under section 10B for the reasons that at its Ultra Fines recovery Plant, only the waste generated by the other units was processed and the said activities could not be construed as production since there was no extraction of iron ore as per decision of Supreme Court that 'production' in the context of iron ore should involve both activities, i.e., extraction of iron ore and processing of iron ore. On appeal the Appellate Tribunal held that if the assessment has been made without making the proper enquiry and application of mind, the order is erroneous and prejudicial to the interest of Revenue. Unlike the Civil Court which is neutral to give a decision on the basis of evidence produced before it, an AO is not only an adjudicator but is also an investigator. The AO cannot remain passive on the face of a return which is apparently in order but calls for further enquiry. It is the duty of the AO to ascertain the truth of the facts stated in the return when the circumstances of the case are such as to provoke enquiry. If there is failure to make such enquiry, the order is erroneous and prejudicial to the interest of revenue. The Revenue has not to prove that its order is erroneous and Commissioner can revise it under section 263. (AY. 2006-07, 2007-08)
Sesa Goa Ltd. v. CIT (2014) 151 ITD 679 / (2015) 168 TTJ 758 (Panaji)(Trib.)

2497 **S.263 : Commissioner – Revision of orders prejudicial to Revenue – Lack of enquiry into claim made by assessee – Order erroneous – Assessing Officer to do assessment afresh. [S.80P(2)(a)(i)]**
Assessee, a co-operative society has filed its return of income declaring nil income and has claimed deduction u/s. 80P(2)(a)(i). Assessment was completed u/s. 143(3) of the Act. CIT proposed to revise the assessment u/s. 263 on the basis that AO failed to examine the claim for deduction u/s. 80P(2)(a)(i). CIT sought to revise the case in view of Apex Court judgment, interest earned on surplus funds invested in short-term deposits, securities and other income which was not in the nature of business income had to be brought to tax and would not be eligible for deduction u/s.80P(2)(a)(i) of the Act. On appeal before ITAT, concluded that assessment is very cryptic. Nothing is mentioned with regard to the claim of the assessee for deduction u/s.80P(2)(a)(i) or 80P(2)(d) in the order. Assessee has also not been able to place on record any correspondence that

might have been there during the course of assessment proceedings. Lack of enquiry of the claim made by assessee for deduction u/s.80P(2)(a)(i) is therefore glaring on record. However, CIT had directed the AO to make the disallowances without giving him any room for taking the submissions and pleading of the assessee into consideration which in our opinion was not proper. At the same time AO had made no enquiries on these vital issues at the time of assessment. Hence CIT(A) was justified in considering the assessment order as erroneous and prejudicial to the interests of Revenue. However in the circumstances, direction of the CIT to assess the incomes is not correct. Therefore, while upholding the order of CIT u/s.263 of the Act, it was directed to AO to do the assessment afresh in accordance with law, untrammelled by the observation of the CIT on merits regard. (AY. 2010-11)
Chitradurga City Multi Purpose Co-operative Society v. ITO (2015) 44 ITR 61 (Bang.)(Trib.)

S.263 : Commissioner – Revision of orders prejudicial to Revenue – Capital gains – Transfer of land for agricultural purposes – There was no enquiry whether land sold was used for agricultural purposes in last two years or not, assessment order passed by Assessing Officer was erroneous and prejudicial to interests of Revenue. [S.54B] 2498
The Assessing Officer completed assessment u/s. 143(3) restricting deduction under section 54B to a certain amount. Commissioner found from records that Assessing Officer while allowing deduction under section 54B had not enquired whether land sold by assessee was used for agricultural purposes in last two years or not. Assessment order made, suffered from lack of enquiry inasmuch as erroneous and prejudicial to interests of Revenue and Commissioner was right in setting aside assessment with a direction to Assessing Officer to frame assessment afresh. (AY. 2006-07)
Om Prakash Rajoria v. CIT (2015) 155 ITD 886 (Jaipur)(Trib.)

S.263 : Commissioner – Revision of orders prejudicial to Revenue – Scientific research and development – Clinical testing drugs – Eligible deduction – Revision was held to be not valid – On merit also the assessee was held to be entitled deduction. [S.80IB (8A)] 2499
Assessee company was engaged in business of clinical testing of drugs and formulations on human beings. It claimed deduction u/s. 80IB(8A) by projecting itself to be an entity engaged in research and development. Assessing Officer allowed the claim. In revision proceeding the Commissioner was of opinion that assessee was only a contract research organization without any transfer of technology developed, He thus taking a view that assessee was not eligible for deduction and set aside the order of Assessing Officer. On appeal allowing the claim of assessee the Tribunal held that once DSIR which was an expert body, granted approval to assessee by specifically declaring it as a research and development company eligible for deduction u/s. 80IB(8A), read with Rules 18D and 18DA of 1962 Rules, Revenue authorities could not decline assessee's claim for deduction on one pretext or another in assessment or revisional proceedings. Therefore, impugned revisional order was set aside. Department appeal for the AY.2009-10 was dismissed on merits. (AY.2008-09, 2009-10)
B. A. Research India Ltd. v. Dy. CIT (2015) 155 ITD 151 / 42 ITR 149 (Ahd.)(Trib.)

2500 **S.263 : Commissioner – Revision of orders prejudicial to Revenue – Cash credit – Share capital at premium – Inadequate enquiry – Revision was held to be justified – Insertion of proviso to section 68 by Finance Act, 2012 which casts onus on closely held company to explain source of share capital is clarificatory and hence applicable with retrospective effect. [S.68]**

Assessee filed return offering meagre income and issued share capital at huge premium, while making large investments in new companies at much higher price than their real worth. Assessment was completed under section 143(3), without making any addition under section 68 of the Act. Commissioner set aside order and directed the Assessing Officer to make fresh assessment after conducting detailed enquiry and upon satisfying on genuineness of transaction. On appeal dismissing the appeal of assessee the Tribunal held that order of Commissioner was not based on irrelevant considerations and further in present circumstances, he was not obliged to positively indicate deficiencies in assessment order on merits on question of issue of share capital at a huge premium. Since inadequate enquiry conducted by Assessing Officer was as good as no enquiry making order erroneous and prejudicial to interests of Revenue, Commissioner was empowered to revise assessment order. Insertion of proviso to section 68 by Finance Act, 2012 which casts onus on closely held company to explain source of share capital is clarificatory and hence applicable with retrospective effect.(AY. 2008-09, 2010-11)

Subhlakshmi Vanijya (P.) Ltd. v. CIT (2015) 155 ITD 171 / 43 ITR 48 / 172 TTJ 721 (Kol.) (Trib.)

2501 **S.263 : Commissioner – Revision of orders prejudicial to Revenue – Speculative transactions – Loss incurred by assessee in currency swap contract cannot be denied to be set off against other heads of income taking it as speculative loss. [S. 28(i), 43(5), 73(1)]**

The assessee company was engaged in export/import and domestic trading of various commodities. During the course of assessment, assessee claimed currency swap loss of ₹ 6.04 crore under the head 'Financial expenses' in the profit and loss account. The Assessing Officer allowed assessee's claim. The Commissioner opined that transaction in question was speculative transaction within the broad meaning of section 43(5) and resultant loss could not be set-off against profits and gains of non-speculative business as per the provisions of section 73(1). The Commissioner thus passed a revisional order setting aside the assessment. The Tribunal held that currencies cannot be covered by the word "commodity". Provision of section 43(5) cannot be applied to currencies. Without prejudice, by virtue of the proviso to section 43(5), hedging transaction cannot be regarded as speculative transactions. Aforesaid proviso does not contain anything to provide for an exception on account of hedging contracts in respect of currencies whereas it specially covers raw material, merchandise, stock and shares. It shows that legislature was clear in its mind that since the word "commodity" itself cannot take in any currency as such, there can be no question for providing an exception in that regard in the proviso. Provisions of section 43(5) do not apply to currencies and, therefore, loss incurred by assessee in currency swap contract cannot be denied to be set off against other heads of income taking it as speculative loss. (AY. 2008-09)

Adani Enterprises Ltd. v. Ad. CIT (2015)55 taxmann.com 375 / 68 SOT 129 (Ahd.)(Trib.)

S.263 : Commissioner – Revision of orders prejudicial to Revenue CIT's action of stepping into shoes of AO and virtually redoing assessment by issuing specific directions to AO is unlawful. Remand to AO with direction to give opportunity of hearing to assessee is meaningless – Revision order was quashed. [S.36(1)(iii), 40(b), 184(2), 184(4)] 2502

(i) It is abundantly clear that CIT has exceeded its jurisdiction in virtually reassessing the case. It is true that the revisional authority itself has wide power to examine the case whether the decision has been erroneous and prejudicial to the interest of Revenue and in exercise of these power modifications are permissible, and furthermore that if the Commissioner comes to this conclusion that the assessment is required to be redone, that such direction can still be issued to the Assessing officer. However, it is trite law that it is not permissible for the CIT being a revisional authority to step into the shoes of the Assessing Officer and to redo the assessment and pass fresh assessment order. In the instant case, the Commissioner has set aside the order on the aforesaid issues with a direction to the Assessing officer to pass a fresh assessment order. At the same time, the Commissioner has directed the Assessing Officer to make the addition of ₹ 5,95,970/- on account of understatement of closing stock, disallow interest u/s. 36(1)(iii) in respect of mixing plant and depreciation in respect of mixing plant and disallow of deduction on account of interest, salary etc. paid to the partners. In our considered view, remanding the matter to the Assessing officer is of no consequence, particularly when the CIT himself has reframed the assessment. In the facts and circumstances of the case the CIT has not left any scope for the Assessing officer to redo the assessment or pass a fresh assessment order. It is also observed that CIT has directed the Assessing Officer to give an opportunity of being heard to the assessee before passing the fresh assessment order. As per the view of Tribunal, giving opportunity of being heard to the assessee by the Assessing Officer is also meaningless, particularly when the CIT himself has reframed the assessment order. The direction given by the learned CIT in the impugned order are also contrary to the settled position of law. When the CIT directs the Assessing Officer to pass a fresh assessment order, the only proper course for the Commissioner was not to express any final opinion as regards to the controversial points. While taking such a view, the Tribunal are fortified by the decision of Hon'ble Gujrat Hon'ble High Court in the case of *Addl. CIT v. Mukur Corporation (1978) 111 ITR 312 (Gujarat)*. It is also observed that in the concluding part of the order of the Commissioner he has issued a direction to the Assessing officer to pass a fresh assessment order then he was not required to express any final verdict as regards the controversial points. In this case, the Commissioner has directed the Assessing Officer to make the specific additions/disallowances, as mentioned in the impugned order. Therefore, the directions given to the Assessing officer to frame a fresh assessment order is bad in law as this is clearly a case in which the learned CIT has exceeded his jurisdiction in reassessing the case. Even the direction given by the CIT to the Assessing officer to provide an opportunity of being heard to the assessee is also of no consequence.

(ii) When a fresh assessment is done, there could always be grounds on which one of the parties is aggrieved and the law prescribes a corrective remedy by way of

appeal, revision etc. If the CIT who is a highly placed authority of the Revenue, is to exercise the powers of which doing a fresh assessment, then the right of appeal, revision etc is totally annihilated and this could never be the intention of the Legislature. (AY. 2010-11)

Ved Parkash Contractors v. CIT (2016) 175 TTJ 19 (UO)(Chad.)(Trib.)

2503 **S.263 : Commissioner – Revision of orders prejudicial to Revenue – Capital gains – Profit on sale of Residential house – Farm house – Revision order was held to be not valid. [S.54]**

Assessee derived long-term capital gain on sale of a farm house and invested part of same in accordance with section 54. AO allowed exemption u/s. 54 after making certain adjustments. CIT set aside assessment order on ground that property sold being a farm house and not a residential house, exemption u/s. 54 was not available and that part of capital gain was invested under Capital Gain Scheme but there was no documentary evidence for same. On appeal allowing the claim the ITAT held that facts indicated that property in question was 'gairmumkin shed' and house, and income from letting out a portion of that property was assessed as income from house property. Copy of FDR under Capital Gain Scheme was also available on record but CIT failed to consider same and the conditions of section 54 were satisfied therefore CIT was not justified in setting aside the order. (AY. 2009-10)

Harpreet Kaur (Smt.) v. CIT (2015) 154 ITD 721 / 173 TTJ (Chd.)(Trib.)

2504 **S.263 : Commissioner – Revision of orders prejudicial to revenue – Amounts not deductible – Deduction at source – If payer obtains declarations in Form 15G/15H, tax is not deductible at source. Failure to furnish such declarations to CIT may attract penalty u/s. 272A (2)(f). However, disallowance u/s. 40(a)(ia) cannot be made – Order of revision was quashed. [S.40(a)(ia), 40A(3) 194A, 197A(IA), 272A(2)(f), Form 15G/15H]**

The assessee has received such Forms as prescribed from those persons to whom interest was paid/being paid and accordingly no deduction of tax was to be made in such cases. The default for non-furnishing of the declarations to the Commissioner of Income-tax as prescribed may result in invoking penalty provisions under section 272A(2)(f), for which separate provision/procedure was prescribed under the Act. However, once Form 15G/ Form 15H was received by the person responsible for deducting tax, there is no liability to deduct tax. Once there is no liability to deduct tax, it cannot be considered that tax is deductible at source under Chapter XVII-B as prescribed under section 40(a)(ia) (I.T.A. No. 1326/Hyd/14 C.O. No. 57/Hyd/14, dt. 7-8-2015) (AY. 2009-10)

Malineni Babulu (HUF) v. ITO (Hyd.)(Trib.); www.itatonline.org

2505 **S.263 : Commissioner – Revision of orders prejudicial to Revenue – Loss under the head income from other sources – Set off against heads of income – Order is not prejudicial to Revenue.[S.71]**

Assessee using part of loan for making deposits in bank. Assessing Officer allowing deduction of interest on entire loan. Interest on borrowings for deposits allowable as expenditure against interest earned on fixed deposits. Commissioner revised the order. On appeal Tribunal held that loss under head "Income from other sources" to be set off

against income from other heads of income hence the order of Assessing Officer is not prejudicial to Revenue. (AY. 2009-10)
S. Rajagopal v. ITO (2015) 68 SOT 318 (URO) / 39 ITR 624 (Chennai)(Trib.)

S.263 : Commissioner – Revision of orders prejudicial to Revenue – In a case where there is inadequate inquiry but not lack of inquiry, the CIT must conduct inquiry and verification and record the finding how the assessment order is erroneous. He cannot simply remand the matter to the AO for verification.[S. 24(b), 143(3), 153] 2506
In cases where there is inadequate inquiry but not lack of inquiry, the CIT must give and record a finding that the order/inquiry made is erroneous. This can happen if inquiry and verification is conducted by the CIT and he is able to establish and show the error and mistake made by the AO, making the order unsustainable in law. In some cases possibly though rarely, the CIT can also show and establish that the facts on record or inferences drawn from facts on record *per se* justified and mandated further enquiry or investigation but the Assessing Officer had erroneously not undertaken the same. In this situation, the said finding must be clear, unambiguous and not debatable. The matter cannot be remitted for a fresh decision to the Assessing Officer to conduct further inquiry without a finding that the order is erroneous. The distinction must be kept in mind by the CIT while exercising judgment under section 263 of the Act and in absence of the finding that the order is erroneous and prejudicial to the interest of revenue, the exercise of jurisdiction under said section is not sustainable. The finding that the order is erroneous is the condition or requirement which must be satisfied for exercise of jurisdiction u/s. 263 of the Act. In such matters, to remand the matter/issue to the Assessing Officer would imply and mean that the CIT has not examined and decided whether or not the order is erroneous but has directed the Assessing Officer to decide the aspect/question. In the most of the cases of alleged inadequate investigation, it would be difficult to hold that the order of the AO, who had conducted inquiries and had acted as an investigator is erroneous without CIT conducting verification/inquiry. It was also laid down that the CIT can direct reconsideration of assessment on this ground but only when the order is erroneous and an order of remit cannot be passed by the CIT to ask the AO to decide whether the order was erroneous and such order is not permissible under the provisions of section 263 of the Act. The jurisdictional pre-condition for invoking section 263 of the Act is that the CIT must come to the conclusion that the order is erroneous and is unsustainable in law. (AY. 2009-10)
Maya Gupta v. CIT (Delhi)(Trib.); www.itatonline.org

S.263 : Commissioner – Revision of orders prejudicial to Revenue – Special Economic Zones – Foreign exchange fluctuation losses – Revision on ground that assessee had not fulfilled eligibility conditions as SEZ was unjustified where it was found that assessee was duly granted approval by SEZ authorities to set up SEZ unit, it was recognized as an entrepreneur under SEZ Act and was also granted renewal of approval for trading by competent authority under SEZ Act – Foreign exchange fluctuation loss was correctly allowed by the AO. [S. 10AA, 37(i), The Special Economic Zone Act, 2005, S.2(z)] 2507
Assessee in its SEZ unit was engaged in carrying on business of trading in gold, platinum and diamond jewellery. SEZ unit imported goods from supplier of Dubai

and re-exported it. AO allowed assessee's claim for deduction under section 10AA. CIT(A) revised said order on ground that assessee had not fulfilled conditions for eligibility namely, import for purposes of re-export and had not earned any foreign exchange and denied exemption. It was found that assessee was duly granted approval by SEZ authorities to set up SEZ unit and assessee was recognized as an entrepreneur under SEZ Act and was also granted renewal of approval for trading by competent authority under SEZ Act. Annual performance report submitted by assessee before SEZ authorities showed that net foreign exchange earnings was in accordance with SEZ Act and SEZ Rules and, thus, assessee complied with SEZ Act and SEZ Rules. Therefore the ITAT held that views taken by AO was one of possible views and, thus, revision was unjustified. As regards foreign exchange fluctuation was allowed by the AO considering the number of documents hence the revision order of the CIT was set aside. (AY. 2009-10, 2010-11)

Zaveri & Co. (P.) Ltd. v. CIT (2014) 32 ITR 250 / (2015) 153 ITD 85 (Ahd.)(Trib.)

2508 **S.263 : Commissioner – Revision of orders prejudicial to Revenue Depreciation – Windmill, generated wind power and sold it to state electricity board prior to 30th September of year, income from which was taxed, depreciation was to be allowed at full rate – Revision order was set aside. [S.32]**

The assessee was in the business of power through windmill. The assessment was completed u/s. 143(3). Depreciation loss of 80% on the cost of a new wind mill was allowed. In revision proceedings under section 263, Commissioner held that erection invoices showed that the wind mill erection was completed on 30-9-2007, hence he directed to restrict the depreciation to 40%. On appeal the Tribunal held that the assessee's wind mill was erected and generated power before 30-9-2007. The same was sold to State Electricity Board and sale proceeds were being offered for taxation. Department had not questioned certificate issued by State Electricity Board, it could not be said that assessee had not erected wind mill on or before 30-9-2007, hence allowance of depreciation at 80% was held to be justified. Order of Commissioner was quashed. (AY. 2008-09)

D. M. Kathir Anand v. ACIT (2014) 29 ITR 753 / (2015) 153 ITD 115 (Chennai)(Trib.)

2509 **S.263 : Commissioner – Revision of orders prejudicial to Revenue – Property held for charitable purposes – Before any activity can be branded as being in the nature of trade or commerce, the AO has to demonstrate the intention of parties backed with facts and figures of carrying out activities with profit motive. Mere surplus from any activity which has been undertaken to achieve the dominant object does not imply that the same is run with profit motive. The intention has to be gathered from circumstances which compelled the carrying on the activity – Revision order held to be not justified. [S. 2(15), 11]**

The AO completed the assessment u/s. 143(3) accepting the nil income shown by the assessee. DIT (E) was of the opinion that the principle of mutuality was wrongly applied by the AO, after examining the bye-laws he held that the order was prejudicial to the interest of Revenue. He accordingly passed the order setting aside the order of AO. On appeal, allowing the appeal of assessee against the order u/s. 263, the Tribunal held that;

(i) The third proviso to section 143(3), requiring the AO to examine the applicability of proviso to section 2(15) in case of institutions notified u/s. 10(23C)(iv) in view of insertion of 17th proviso to section 10(23C), was not on statute book at the time when assessment order was passed and since the notification remained in force the invocation of section 263 by DIT(E) was not justified in view of the decision of Hon'ble Supreme Court in the case of Max India Ltd.
(ii) From the detailed submissions of assessee, reproduced earlier, which have not been controverted by Department, we fail to understand as to how these activities can be said to have an iota of commercial/trade colour. The dominant object of the assessee is definitely for the well-being of public at large by organizing various seminars for the welfare of people by disseminating knowledge in various fields in order to uplift the social consciousness of the society at large. (The composition of membership clearly exemplifies the real intention of assessee. We fail to understand as to how the hostel accommodation provided to various invitees could be considered as a commercial activity. Before any activity can be branded as being in the nature of trade or commerce, the AO has to demonstrate the intention of parties backed with facts and figures of carrying out activities with profit motive. Mere surplus from any activity, which undisputedly has been undertaken to achieve the dominant object, does not imply that the same is run with profit motive. The intention has to be gathered from circumstances which compelled the carrying on an activity. In the present case, learned counsel has clearly demonstrated that surplus was generated from interest income and not from catering or hostel activities. Therefore, the objection of learned DIT(E) does not survive on this count also.
(iii) The primary object of insertion of proviso to section 2(15) was to curb the practice of earning income by way of carrying on of trade or commerce and claiming the same as exempt in the garb of pursuing the alleged charitable object of general public utility. This proviso never meant to deny the exemption to those institutions, where the predominant object is undeniably a charitable object and in order to achieve the same incidental activities, essential in the given circumstances, are carried on. Revision order was quashed. (ITA No 3124 /Del/2014 11-5-2015). (AY. 2009-10)
India International Centre v. ADIT (Delhi)(Trib.); www.itatonline.org

S.263 : Commissioner – Revision of orders prejudicial to Revenue Property held for charitable purposes – Mutuality – Revision order was set aside. [S. 2(15), 11] 2510
The assessment was completed u/s. 143(3), accepting the nil income shown by the assessee. DIT(E) passed the order under section 263 set aside the order of AO on the ground that the assessee had the consultancy income which is in the nature of trade and commerce. He accordingly set aside the order passed by the AO. On appeal allowing the appeal of the assessee, the Tribunal held that; (i) The expressions "trade", "commerce" and "business", as occurring in the first proviso to section 2(15) of the Act, must be read in the context of the intent and purport of section 2(15) of the Act and cannot be interpreted to mean any activity which is carried on in an organized manner. The purpose and the dominant object for which an institution carries on its activities is material to determine whether the same is business or not. The purport of the first proviso to section 2(15) of the Act is not to exclude entities which are essentially for

charitable purpose but are conducting some activities for a consideration or a fee. The object of introducing the first proviso is to exclude organizations which are carrying on regular business from the scope of "charitable purpose". The expressions "business", "trade" or "commerce" as used in the first proviso must, thus, be interpreted restrictively and where the dominant object of an organization is charitable any incidental activity for furtherance of the object would not fall within the expressions "business", "trade" or "commerce".

(ii) After going through the objects and activities of the assessee association it is clear that the assessee association did not carry on any "business", "trade" or "commerce" with the main object of earning profit. The activity of imparting support services to State Road Transport Undertakings without any profit motive are being conducted in furtherance of the object for which assessee association had not constituted by the Government of India. The activities of providing laboratory test services and consultancy to the State Road Transport Undertakings of all over India cannot be held to be "trade", "business" or "commerce" merely because some fee or charges are being received by the assessee association. Accordingly, even if some fees or charges are being charged by the assessee association for providing laboratory test services and consultancy services in accordance with its charitable objects, the activities cannot be held to be rendered in relation to any "trade", "commerce" or "business" as such activities are undertaken by the assessee association in furtherance of its main objects which are undisputedly of charitable nature and which is not an activity of "trade", "commerce" or "business" with main object of earning profit.

(iii) The first proviso to section 2(15) of the Act carves out an exception which excludes advancement of any object of general public utility from the scope of charitable purpose to the extent that it involves carrying on any activity in the nature of "trade", "commerce" or "business" or any activity of rendering certain services in relation to any "trade", "commerce" or "business" for a cess or fee or any other consideration, irrespective of the nature of the use or obligation or retention of income from such activity. Their Lordship also held that the expression "trade", "commerce" or "business", as occurring in the first proviso of section 2(15) of the Act, must be read in the context of the intent in purported of Section 2(15) of the Act and cannot be interpreted to mean any activity which is carried on in an organized manner. Explaining the dominant object of newly inserted proviso to section 2(15) of the Act, speaking for Jurisdictional High Court of Delhi, their lordship also held that the first proviso to section 2(15) of the act does not purported to exclude entities which are essentially for charitable purpose but are conducting some activities for a consideration or a fee and the object of introducing first proviso is to exclude organizations which are carrying on regular business from the scope of charitable purpose. It was also held that expression "business" "trade" or "commerce" as used in first proviso must, thus, be interpreted restrictively and where the dominant object and organization is charitable any incidental activity for furtherance of the object would not fall within the expression "business", "trade" or "commerce". Appeal of assessee was allowed.(AY. 2009-10)

Association of State Road Transport Undertakings v. CIT (2015) 155 ITD 1177 / 40 ITR 622 (Delhi)(Trib.)

S.263 : Commissioner – Revision of orders prejudicial to Revenue – Grant of higher depreciation on furniture – Revision was held to be proper – Revision with regard to corpus receipts to be set aside. 2511

The assessee was an educational society running a medical college and hospital. The AO in the original proceedings has allowed depreciation on furniture at 40% as against applicable rate of 10%. Commissioner has held that the AO has passed the order without proper enquiry. On appeal the revision order was upheld. As regards corpus donation, the revision was held to be not justified. (AY. 2004-05 to 2010-11)

Prathima Educational Society v. Dy. CIT (2015) 38 ITR 306 / 69 SOT 84 (URO)(Hyd.)(Trib.)

S.263 : Commissioner – Revision of orders prejudicial to Revenue – Deduction of tax at source – Credit for tax deducted – Credit not to be denied on ground income not chargeable to tax in that year – Revision was held to be not justified. [S. 194J, 199] 2512

The assessee procured contracts for erection of thermal power stations and sub-contracted the work to other contractors. While making payment to the assessee tax was deducted at source under section 194J of the Act, treating it as fees paid for professional and technical services. The Assessing Officer allowed the assessee credit of tax at source deducted. The Commissioner held that the allowance of credit for the tax deducted at source from the payment made on account of mobilisation advance was in violation of section 199 of the Act and erroneous and prejudicial to the interests of the Revenue, since the amount of mobilisation advance was not chargeable to tax in the hands of the assessee as income in the year. On appeal :

Held, allowing the appeal, that once the tax was deducted at source and paid to the Central Government, credit therefor should be given to the assessee in the year of deduction of tax at source. The view taken by the Assessing Officer while allowing credit for the tax deducted at source from mobilisation advance was a possible view and the Commissioner was not justified in substituting his own view for such possible view taken by the Assessing Officer. (A.Y. 2006-07)

Zelan Projects P. Ltd. v. Dy. CIT (2015) 38 ITR 41(Hyd.)(Trib.)

S.263 : Commissioner – Revision of orders prejudicial to Revenue – Revision on grounds different from those set down in show cause notice – Not permissible – Revision on ground of lack of proper enquiry by Assessing Officer – Not valid. 2513

The assessee was a railway contractor. The assessee's return was subjected to scrutiny assessment proceedings and the Assessing Officer finally assessed the income of the assessee. The Commissioner issued notice for revision listing out certain allowances and deductions granted in the assessment which he felt were inadmissible. The Commissioner in his order of revision held that the order passed by the Assessing Officer was erroneous and prejudicial to the interests of the Revenue on the ground that the order was passed without proper consideration of facts, without following the law and without making requisite and proper enquiries. On appeal:

Held, that the Commissioner set out one reason for revising the order, but actually revised the order on some other ground. That was not permissible under the scheme of the law. Lack of proper inquiries, which an Assessing Officer ought to have conducted on the facts of the case, was altogether a different reason from inadmissibility of a claim

to deduction or an income which ought to have been brought to tax. Therefore, the revision order was contrary to the scheme of law and should be quashed. (AY. 2007-08)
B. S. Sangwan v. ITO (2015) 38 ITR 11 / 67 SOT 447 (Delhi)(Trib.)

2514 **S.263 : Commissioner – Revision of orders prejudicial to interest of Revenue – Lack of proper enquiry – Revision was held to be justified. [S.54F]**
AO has passed cryptic and non-speaking order, CIT was justified in assuming jurisdiction, however on merit Tribunal allowed the exemption under section 54F. (AY. 2006-07)
S. Uma Devi v. CIT (2015) 117 DTR 151 / 70 SOT 225/ 169 TTJ 487 (Hyd.)(Trib.)
V. Shailaja v. CIT (2015) 117 DTR 151 / 70 SOT 225/ 169 TTJ 487 (Hyd.)(Trib.)

2515 **S.263 : Commissioner – Revision of orders prejudicial to interest of Revenue – Before taking any action under section 263, Commissioner must record his satisfaction; issuance of notice on basis of proposal made by ITO is void *ab initio*.**
Tribunal held that the CIT had not applied his mind but the matter was referred by the AO for initiating the proceeding under s. 263 of the Act. It is noticed that the notice under s. 263 of the Act was issued only on receipt of the proposal under s. 263 of the Act from the ITO. and the assessee explained, *vide* written submission which has been reproduced. It is well-settled that the learned CIT while exercising the revisionary powers under s. 263 of the Act may call for and examine the records of any proceedings and thereafter if he considers that any order passed therein is erroneous in so far as it is prejudicial to the interest of the Revenue, he may, after giving the assessee an opportunity of being heard and after making or causing to be made such inquiry as he deems necessary, pass such order thereon as the circumstances of the case justify. Therefore, before taking any action, learned CIT himself shall apply his mind after examining the record of any proceedings and his satisfaction is must. However, the satisfaction was of the AO who proposed action under s. 263 of the Act, but not of the learned CIT. Therefore, issuance of notice under s. 263 of the Act on the basis of the proposal made by the ITO was void *ab initio*; therefore, the matter was set aside. (AY. 2008-09)
Dharmendra Kumar Bansal v. CIT (2014) 161 TTJ 801 / (2015) 152 ITD 406 (Jaipur)(Trib.)

2516 **S.263 : Commissioner – Revision of orders prejudicial to Revenue – Assessing Officer including receipt from sale of carbon credits as eligible profits – Order not prejudicial to Revenue. [S.80IA, 143(3)]**
The assessee was in the line of power generation business. The assessee had undertaken a hydroelectric power project allotted by the Government. The assessee claimed deduction under section 80-IA of the Act. The AO allowed the deduction. The CIT held that the order of the AO was erroneous and prejudicial to the Revenue as the assessee's income derived from the sale of carbon credits, was not derived from the eligible business and would not qualify for grant of deduction under section 80-IA of the Act. On appeal:
Held, allowing the appeal, that the action under section 263 would not be justified if the twin conditions were not fulfilled. In the assessee's case, the Commissioner felt that the receipts from sale of carbon credits were not derived from the industrial undertaking

so as to be eligible for grant of deduction and the Assessing Officer committed an error in including the receipt in the eligible profits. It was to be seen whether the receipt was of capital or of Revenue nature. Even if the order of the Commissioner was upheld, it would affect the computation of income. Ultimately because the receipt would not be taxable, it would not come under the ambit of computation of income and simultaneously it would be excluded from the deduction under section 80-IA of the Act as well as of the total income. The result would be revenue neutral. Therefore, the second condition for taking action under section 263 of the Act did not exist. The assessment order was not prejudicial to the interests of the Revenue. (AY. 2009-10)
Subhash Kabini Power Corporation Ltd. v. CIT (2015) 37 ITR 106 (Bang.)(Trib.)

S.263 : Commissioner – Revision of orders prejudicial to Revenue – Lack of enquiry – Revision was held to be valid – Depreciation on electrical equipment functional test to be applied – Matter remanded. 2517

AO allowing excess depreciation on windmill. Assessee accepting claim as typographical error during revision proceedings. AO accepting claim of assessee without giving reason. Setting aside of assessment order proper. As regards depreciation for electrical equipment on windmill. Functional test whether equipment an integral part of windmill. Failure by AO and Commissioner to carry out functional test. Assessee entitled to depreciation at higher rate if electrical equipment is specially designed to suit need of windmills. Matter remanded. (AY. 2009-10)
Bhima Jewellery v. Dy. CIT (2015) 37 ITR 408 (Cochin)(Trib.)

S.263 : Commissioner – Revision of orders prejudicial to Revenue – Initial assessment year – Period of ten years to be reckoned from date assessee's business started functioning – Revision was held to be justified. [S.80IA] 2518

The assessee, engaged in hotel business, claimed deduction under section 80-IA of the Act. The AO allowed the claim of the assessee, but the Commissioner revised the order of the AO holding that the assessee was not eligible for exemption under section 80-IA of the Act, on the ground that the initial assessment year for claiming deduction under section 80-IA was 1999-2000, during the year in which the assessee's hotel started functioning and, therefore, the ten assessment years expired by the assessment year 2008-09. On appeal, the assessee contended that the initial assessment year was the year in which the approval was granted by the Director General of Income-tax (E) and not the assessment year in which the assessee started functioning :
Held, dismissing the appeal, that the assessee was eligible for deduction under section 80-IA of the Act for ten assessment years from the initial assessment year. Though the approval of the Director General of Income-tax(E) was a precondition, the initial assessment year would be the year in which the assessee's hotel started functioning for the purpose of computing ten assessment years for grant of deduction under section 80-IA of the Act. The Commissioner had rightly exercised revisional jurisdiction holding that grant of deduction under section 80-IA of the Act was erroneous and prejudicial to the interests of the Revenue. (AY. 2009-10)
Escapade Resorts P. Ltd. v. ACIT (2015) 37 ITR 766 / 54 taxmann.com 197 / 68 SOT 48 (UO) (Cochin)(Trib.)

2519 **S.263 : Commissioner – Revision of orders prejudicial to Revenue – Depreciation – Intangible – Share application money – Unsecured loan – Failure of the Commissioner to prove that view taken by Assessing Officer contrary to law and facts – Revision was held to be not valid. [S. 32, 68]**

AO in the course of assessment proceedings conducted the enquiry and allowed the depreciation. The Tribunal held that the Commissioner is not permitted to invoke the jurisdiction merely because he does not agree with the view of the AO. AO called the details and allowed the share application money and unsecured loan. Tribunal held that commissioner failed to prove that view taken by the AO was contrary to law and facts. The revision order of Commissioner was held to be beyond jurisdiction. (AY. 2009-10)

Elder IT Solutions P. Ltd v. CIT (2015) 37 ITR 443 (Mum.)(Trib.)

2520 **S.263 : Commissioner – Revision of orders prejudicial to Revenue – Business income – Partner – Remuneration – Income from other sources – Rate of exchange – Foreign currency AO has raised the query in the original assessment proceedings – Revision order passed by the Commissioner was quashed. [S. 28(v), 40(b), 43A, 56]**

Assessee claimed deduction under section 28(v) in respect of remuneration received in terms of an agreement with firm in which it was a partner. Said claim was allowed in scrutiny. Subsequently, Commissioner sought to initiate revision proceedings taking view that said amount was to be treated as income from other sources. However, it was found that during course of assessment proceedings, AO raised query in respect of said deduction and sought explanation from assessee to which assessee furnished replies. Assessee claimed expenses of ₹ 5.66 lakh as "exchange rate flucutation loss". AO raised query with respect to said loss. Assessee submitted its reply which was found to be acceptable by AO because no addition on account of exchange rate fluctuation was made by AO. CIT revised the order under section 263 Tribunal held that since no material was brought on record to demonstrate that view taken by AO was an impermissible view and was contrary to law or was upon erroneous application of legal principles, revision proceedings could not be initiated. (AY. 2006-07, 2008-09)

Cadila Healthcare Ltd. v. CIT (2014) 51 taxmann.com 255 / 67 SOT 188 (Ahd.)(Trib.)

Section 264 : Revision of other orders.

2521 **S.264 : Commissioner – Revision of other orders – Acquisition of land – Compensation – Capital gains assessed in mother's hands based on her return – Inclusion of capital gains by son in declaration under Voluntary Disclosure of Income Scheme – Assessment cannot be challenged in revision before Commissioner. [Voluntary Disclosure of Income Scheme, 1997 – Finance Act, 1997, S. 69, 70]**

The properties of K, the assessee's husband were acquired by the Government which entitled him to compensation and interest thereon. He died on June 26, 1995. The assessee filed returns for the assessment years 1994-95 and 1995-96 disclosing capital gains which were accepted and assessment was completed. The assessee's son filed a declaration under the Voluntary Disclosure of Income Scheme, 1997, disclosing the entire income from capital gains which was returned and assessed in the hands of the assessee. Thereafter, the assessee filed revision petitions under section 264 of

the Income-tax Act, 1961, before the Commissioner contending that the capital gains assessed in her hands were declared by her son under the Scheme and, hence, she was entitled to refund of the tax paid for the two years. The Commissioner rejected the revision petitions. On a Writ Petition, the Single Judge arrived at a finding that she was not entitled to relief since the proceedings pursuant to the returns filed were completed under section 143(1)(a) by the Assessing Officer, that since the son of the assessee had paid the amount under the Scheme, the proceedings could not be reopened in view of the prohibition contained under sections 69 and 70 of the Finance Act, 1997, and therefore, the assessee was not entitled to the relief sought. On appeal :
Held, dismissing the appeal, that so far as the tax paid by the assessee was concerned, it was on the basis of the compensation received by her under the land acquisition proceedings after the death of the original awardee and which she was liable to pay for the assessment years. Therefore, so far as the payment of tax for the assessment years were concerned, it was in accordance with law and did not require any correction in terms of section 143(1)(a). The subsequent payment of the tax amount under the Scheme by the son of the assessee was in accordance with the Scheme and at that point of time, if he had been cautious enough, he could have restricted the payment to the balance amount after deducting the payment made by the petitioner for the assessment years 1994-95 and 1995-96. The assessee could not have sought reopening of the proceedings finalised under section 143(1)(a) invoking section 264. Decision of the single judge in *Smt. Annamma Ouseph (Decd.) v. ACIT [2006] 284 ITR 298 (Ker.)* affirmed. (AY. 1994-95, 1995-96)
Kurien Jose v. ACIT (2015) 377 ITR 442 / 63 Taxmann.com 302 / (2016) 283 CTR 117 /130 DTR 141 (Ker.)(HC)

S.264 : Commissioner – Revision of other orders – Notional income – Advance from own funds – Notional income cannot be brought to tax. [S.4, 5, 144, Article 226] 2522
The assessee had given an advance of certain sum to another company 'S' out of its funds and no interest had been charged for this loan. The Assessing Officer computed notional interest on said advance and made addition in the income of assessee. On revision under section 264, the Commissioner upheld order of Assessing Officer. On Writ, allowing the petition the Court held that, in the absence of any specific provision under which the so called notional income on advances, could be brought to tax, impugned orders passed by the Commissioner cannot be sustained. (AY. 2009-10)
Shivnandan Buildcon (P.) Ltd. v. CIT (2015) 233 Taxman 297 (Delhi)(HC)

S.264 : Commissioner – Revision of other orders – Best judgment – After filing his return and giving a particular address therein, assessee made himself unavailable at that address; nor did he inform Revenue of address where communication related to his new address – Rejection of revision application was held to be justified. [S.144] 2523
In his return of income, the assessee had disclosed his address. The Assessing Officer, with a view to complete the assessment, sought to serve notices upon the assessee. All said notices were returned unserved by the postal authorities with the remark 'not known'. Subsequently, the Inspector, on making enquiry, learnt that the assessee had left India. In view of the above, the Assessing Officer, passed a best judgment assessment order on 19-3-1993 under section 144 for said assessment year.

The assessee stated that sometime in October, 2003, he learnt from the Tax Recovery Officer that an assessment order had been passed. It was stated that on approaching the Tax Recovery Officer, he received a copy of the order dated 19-3-1993 passed under section 144 on 5-1-2004.
Thereafter on 28-7-2004, the assessee filed a revision application under section 264 before the Commissioner challenging the assessment order. The revision application, stated that the assessment order dated 19-3-1993 was received by him only on 5-1-2004. Therefore, the revision application was filed within the time of one year provided under section 264.
The Commissioner, refused to entertain said application on the ground that the same was time barred i.e. beyond the period of one year from the date of communication of order dated 19-3-1991. This was because, the impugned order dated 30-3-2006 recorded a finding of fact that the assessee was served with a copy of the order dated 19-3-1993 on 1-4-1993. In support, a xerox copy of the acknowledgement received from the postal authorities was also annexed to the impugned order.
On writ:
The issue before the Commissioner was whether or not the revision application filed against the order dated 19-3-1993 was within time. The averments of the petition that he received the order dated 19-3-1993 only on 5-1-2004, is in the face of the xerox copy of the postal acknowledgement given by the postal authorities, evidencing the receipt of the order by the assessee on 1-4-1993. Thus, on the face of it, the revision application as filed, is hopelessly time barred. Although the assessee's submission that the issue of jurisdiction can be raised at any time cannot be disputed, the issue of examining the correctness of the order dated 19-3-1993 does not arise as the revision application fails in the threshold requirement of the time within which it may be filed. The assessee made much song and dance about the assessment order dated 19-3-1993 being passed without any notice being served upon him. The assessee after filing his return of income and giving a particular address there in makes himself unavailable at that address. Nor does the assessee inform the revenue of the address where communication relating to his return of income could be sent. On the aforesaid facts, it ill comes from the assessee that the absence of notice being served upon him, the entire proceedings are bad in law. In the instant facts, the impugned order dated 30-3-2006 of the Commissioner is not perverse or suffering from any flaw in the decision making process. In these circumstances, petition is dismissed. (AY. 1990-91)
Rajan R. Sippy v. CIT (2015) 230 Taxman 656 (Bom.)(HC)

Section 268A : Filing of appeal or application for reference by income-tax authority.

2524 **S.268A : Appeal – High Court – Monetary ceiling limits – Revenue audit objection – No document to support – Tribunal finding appeal not maintainable on ground tax effect much less than prescribed limit – ustified. [S. 254(1)]**
The Commissioner (Appeals) deleted the addition of ₹ 2,52,000 made by the Assessing Officer disallowing the remuneration paid to the directors. The Tribunal categorically held that even if the reopening of the assessment was held to be valid, the addition effected by the Assessing Officer was only ₹ 2,52,000, which was much less than ₹ 3

lakh and the tax component was well below ₹ 2 lakhs and, placing reliance upon the Central Board of Direct Taxes Instruction No. 3 of 2011, dated February 9, 2011 (2011) 332 ITR 1 (St.) held that the appeal was not maintainable. On appeal :
Held, dismissing the appeal, that the Revenue contended that there was a Revenue audit objection in so far as the particular transaction was concerned, and the issue would fall well within sub-clause (c) of clause 8 of Instruction No. 3 of 2011, dated February 9, 2011. However, there was no document relating to the Revenue audit objection available in the typed set of documents filed along with the appeal. There was no reference to any document filed by the Department before the Tribunal, in so far as the Revenue audit objection in relation to the transaction was concerned. Therefore, the view taken by the Tribunal was entirely justified. (AY. 2003-04)
CIT v. Shri Shanthinath Benefit Fund Ltd. (2015) 371 ITR 271 (Mad.)(HC)

S.268A : Appellate Tribunal – Monetary limits – Instruction No. 5 of 2014 revising monetary limits – Applicable to pending cases – Tax effect less than prescribed limit – Appeal not maintainable. 2525
The instructions issued in the circulars issued by the Central Board of Direct Taxes were applicable to pending cases also. Therefore, Instruction No. 5 of 2014 dated July 10, 2014, issued by the Central Board of Direct Taxes was applicable to pending cases and the monetary tax limit for filing appeals before the Tribunal was ₹ 4 lakh. Appeal of Department was dismissed since the tax effect was less than ₹ 4 lakh. (A.Y. 2001-02)
ITO v. Chemex India P. Ltd. (2015) 41 ITR 403 (Delhi)(Trib.)

S.268A : Appellate Tribunal – Monetary limits – Instructions – Apply to pending cases. [S.253] 2526
It was held that Instruction No. 5 of 2014, F. No. 279/Misc. 142/2007-ITJ (Pt), dated 10-7-2014, revising monetary limit to ₹ 4 lakh for filing appeal before Tribunal on income-tax matters will apply to pending appeals also. (AY. 2007-08)
ITO v. Arati Jana (Smt.) (2014) 109 DTR 228 / 165 TTJ 559 / (2015) 67 SOT 229 (Kol.) (Trib.)

S.268A : Appellate Tribunal – Monetary limit – Instruction No. 5 of 2014 is held to be applicable to pending cases – Failure by Department to point out exceptional circumstances for filing appeal despite monetary limit – Appeal to be dismissed *in limine*. [S.254(1) 2527
Held, that Instruction No. 5 of 2014 issued by the Central Board of Direct Taxes on July 10, 2014 which prescribed a monetary limit of a tax effect of ₹ 4 lakhs for filing appeals to the Tribunal was applicable to the pending appeals. In the assessee's case, since the tax effect was below the prescribed limit in accordance with the instruction of Central Board of Direct Taxes and the Department had failed to point out exceptional circumstances for filing the appeal despite the monetary limit being below the prescribed limit, the appeal was liable to be dismissed ***in limine.*** (AY. 2002-03)
Dy. CIT v. Chetan Prakash Mittal (2015) 37 ITR 28 (Delhi)(Trib.)

2528 **S.268A : Appellate Tribunal – Monetary limits – Appeals by Department – CBDT instruction is applicable to pending appeals.**
Held, dismissing the appeal *in limine,* that Instruction No. 5 of 2014 issued by the Central Board of Direct Taxes on July 10, 2014, revising the monetary limits for filing of appeals by the Department before the Tribunal was applicable to pending appeals and therefore, the appeal filed by the Department on May 18, 2012 in which the tax effect was below the prescribed limit, was not maintainable. (AY. 1995-96 to 1999-2000)
ITO v. Gurudayal Sontosh Kumar (2015) 38 ITR 735 (Kol.)(Trib.)

2529 **S.268A : Appellate Tribunal – Monetary limit – Instruction No. 5 of 2014 is held to be applicable to pending cases.**
Instruction No. 5 of 2014 revising monetary limits is applicable to pending cases. Tax effect is less than ₹ 4 lakh prescribed limit. Appeal not maintainable. (AY. 2003-04)
Dy. CIT v. Piyush Apartment P. Ltd. v. (2015) 37 ITR 340 (Delhi)(Trib.)

2530 **S.268A : Appellate Tribunal – Monetary limits for appeals by Department – Instruction No. 5 of 2014, dated July 10, 2014 revising monetary limits – Applicable to pending appeals – Failure by Department to point out exceptions provided in Circular – Appeal not maintainable.**
Held, dismissing the appeal *in limine*, that the main objective of Instruction No. 5 of 2014 issued by the Central Board of Direct Taxes (CBDT) on July 10, 2014 was to reduce pending litigations, where the tax effect was considerably low. Hence, the instruction revising the monetary limit for filing appeals before the Tribunal was applicable to pending appeals retrospectively. The Department having failed to point out exceptions provided in the Circular, the appeal in question filed on September 8, 2011 and pending before the Tribunal for the assessment year 2007-08 was not competent. (AY. 2007-08)
ITO v. Santo Stores (2015) 154 ITD 143 / 37 ITR 665 (Kol.)(Trib.)

Section 269C : Immovable property in respect of which proceedings for acquisition may be taken.

2531 **S.269C : Acquisition of immoveable property – The Department should give full particulars of property to Director of Land Records to take appropriate action – Matter remanded.**
In 1973, a property was appropriated to income-tax department. Two communications were sent to Assistant Director of Land Records for registering aforesaid property in name of Income-tax department. However, no action was taken in this regard. It was found that description of property was wrongly made. Allowing the petition the Court held that the department should give full particulars of property to Director of Land records to take appropriate action. Matter remanded.
ITO v. State of Karnataka (2015) 232 Taxman 108 (Karn.)(HC)

Section 269SS : Mode of taking or accepting certain loans, deposits and specified sum.

S.269SS : Acceptance of loans and deposits – Otherwise than by account payee cheque or account payee bank draft – Where there was a reasonable cause for taking the loan amount in cash and since loan was routed through bank account of assessee for payment to Government for converting land into freehold property, no penalty could be imposed. [S. 271D, 273B] 2532

The Assessee acquired leasehold rights over a land along with her husband. For converting it into a freehold land, the assessee took 50% loan amount in cash from Samajwadi Party. Political Party (Cash deposited in bank) and paid to the Government through banking channel. The AO held that provisions of Section 269SS were violated and therefore, imposed a penalty u/s. 271D. On appeal, the CIT(A) and the Tribunal set aside the order of penalty.

On Revenue's appeal, the High Court held that as per the Tribunal's findings, the loan was a genuine loan and was not unaccounted money, which was reflected in the books of account of the assessee as well as the political party. Further, the cash was deposited in the bank account of the assessee and the money was thereafter, routed through the banking channel for payment to the Government for converting the land into freehold property. Therefore, there was a reasonable cause shown by the assessee and the appellate authorities were right in holding that no penalty could be imposed. (AY. 2006-07)

CIT v. Dimpal Yadav (2015) 379 ITR 177 / 234 Taxman 160 / 280 CTR 309 / 126 DTR 60 (All.)(HC)

CIT v. Akhilesh Kumar Yadav (2015) 379 ITR 177 / 234 Taxman 160 / 280 CTR 309 / 126 DTR 60 (All.)(HC)

S.269SS : Acceptance of loans and deposits – Otherwise than by account payee cheque or account payee bank draft – Deletion of penalty was held to be justified. [S.269T] 2533

In the course of assessment proceedings, the Assessing Officer noticed that assessee had taken certain loan in cash for purchase of property.

The Assessing Officer taking a view that it was a case of violation of section 269SS, passed a penalty order under section 269T.

The Tribunal taking a view that there was no evidence on record showing that loan was in fact taken in cash, set aside addition made under section 69C as well as penalty order passed under section 269T.

On Revenue's appeal:

It was noted that Tribunal has recorded a finding that the allegation that loans/ deposits must have been taken in cash was a mere suspicion, which could have been a cause for further verification and investigation, but mere suspicion cannot be a ground to hold that loan/deposits were received in cash. The findings of the Tribunal were not perverse.

Further, the Revenue has not filed any document or material to show that in fact loan was taken and interest payment was made. The persons to whom allegedly

interest was paid, their details and particulars were not ascertained, verified and examined.

The findings of the Tribunal are factual. The reasoning refers to several factual aspects and different assumptions drawn by the Assessing Officer. The said findings are not shown to be perverse, or contrary to facts, evidence or material. Consequently, the revenue's appeal is dismissed. (AY. 2004-05)

CIT v. Home Developers (P.) Ltd. (2015) 229 Taxman 254 (Delhi)(HC)

2534 **S.269SS : Acceptance of loans and deposits – Otherwise than by account payee cheque or account payee bank draft – Firm – Partners – Transaction of loan between a firm and its partner does not attract section 269SS. If other High Courts have taken a consistent view, that should be followed even if opposite view is possible. [S.271D, 273B]**

(i) The question raised is whether in a transaction between the firm and the partner the provision of Section 269SS would be attracted and if we hold that Section 269SS was attracted and therefore violated, whether the assessee would be entitled to benefit of Section 273B of the Act. The position that emerges is that there are three different High Courts in (2013) 354 ITR 9 (Mad.), *Commissioner of Income Tax v. V. Sivakumar, (2008) 304 ITR 172 (Raj.), Commissioner of Income Tax v. Lokhpat Film Exchange (Cinema) and (2005) 277 ITR 420 (P&H), Commissioner of Income Tax v. Saini Medical Store* which have held that Section 269SS would not be violative when money is exchanged *inter se* between the partners and partnership firm in spite of the fact that the partnership firm and individual partners are separate assessees. We appreciate and understand that the opposite view is possible. Keeping in view that three different High Courts have taken a consistent view on the facts, which are similar to the facts in the present case, which includes the judgment of the Madras High Court as late as in the year 2013, we respectfully follow the same line of reasoning given by the Madras High Court in the case of V. Sivakumar (2013) 354 ITR 9;

(ii) Having said that, it is clear that any interest, salary, bonus, commission or remuneration paid by a firm to any of its partners should be regarded as a mode of adjusting the amount that must have been taken to have been contributed to the partnership assets by a partner, who can really contribute in kind as well as in money. Applying this principle, we are of the view that the transaction effected in these cases cannot partake the colour of loan or deposit and as such, Section 269 SS nor Section 271-D of the Act would come into play;

(iii) It is an undisputed fact that the money was brought by the partners of the assessee-firms. The source of money has also not been doubted by the Revenue. The transaction was *bona fide* and not aimed to avoid any tax liability. Creditworthiness of the partners and genuineness of the transactions coupled with the relationship between the "two persons" and two different legal interpretations put forward could constitute a reasonable cause in a given case

for not invoking Section 271-D and 271-E of the Act. Section 273B of the Act would come to the aid and help of the assessee.

CIT v. Muthoot Financiers (2015) 371 ITR 408 / 275 CTR 501 / 230 Taxmann 95 / 116 DTR 292 (Delhi)(HC)

CIT v. Muthoot M. George Bankers (2015) / 371 ITR 408 / 275 CTR 501 / 230 Taxman 95 / 116 DTR 292 (Delhi)(HC)

CIT v. Muthoot Bankers (2015) 371 ITR 408 / 275 CTR 50 / 230 Taxman 95 / 116 DTR 292 (Delhi)(HC)

S.269SS : Acceptance of loans and deposits – Otherwise than by account payee cheque or account payee bank draft – Penalty – Journal entries – Section does not apply to non-monetary book entry transactions of loans and advances. [S. 271D] 2535

Section 269SS indicates that it applies to a transaction where a deposit or a loan is accepted by an assessee, otherwise than by an account payee cheque or an account payee draft. The ambit of the section is clearly restricted to transaction involving acceptance of money and not intended to affect cases where a debit or a liability arises on account of book entries. The object of the section is to prevent transactions in currency. This is also clearly explicit from clause (iii) of the explanation to section 269SS of the Act which defines loan or deposit to mean "loan or deposit of money". The liability recorded in the books of account by way of journal entries, i.e. crediting the account of a party to whom monies are payable or debiting the account of a party from whom monies are receivable in the books of account, is clearly outside the ambit of the provision of Section 269SS of the Act, because passing such entries does not involve acceptance of any loan or deposit of money. (AY. 2007-08)

CIT v. Mahagun Technologies Pvt. Ltd. (Delhi)(Trib.); www.itatonline.org

Section 269T : Mode of repayment of certain loans or deposits.

S.269T : Acceptance of loans and deposits – Otherwise than by account payee cheque or account payee bank draft – Loan transactions in cash though between two related firms where one partner is common, violates provisions of section 269T and therefore attracted penalty provisions. [S.271E] 2536

The assessee, a partnership firm, repaid certain advances / loans to another firm, having one common partner on several occasions in cash.

The AO rejected the assessee's explanation that since both the firms were engaged in real estate and having a common partner, these transactions were to be described as inter-firm transactions and not loans/advances and levied penalty u/s. 271E for violating the provisions of section 269T, confirmed by the CIT(A).

The Tribunal, however, held that the transaction was not in nature of a loan and the refund of money, being a cash transaction between sister concerns, provisions of section 271E would not be attracted.

On appeal, the High Court held that normally the Court takes a liberal view in matters where there is only some violation of provisions of the Act, especially when the transactions are reflected in the books of account of the assessee and are

genuine with a valid reason. One odd non-compliance made by the assessee should normally not attract penal provisions. But, where there are more than half a dozen occasions, the same cannot be said to be reasonable cause shown by the assessee for repeatedly violating the provisions of section 269T of the Act. In view of the above, the order of the Tribunal was set aside and penalty order of the revenue authorities was restored. (AY. 2005-06)
CIT v. Canara Housing Development Co. (2015) 234 Taxman 719 / 126 DTR 257 (Karn.) HC)

Section 271 : Failure to furnish returns, comply with notices, concealment of income, etc.

2537 **S.271(1)(a) : Penalty – For late filing of return – Neither Form No. 6 seeking extension of time was filed nor satisfactorily explained cause for delay – Levy of penalty was held to be justified.**
Assessee, a Government contractor, filed his return after a delay of 23 months. Assessing Officer imposed penalty for delay. Assessee had not filed Form No. 6 seeking extension of time nor had he justified and satisfactorily explained cause for delay. Imposition of penalty was justified. (AY. 1984-85)
Bharat Furnishing Co. v. CIT (2015) 231 Taxman 510 (Delhi)(HC)

2538 **S.271(1)(c) : Penalty – Concealment – Expenditure not deductible – Quantum appeal admitted by High Court – Penalty could not be imposed. [S.260A]**
Dismissing the appeal of Revenue the Court held that in the present case, the details of the claim were provided by the assessee. The question whether or not on such details, deductions could be allowed was still in doubt. Such questions had been admitted for determination by the High Court in the appeal filed by the assessee. The mere admission of the appeal by the High Court on the substantial questions of law would make it apparent that the additions made were debatable. There was no concealment of income or furnishing of inaccurate particulars of such income. Penalty could not be imposed under section 271(1)(c). (AY. 2001-02)
CIT v. Ankita Electronics P. Ltd. (2015) 379 ITR 50 / (2016) 131 DTR 284 (Karn.)(HC)

2539 **S.271(1)(c) : Penalty – Concealment – Capital gains – Exemption debatable – Levy of penalty was held to be not valid. [S. 54, 54F]**
Dismissing the appeal of the Revenue the Court held that It was not the case of the Revenue that the assessee had furnished inaccurate details with regard to the income derived from the sale and purchase of the properties. The question as to whether the assessee was to be given the benefit under section 54 or section 54F or was not to be given the benefit of either of these two sections, was yet to be finalised by the High Court, where the appeal against the assessment proceedings was still pending. The assessee had given full description of the property which was sold by him and of the property purchased by him. Merely because the assessee was

not to be given the benefit under section 54 as the property sold by the assessee was not a residential property it could not be said that there was concealment of material information by the assessee because complete details of the property sold by the assessee were given by him in the returns filed by him. Where penalty was imposed in respect of any addition where the High Court has admitted the appeal on substantial question of law, then the sustainability of the addition itself becomes debatable, and in such circumstances penalty could not be levied under section 271(1)(c). (AY. 2008-09)
CIT v. Harsha N. Biliangady (Dr.) (2015) 379 ITR 529 (Karn.)(HC)

S.271(1)(c) : Penalty – Concealment – Amount disclosed under section 132(4) and returned income being the same – Penalty cannot be levied. [S. 132(4), 153A] 2540
Dismissing the appeal of Revenue the Court held that; where on search assessee in response to a notice under section 153A filed returns of income disclosing certain additional income and it was found that difference between income declared under section 139(1), additional income offered under section 132(4) and assessed income under section 153A being identical with income returned under section 153A, no penalty under section 271(1)(c) was leviable. (AY. 2000-01 to 2004-05)
CIT v. Brijendra Gupta (2015) 234 Taxman 51 / 128 DTR 188 (Cal.)(HC)

S.271(1)(c) : Penalty – Concealment – Claim of assessee was not accepted by Revenue – Levy of penalty was not justified. 2541
Dismissing the appeal of Revenue the Court held that, merely because the assessee made a claim which was not acceptable *ipso facto* the assessee could not be said to have made a wrong claim by furnishing inaccurate particulars attracting penalty. (AY 2007-08)
PCIT v. G. K. Properties P. Ltd. (2015) 377 ITR 417 (T&AP)(HC)
Editorial : Order in G. K. Properties P. Ltd. v. ITO [2014] 36 ITR (Trib.) 544 (Hyd.) is affirmed.

S.271(1)(c) : Penalty – Concealment – Revised return was filed showing additional income – Penalty could not be levied. [S.139(5)] 2542
Dismissing the appeal of Revenue the Court held that the Tribunal which is the ultimate fact finding authority, after consideration of the evidence had found that there was no concealment of income, further scrutiny by way of reappreciation of evidence would be beyond the scope of the present appeal. The deletion of penalty was justified.(AY. 2005-06)
CIT v. Bhavinkumar M. Dagli (2015) 377 ITR 389 (Guj.)(HC)

2543 **S.271(1)(c) : Penalty – Concealment – Non-compete fee – Capital or Revenue – Based on legal opinion – Deletion of penalty was held to be justified.**
Dismissing the appeal of Revenue the Court held that the assessee had disclosed material particulars in return. Assessee also had obtained legal opinion that entire receipt of non-compete fees from foreign collaborator a capital receipt and not on account of transfer of any capital asset, therefore basis for taking amount of compensation as business income of assessee debatable and not a case of furnishing inaccurate particulars of income attracting penalty. (AY. 2004-05)
PCIT v. Control and Switchgear Contractors Ltd. (2015) 377 ITR 215 (Delhi)(HC)
Editorial: CIT v. Zoom Communication P. Ltd. [2010] 327 ITR 510 (Delhi) is distinguished.

2544 **S.271(1)(c) : Penalty – Concealment – Excess generation of scrap – Levy of penalty was held to be not justified**
Penalty was levied on ground that there was excess generation of scrap. Finding that there was no such excess generation of scrap- Levy of penalty was held to be not justified. (AY. 1999-2000)
CIT v. Gujarat Foils Ltd. (2015) 377 ITR 324 (Guj.)(HC)

2545 **S.271(1)(c) : Penalty – Concealment – Addition deleted – Penalty could not be imposed. [S.69]**
Dismissing the appeal of Revenue the Court held that, when addition was deleted penalty could not be imposed. (AY. 2002-03, 2003-04, 2004-05)
PCIT v. J. Upendra Construction P. Ltd. (2015) 377 ITR 383 / 232 Taxman 697 (Guj.)(HC)

2546 **S.271(1)(c) : Penalty – Concealment – Additional income was disclosed only after investigation by Director of Income tax with certain evidence, by filing revised return – Levy of penalty was held to be justified. [Evidence Act, 1872, S.114]**
Allowing the appeal of Revenue the Court held that the omission on the part of the assessee to answer questions as regards payment to the U.P. Distillers Association would attract the presumption laid down in illustration (h) to section 114 of the Evidence Act, 1872. In the return filed originally included the expenditure claimed and the revised return was filed by the assessee added the expenditure claimed earlier this being filing of inaccurate particulars of income. (AY. 2003-04, 2004-05)
CIT v. Balarampur Chini Mills Ltd. (2015) 376 ITR 1 / 280 CTR 363 (Cal.)(HC)

2547 **S.271(1)(c) : Penalty – Concealment – Loss – Set off of undisclosed stock against loss – Levy of penalty was held to be not justified. [Ss. 69B, 69C, 71]**
The Commissioner (Appeals) enhanced the income treating the income as deemed income under section 69B and also issued notice under section 271(1)(c) on the ground that the undisclosed stock was an income and, therefore, the assessee was bound to pay the tax on the undisclosed stock and to pay penalty. The Tribunal did not consider the case of the assessee with regard to the set-off available under section 71 as well as its claim with regard to losses incurred during the assessment year 2001-02. On appeals : Held, allowing the appeals, that considering the proviso to section 69B, the assessee

had not fully disclosed the stocks in the books of account and, therefore, the Assessing Officer as well as the Commissioner have rightly observed that the case of the assessee would fall under the proviso to section 69B. The contention that the case would fall under the proviso to section 69C did not apply to the facts of the present case. It was not the case of the Revenue that there was an unexplained expenditure, which would cover under the proviso and, therefore, the assessee would not be entitled for the set off under the proviso to section 71. The amount of excess stock would fall under the definition of income as per section 14 (sic) and, therefore, the assessee would be entitled for the set-off under the proviso to section 71. Hence, the assessee's claim was allowed. Consequently, there is no question of imposing any penalty on the assessee under section 271(1)(c). (AY. 2001-02)
Krishnamegh Yarn Industries v. ACIT (2015) 376 ITR 561 (Guj.)(HC)

S.271(1)(c) : Penalty – Concealment – No finding that the claim was bogus – Levy of penalty was not justified. [S.80IB(7A)] 2548
Allowing the appeal the Court held that the claim of the assessee was a legal claim. The Assessing Officer had not given any finding that the claim to deduction was bogus. The Assessing Officer had only stated that such claim was not allowable as the conditions envisaged under section 80IB(7A) were not fulfilled. Thus, the claim was found to be legally unacceptable but it did not amount to furnishing of inaccurate particulars or concealment of income. It was a simple case of non-allowance of the legal claim. There was no concealment of income and penalty could not be levied. (AY 2006-07)
Rave Entertainment P. Ltd. v. CIT (2015) 376 ITR 544 / 281 CTR 472 (All.)(HC)

S.271(1)(c) : Penalty – Concealment – Amount was disclosed as capital receipt – Assessed as income – Just because explanation was not accepted in quantum proceedings, levy of penalty was held to be not valid. [S.45] 2549
Dismissing the appeal of Revenue the Court held that the disclosure of amount was made by assessee as a part of notes to its accounts as well as by a letter given along with return of income claiming same as not taxable, would be considered as a complete disclosure of all relevant facts, mere fact that explanation of assessee was not accepted in quantum proceedings would not *ipso facto* become a reason to levy penalty for concealment on assessee. (AY. 2005-06)
CIT v. S.M. Construction (2015) 233 Taxman 263 (Bom.)(HC)
Editorial: CIT v. Zoom Communication (P) Ltd. (2010) 327 ITR 510 (Delhi)(HC) is distinguished.

S.271(1)(c) : Penalty – Concealment – Protective assessment – Penalty could not be levied. [S. 69, 132(4)] 2550
In course of search at premises of assessee, unnamed promissory notes were found. Assessee offered said sum as unexplained investment. Assessing Officer assessed said income under section 69 as a protective measure. The Assessing Officer passed an order to initiate the proceedings for penalty under section 271(1)(c). The Commissioner (Appeals) allowed the appeal of assessee. On appeal by Revenue the Tribunal confirmed the order of Assessing Officer. On reference by assessee the Court held that unless and

until substantive assessment is made and final assessment order is passed in case of assessee making addition in hands of assessee, initiation of penalty proceedings is not permissible; there cannot be initiation of penalty proceedings with respect to protective assessment order. (AY.1986-87, 1987-88)
Bhailal Manilal Patel v. CIT (2015) 232 Taxman 483 (Guj.)(HC)

2551 **S.271(1)(c) : Penalty – Concealment – Mistake by Chartered Accountant – Reasonable cause – Deletion of penalty was held to be justified. [S.115JB]**
Dismissing the appeal of Revenue the Court held that where Chartered Accountant appointed by assessee – Company committed a mistake while computing book profits under section 115JB which he admitted by filing a personal affidavit before Tribunal, assessee could not be held guilty of concealment of particulars of income so as to levy penalty. (AY. 2009-10)
CIT v. Compro Technologies (P.) Ltd. (2015) 232 Taxman 392 (Delhi)(HC)

2552 **S.271(1)(c) : Penalty – Concealment – Deduction at source – Fees for technical services – Bona fide mistake – Failure to deduct tax at source on the basis of certificate of Charted Accountant – Deletion of penalty was held to be justified. [S.40(a)(ia), Form No 3CD]**
Assessee-company was engaged in manufacture of carbon blocks used in water purifying filters. Assessee made payment for technical services to a foreign company 'F' without deduction of tax. Assessing Officer treated non-deduction of tax regarding said company as concealment of income and initiated penalty proceedings. It was found that Chartered Accountant had given a certificate to effect that assessee was not required to deduct tax at source while making payment to a company 'F'. Thus, assessee remitted payments to said company based on certificate issued by CA and no violations were reported in Form No. 3CD. Tribunal allowed the appeal and deleted the penalty. On appeal by revenue, dismissing the appeal of Revenue the Court held that failure to deduct tax by assessee was a *bona fide* mistake and hence this was not a case to levy penalty. (AY. 2006-07)
CIT v. Filtrex Technologies (P.) Ltd. (2015) 232 Taxman 811 / 126 DTR 221 / (2016) 380 ITR 222 (Karn.)(HC)

2553 **S.271(1)(c) : Penalty – Concealment – Stamp valuation – Department valuation was more than the agreement value – Deletion of penalty was held to be justified. [S.50C]**
Stamp valuation, department valuation was more than the agreement value, deletion of penalty was held to be justified.
CIT v. Fortune Hotels and Estates (P.) Ltd. (2015) 232 Taxman 481 (Bom.)(HC)

2554 **S.271(1)(c) : Penalty – Concealment – Survey – Fixed deposit – explanation was not considered – Matter remanded**
Reasonable explanation was offered by assessee as to fixed deposit prior to 31-3-2001 and renewal of fixed deposit with interest. He claimed it primarily as family income out of partition and agricultural income. Before an opportunity could be given to him to explain, he died. His legal representatives, however, made an attempt to convince authorities but were not successful. Allowing the appeal the Court held that; whether

details given by legal representatives of deceased assessee had to be considered by Authority before it proceeded to invoke section 271(1)(c) since this exercise had not been done in present case, matter was to be remanded back. (AY. 2002-03 to 2008-09)
N. R. Palanivel v. CIT (2015) 232 Taxman 478 / 273 CTR 224 (Mad.)(HC)

S.271(1)(c) : Penalty – Concealment – MAT provision was not complied with – Levy of penalty was held to be justified. [S.115JB] 2555
Dismissing the appeal of assessee the Court held that where assessee company filed its nil return without complying with provisions of section 115JB where Assessee was liable to pay MAT, levy of penalty under section 271(1)(c) on non-compliance thereof was justified. (AY. 2007-08)
Sri Gokulam Hotels India (P.) Ltd. v. ACIT (2015) 232 Taxman 487 (Mad.)(HC)

S.271(1)(c) : Penalty – Concealment – Carried forward Losses of earlier years were sought to be set off – There was no such loss- Levy of penalty was held to be justified [S.72] 2556
On appeal by assessee dismissing the appeal the Court held that since assessee had failed to bring any material on record to prove that losses were carried forward from earlier years, which was to be set off against income of assessment year under consideration, it would amount to concealment of income and since concealment was wilful and assessee furnished inaccurate details of income, levy of penalty was justified. (AY. 1998-99)
U.P. Matsya Vikas Nigam Ltd. v. CIT (2015) 232 Taxman 476 (All.)(HC)

S.271(1)(c) : Penalty – Concealment – Disclosure of income made after the search conducted at the office of sister concern cannot be called voluntary disclosure by the assessee – Levy of penalty was held to be justified 2557
The assessment proceedings u/s.143(3) of the Act was completed in the case of assessee. It became apparent that the assessee has paid a sum of ₹ 3.40 crores too U. P. Distilleries Association which is disallowable u/s. 37(1) only when search and seizure proceeding was conducted in U.P. Distilleries Association. The Assessee filed a revised return disclosing additional amount of ₹ 3.40 crores. The assessment was, thus, reopened u/s.147.
It was submitted by the assessee that to avoid protracted litigation and to put a quitous to the whole issue the assessee had offered this amount as disallowable item u/s 37(1) of the Act. It has been held that when the return of income filed u/s. 139 includes an expenditure disallowable u/s. 37(1), it would automatically follow that inaccurate particulars had been furnished in the return of income filed by the assessee and the penalty u/s. 271(1)(c) was sustained. (AY. 2003-04, 2004-05)
CIT v. Balarampur Chini Mills Ltd. (2015) 124 DTR 75 / 280 CTR 363 (Cal.)(HC)

S.271(1)(c) : Penalty – Concealment – Disallowance of expenses – Levy of penalty was held to be not valid 2558
Assessee, engaged in business of purchase of land and real estate development, claimed deduction of interest payment and miscellaneous expenses. Expenditure was disallowed

on ground that assessee had not 'carried out' any business and on basis of such disallowance penalty was also levied. High Court held that when copy of title deeds of land, land development agreements, development licence and monthly MIS report on progress of projects were on record and interest was paid or money borrowed for purchase of land which was held as stock-in-trade, assessee had discharged onus under Explanation No. 1 to section 271(1)(c) and, therefore, penalty could not be imposed. (AY. 2006-07)
CIT v. Jagran Agents (P.) Ltd. (2015) 231 Taxman 512 (Delhi)(HC)

2559 **S.271(1)(c) : Penalty – Concealment – Leave encashment – Gratuity – Amounts not deductible – Levy of penalty was held to be not justified. [S.43B]**
Assessee-society filed loss return. It treated unpaid amounts related to leave encashment and gratuity as liability and claimed deduction of same. Assessing Officer disallowed same by invoking section 43B and imposed penalty. High Court held that since full particulars of income were given in said return and same were not found to be incorrect penalty was to be deleted. (AY. 2008-09)
CIT v. National Institute of Technical Teacher Training of Research (2015) 231 Taxman 657 (P&H)(HC)

2560 **S.271(1)(c) : Penalty – Concealment – Incorrect claim of expenditure would not amount to giving inaccurate particulars of income and merely because initially claim was made under incorrect head, it may not be termed as furnishing inaccurate particulars. [Ss. 35AB, 37(1)]**
In return of income, the assessee had claimed technical know-how licence fees as revenue expenses. When the Assessing Officer observed that the claim of expenses of technical know-how by the assessee under section 37(1) was not allowable, the assessee had made an alternative claim under section 35AB. Accordingly, one-sixth of such expenses was allowed. Consequently, the penalty proceedings were initiated and penalty for concealment was imposed by the Assessing Officer.
In the opinion of the Commissioner (Appeals), the assessee knowingly committed the default of furnishing inaccurate particulars of income and concealment of income by claiming technical know-how expenditure and he upheld the order passed by Assessing Officer.
The Tribunal held that there was nothing to attract any of the ingredients of section 271(1)(c).
On appeal dismissing the appeal the Court held that there was no reason to interfere with the order impugned as the Tribunal was right in interpreting that the incorrect claim of expenditure would not amount to giving inaccurate particulars of income and merely because initially the claim was made under incorrect head, it may not be termed as furnishing inaccurate particulars. It is a matter of record that later on during the course of proceedings, the assessee had corrected the same, and accordingly, the same was disallowed. With nothing to indicate of any furnishing of inaccurate particulars with regard to income of the assessee, making of the unsustainable claim under the law simply could not be a ground warranting any interference.
CIT v. Amol Dicalite Ltd. (2015) 231 Taxman 663 (Guj.)(HC)

S.271(1)(c) : Penalty – Concealment – Agricultural income – Income from undisclosed sources – Levy of penalty was held to be not justified 2561

Where Revenue accepted income-tax and wealth-tax from appellants-assessee for relevant years and after ten years, took matter under review for levying penalty for concealment, same could not be upheld, though the quantum of addition was up held. (AY. 1978-79 to 1986-87)

Mahnedara R. Patel (HUF) v. ITO (2015) 231 Taxman 445 (Guj.)(HC)

S.271(1)(c) : Penalty – Concealment – Depreciation – Depreciable asset – Penalty ought not to have been imposed without satisfying concealment or submission of inaccurate particulars. [S.32, 50, 147, 148] 2562

The assessee, a State co-operative society, sold a dal mill in the year previous to the assessment year but did not declare any profits or short-term capital gains on the sale. The assessment was reopened and the amount was assessed as short term capital gain and the addition was confirmed by CIT(A) and Tribunal. The AO levied the penalty which was affirmed by Tribunal. On appeal :

Held, allowing the appeal, that the prime factors required to be considered while imposing penalty under section 271(1)(c) are concealment of particulars of income or submission of inaccurate particulars of such income. There was no dispute that the assessee had disclosed all details about its income including the fact of sale of the dal mill for a consideration. Depreciation was claimed by it treating the asset as a depreciable asset. The written down value too was referred to but the error crept in treating the transaction as long-term capital gains. The error committed by the assessee could not be treated as concealment of particulars of its income or furnishing inaccurate particulars of income. Penalty could not have been imposed under section 271(1)(a) or (c) without satisfying the concealment or the submission of inaccurate particulars of income on the part of the assessee. Such satisfaction must be reflected in the order of assessment as penalty under the provision was not automatic. Thus, the Tribunal was not justified in confirming the penalty imposed on the assessee under section 271(1)(c) when the claim of the assessee was a debatable one and there was no specific finding that the assessee had submitted false or incorrect accounts.

Anoopgarh Kraya Vikraya Sahakari Samiti Ltd. v. ACIT (2015) 374 ITR 558 / 124 DTR 165 / 232 Taxman 256 / 279 CTR 325 (Raj.)(HC)

S.271(1)(c) : Penalty – Concealment – Foreign exchange – Net of preoperative expenses Wrong deduction – No concealment of particulars – No inaccuracy in particulars of income – Not to be equated with concealment – Penalty not to be imposed – Penalty can be imposed when the income assessed is less. [Explanation 4] 2563

The assessee debited a sum of ₹ 26,63,283 comprised of foreign exchange, job work, sale of components, sale of scrap, and sale of miscellaneous scrap out of the total pre-operative expenses of ₹ 7,57,43,555 and claimed the net pre-operative expenses as ₹ 7,30,84,272. The Tribunal found that deduction was not correct and the amount of ₹ 26,63,283 ought to have been treated as income earned during April 1, 1999, to May 31, 1999, for the purpose of assessment. The Additional Commissioner imposed penalty under section 271(1)(c) of the Act, stating that since there was a wrong deduction

claimed by the assessee from the income, it amounts to furnishing inaccurate particulars of income. This was reversed by the Tribunal and the penalty was deleted. On appeal: Held, allowing the appeal partly, (i) that the Additional Commissioner did not find any concealment of particulars of income but a wrong deduction. There was no inaccuracy in particulars of income furnished by the assessee. Out of various receipts, the assessee wrongly deducted the amount from his total pre-operative expenses while making computation of income. Wrong deduction of an amount for computation of income in the return submitted by the assessee could not be equated with concealment of income or furnishing of inaccurate particulars of income so as to attract penalty under section 271(1)(c). The appellate authorities recorded a concurrent finding holding that there was no concealment of particulars of income by the assessee. Therefore, penalty under section 271(1)(c) was not attracted. (ii) That the assessing authority is not required to mention in the assessment order that penal proceedings must be initiated but he is obliged to record existence of ingredients attracting penal provisions so as to justify penal proceedings. (iii) That Explanation 4 to section 271(1)(c) is clarificatory and not substantive. (iv) That penalty under section 271(1)(c) is imposable when the assessed figure is less. (v) That the view taken by the Tribunal was unsustainable to the extent the Tribunal had allowed the cross objection filed by the assessee.
CIT v. Hongo India P. Ltd. (2015) 374 ITR 48 (All.)(HC)

2564 **S.271(1)(c) : Penalty – Concealment – Disallowance of interest on borrowed capital – The rigours of penalty provisions cannot be diluted only because a small number of cases are picked up for scrutiny. No penalty can be levied unless if assessee's conduct is "dishonest, *mala fide* and amounting concealment of facts". The AO must render the "conclusive finding" that there was "active concealment" or "deliberate furnishing of inaccurate particulars" [S. 36(1)(iii),143(1)]**

(i) Section 271(1)(c) of the Act lays down that the penalty can be imposed if the authority is satisfied that any person has concealed particulars of his income or furnished inaccurate particulars of such income. The Apex Court in *Commissioner of Income Tax v. Reliance Petroproducts Pvt. Ltd. [2010] 322 ITR 158 (SC)* applied the test of strict interpretation. It held that the plain language of the provision shows that, in order to be covered by this provision there has to be concealment and that the assessee must have furnished inaccurate particulars. The Apex Court held that by no stretch of imagination making an incorrect claim in law, would amount to furnishing inaccurate particulars.

(ii) Thus, conditions under section 271(1)(c) must exist before the penalty can be imposed. Mr. Chhotaray tried to widen the scope of the appeal by submitting that the decision of the Apex Court should be interpreted in such a manner that there is no scope of misuse especially since minuscule number of cases are picked up for scrutiny. Because small number of cases are picked up for scrutiny does not mean that rigours of the provision are diluted. Whether a particular person has concealed income or has deliberately furnished inaccurate particulars, would depend on facts of each case. In the present case we are concerned only with the finding that there has been no concealment and furnishing of incorrect particulars by the present assessee.

(iii) Though the assessee had given interest free advances to its sister concerns and that it was disallowed by the Assessing Officer, the assessee had challenged the same by instituting the proceedings which were taken up to the Tribunal. The Tribunal had set aside the order of the Assessing Officer and restored the same back to the Assessing Officer. Therefore, the interpretation placed by Assessee on the provisions of law, while taking the actions in question, cannot be considered to be dishonest, *mala fide* and amounting to concealment of facts. Even the Assessing Officer in the order imposing penalty has noted that commercial expediency was not proved beyond doubt. The Assessing Officer while imposing penalty has not rendered a conclusive finding that there was an active concealment or deliberate furnishing of inaccurate particulars. These parameters had to be fulfilled before imposing penalty on the assessee.

(iv) The case of *Commissioner of Income Tax v. Zoom Communications P. Ltd. [2010] 327 ITR 510 (Delhi)* is clearly distinguishable on facts. In that case the assessee had conceded before Assessing Officer that its action of claiming Revenue deductions was not correct at all. It was not the case of the assessee therein, throughout the proceedings, that the deductions carried out by the assessee was a debatable issue. The Delhi High Court noted that even before it the assessee could not explain the circumstances and it's conduct. Appeal of Revenue was dismissed. (AY.2003-04)

CIT v. Dalmia Dyechem Industries Ltd. (2015) 377 ITR 133 / 234 Taxman 9 / 127 DTR 60 (Bom.)(HC)

Editorial: CIT v. Zoom Communication P. Ltd. (2010) 327 ITR 510 (Delhi)(HC) is considered and distinguished.

S.271(1)(c) : Penalty – Concealment – Additional Evidence – After accepting block assessment and paying taxes, assessee cannot produce additional evidence to explain undisclosed income and penalty would sustain. [ITAT. R.29] 2565

The assessee was engaged in the business of jewellery. During the course of search proceedings, certain undisclosed cash and jewellery were seized and the AO required the assessee to file returns of income for the preceding six years. The assessee filed returns of income, however declaring a lower income as compared to what was found during the search and filed written submissions in this connection. Subsequently a revised return was filed declaring the entire income found during search, however, after the due date had expired. The AO did not accept the said revised return and passed an Order which was accepted by the assessee. However penalty proceedings were contested before the appellate authorities. The Tribunal refused to admit additional evidence in the matter on the ground that the material sought to be admitted could have been produced easily before the lower authorities and the assessee was not able to produce satisfactory explanation with respect to the same.

The High Court observed that immunity to penalty would be available if the income was surrendered during search and the manner of earning such income was also disclosed. The High Court further observed that the revised return was submitted by the assessee only when it was completely cornered during the assessment proceedings. The High Court dismissed the assessee's appeal and held that it was a clear case of concealment and penalty had been rightly levied and the Order of the Tribunal had no infirmity in it. (AY. 2007-08)

Jawahar Lal Jain (HUF) v. CIT (2015) 370 ITR 712 / 276 CTR 487 / 118 DTR 177 (P&H)(HC)

2566 **S.271(1)(c) : Penalty – Concealment – Addition on estimate basis – Levy of penalty was not justified. [S.145]**
During search excess stock was found on physical verification as against book stock worked out as on date of search. Assessee did not file return of income for relevant year in which search had been conducted. Assessing Officer completed assessment for relevant assessment year on basis of materials available with him. Penalty proceedings were initiated for concealing particulars of income. Dismissing the appeal of Revenue the Court held that since no return of income had been filed by assessee and income was assessed on estimate basis by revenue, no penalty under section 271(1)(c) could be levied for concealment of income.
ITO v. Bombaywala Readymade Stores (2015) 230 Taxman 313 (Guj.)(HC)

2567 **S.271(1)(c) : Penalty – Concealment – Set-off of long term capital loss from short term capital gain – Deletion of penalty was held to be justified.**
Assessee claimed set off of long term capital loss from short term capital gain. However, same was disallowed by Assessing Officer. Assessee's claim was based on law which was in force in previous year. Dismissing the appeal of revenue the Court held that once changed law was brought to notice of assessee and assessee accordingly paid tax on capital gain arose, there was no suppression of income for evading tax and no penalty could be levied. (AY. 2004-05)
CIT v. Chandrasekaran (2015) 230 Taxman 658 (Karn.)(HC)

2568 **S.271(1)(c) : Penalty – Concealment – Income from business of property income – Deletion of penalty was held to be justified. [Ss. 22, 28(i), 32]**
Assessee let out his premises and treated income from same as his business income and claimed depreciation on it. However, Assessing Officer rejected assessee's claim and treated said income as income from house property. Dismissing the appeal of Revenue the Court held that once mistake was brought to notice of assessee and he paid tax on said income and there was no suppression of income, no penalty could be levied. (AY. 2004-05)
CIT v. Chandrasekaran (2015) 230 Taxman 658 (Karn.)(HC)

2569 **S.271(1)(c) : Penalty – Concealment – Royalty payment was claimed as deduction twice – Levy of penalty was held to be justified**
Royalty payment claimed and allowed during preceding assessment year. Assessee claimed royalty claimed for second time in subsequent year. The error of computation unearthed during assessment proceedings. On appeal: dismissing the appeal, the Court held that the plea taken by the assessee was cursory and did not give any acceptable explanation for the wrong computation, as the error was detected by the authority during the proceedings under section 143(3) and a categorical finding was recorded that the assessee suppressed the income by making a wrong claim to deduction of royalty payment, which actually pertained to earlier assessment years, which was claimed and allowed. Therefore, the levy of penalty under section 271(1)(c) was proper. (AY 2002-03)
Lanxess India P. Ltd. v. ACIT (2015) 373 ITR 346 / 126 DTR 224 (Mad.)(HC)

S.271(1)(c) : Penalty – Concealment – Investment of shares – Stock-in-trade – Capital gains – Business income – Levy of penalty was not justified. [Ss. 28(i), 45] 2570

The assessee was engaged in the investment of shares and securities cum business of shares and securities and other related activities. In the return of income, the assessee disclosed certain short-term capital gains on account of sale of shares. However, the AO held that the aforesaid sale and purchase was not in the nature of investment but transactions relating to trading in shares and, accordingly, treated it as business income. The reasons given by the AO to treat the shares in question as stock-in-trade were that the broker notes did not indicate whether the shares were procured as investment or as stock-in-trade and the physical delivery of shares was not taken. The AO also levied penalty under section 271(1)(c) holding that the assessee did not disclose full and necessary particulars. On appeal, the CIT(A) deleted the penalty observing that all particulars relating to capital gains were duly disclosed in the return as well as in the balance sheet which indicated that the assessee was maintaining a clear demarcation between the shares which were treated as investment and shares held as stock-in-trade for business.

On Revenue's appeal, the Tribunal affirmed the finding of the CIT(A). On appeal to the High Court, in the written submission filed before the Commissioner (Appeals) it was stated that the details of shares held as investments were duly mentioned in the balance sheet and in note forming part of the balance sheet, detail of transactions which were treated as business was clearly reflected. Further, the shares which were sold and treated as short-term capital gains were not accounted for in the opening balance nor in the closing balance. In the books of account also, the shares in question were shown under the head 'investment' and in the profit and loss account, short-term capital gains was duly credited. The aforesaid finding of the Commissioner (Appeals) was affirmed by the Tribunal in the impugned order. Thus, the finding of the Assessing Officer that material facts were not duly disclosed by the assessee is not correct. No document or material has been filed to support or contend that the finding of the appellate authorities including the Tribunal is perverse or factual incorrect. In view of the aforesaid position, no substantial question of law arises for consideration in this appeal. The appeal is dismissed. (AY. 2001-02)

CIT v. Anant Overseas (P.) Ltd. (2015) 229 Taxman 433 / 117 DTR 45 (Delhi)(HC)

S.271(1)(c) : Penalty – Concealment – Bogus loan and interest – Detection by investigation wing – Revised return – Levy of penalty was held to be justified. [Ss. 147, 148] 2571

After assessment of assessee had been completed, Investigation Wing detected money laundering racket, in which assessee was also found involved. In response to notice under section 148 assessee filed return of income declaring bogus loan of ₹ 10 lakh and interest thereon as additional income. Assessing Officer completed reassessment and also levied penalty under section 271(1)(c) on assessee. On facts, concealment of income came to be established and penalty under section 271(1)(c) was rightly levied upon assessee. (AY. 2001-02)

Bharatkumar G. Rajani v. Dy. CIT (2015) 229 Taxman 565 (Guj.)(HC)

2572 **S.271(1)(c) : Penalty – Concealment – Income estimate by applying the net profit rate of 8 per cent – Deletion of penalty was held to be justified. [S.40A(3), 44AD]**

Assessee carried on construction business. It had issued large number of bearer cheques to small suppliers of building material. In response to notice issued by Assessing Officer seeking to disallow said payments under section 40A(3), assessee offered that its income might be computed by applying net profit rate of 8 per cent of gross receipts. Assessing Officer having accepted assessee's offer, made addition in terms of section 44AD. He also passed a penalty order under section 271(1)(c). Tribunal, however, set aside said penalty order. Court held that since at time of initiating penalty proceedings Assessing Officer did not have any material on record showing that payments made to suppliers were bogus, he could not have merely on basis of assessee's offer to be taxed on estimate basis, concluded that assessee had provided inaccurate particulars in its return, therefore, Tribunal was justified in setting aside impugned penalty order. (AY. 2004-05)

CIT v. Vatika Construction (P.) Ltd. (2015) 229 Taxman 562 (Delhi)(HC)

2573 **S.271(1)(c) : Penalty – Concealment – Survey – No satisfactory explanation as regards failure by assessee to disclose in original return gifts from non-resident Indians – Disclosure in revised return only after survey operation in business premises – Genuineness of gifts not proved – Levy of penalty justified. [S. 133A, 148, Explanation 1(B)]**

The assessee, a proprietary concern carrying on business in cloth and readymade garments, did not disclose in his return gifts received from non-resident Indians. In response to the notice under section 148, he filed the return admitting the same income as was declared originally. Subsequently, he filed a revised return showing a total income of ₹ 10,86,060 which included the gifts from the non-resident Indians. On the ground that the assessee had concealed income in the original return, the Assessing Officer initiated penalty proceedings under section 271(1)(c) of the Act by issuing notice to the assessee. In response to the notice, the assessee, in order to buy peace, offered the whole amount of gifts as income and since the assessee was not able to prove the genuineness of the non-resident Indian gifts, he agreed to offer the amount as income for the assessment year 1995-96. Hence, the Assessing Officer completed the assessment under section 143(3) read with section 147 accepting the income disclosed in the return filed subsequently and levied penalty under section 271(1)(c). The Commissioner (Appeals) cancelled the penalty proceedings holding that the Assessing Officer because of the surrender made by the assessee in the course of survey, did not consider it necessary to make further enquiry to establish whether the gifts claimed were not genuine or false to establish the fact that the assessee had actually concealed facts or particulars of its income or that it had furnished inaccurate particulars of its income. The Tribunal restored the penalty proceedings initiated by the Assessing Officer holding that when the assessee had admitted the income only after being questioned during the course of survey, the onus was on the assessee to establish that the assessee had not concealed any income. On appeal :

Held, dismissing the appeal, that the assessee had agreed to offer the gifts as income only after survey was conducted in the premises of the assessee. But for the survey, the assessee would not have offered the gifts as income. Hence, the onus was on the assessee to substantiate the gifts. When the assessee was not able to prove the

genuineness of the gifts, the Tribunal was justified in confirming the order of the Assessing Officer. (AY. 1995-96)
R.Padmanabhan v. Dy. CIT (2015) 371 ITR 211 (Mad.)(HC)

S.271(1)(c) : Penalty – Concealment – Search and seizure – Voluntary disclosure – Assessee filing return but not disclosing amount surrendered voluntarily – Penalty leviable. [S. 132, 132(4), 271(1)(c), Explanation, 5A(a), (b)] 2574
A search under section 132 of the Act was conducted at the premises of the assessee on February 3, 2009. In the course of search, the assessee made a voluntary disclosure under section 132(4) disclosing a sum of ₹ 6 crore, even though no incriminating document suggesting any such undisclosed income was found. No concealed income was established from any of the papers and documents found in the course of search in the panchnama of the assessee or in other panchnamas. The entire disclosure was made voluntarily and in good faith. On the basis of the disclosure, the assessee filed a return, offering a sum of ₹ 70,000 for taxation earned during the assessment year 2008-09. Since the assessee for the assessment year 2008-09 had earlier filed his return in which the sum of ₹ 70,000 was not disclosed, the Assessing Officer imposed a penalty under section 271(1)(c). The Commissioner (Appeals) confirmed the levy of penalty. The Tribunal cancelled the penalty. On appeals :
Held, allowing the appeal, that clause (b) of Explanation 5A to section 271(1) was not applicable to the case of the assessee for the reason that it was not the case of the assessee that he had not filed the return for the assessment year 2008-09. Clause (b) was not applicable to those cases where the assessee had filed a return but did not disclose the income, as the present assessee. His case was covered by clause (a). The assessee was not entitled to get the benefit of immunity under clause (b). Stress was laid by the Tribunal on the expression "voluntary" but the meaning of the expression "voluntary" in the context is that the statement made by him was not extorted from him by applying force. It is in that sense a voluntary disclosure which had been clarified by the assessee by stating that he had not given any statement under pressure and he did not want to rectify or modify the statement made by him. Levy of penalty was held to be justified. (AY. 2008-09)
CIT v. Prasanna Dugar (2015) 371 ITR 19 / 122 DTR 182 / 279 CTR 86 (Cal.)(HC)
Editorial: SLP of assessee was dismissed. (SLA. No. 12767 of 2015 dated 1-5-2015) Prasanna Dugar v. CIT (2015) 373 ITR 681 / 279 CTR 536 (SC)

S.271(1)(C) : Penalty – Concealment – Non production of bills – Levy of penalty was held to be justified 2575
When the Assessing Officer asking for the Bills for 9 alleged items, non-production of Bills for 6 items amounts to furnishing of inaccurate particulars hence, the levy of penalty is justified. (AY. 2003-04)
Clariant Chemicals India Ltd v. ACIT (2015) 274 CTR 353 / 229 CTR 267 / 115 DTR 65 (Bom.)(HC)

S.271(1)(c) : Penalty – Concealment – Cash credits – Merely because additions are made in the quantum proceedings, penalty cannot be imposed mechanically. [S.68] 2576
The assessee is engaged in the business of boring of tube-wells for farmers. The assessee filed its return of income for the AY 1986-87. Pursuant thereto, some additions were

made u/s. 68 and accordingly penalty u/s. 271 (1) (c) was imposed on the basis that the assessee had failed to disclose its income truly and correctly. Being aggrieved, the assessee filed an appeal to the CIT(A), who dismissed the appeal. The Tribunal also upheld the CIT(A)'s order.

On appeal to the Court, it held that the AO cannot impose penalty in the case of an assessee mechanically, merely on the basis of addition of a certain amount, over and above the amount already declared by the assessee. The AO has to record reasons specifying that there was either concealment of income or supplying of untrue particulars of taxable income for the relevant year which the AO failed to do. (AY. 1986-87)

Amrut Tubwell Company v. ACIT (2015) 115 DTR 1 / 234 Taxman 756 / 275 CTR 86 (Guj.) (HC)

2577 **S.271(1)(c) : Penalty – Concealment – Consultancy service – Shown as exempt – Full material fact was disclosed in the return – Amount disclosed and tax paid – Levy of penalty was held to be not valid. [S. 10(8A), 132(4), Explanation 5]**

Assessee is a NR, received certain amount under a contract with Development Bank (ADB), for providing consultancy service. In the return the aforesaid amount was claimed as exempt from tax in view of the specific recital in the agreement that the government has agreed and affirmed to provide and make available to the assessee free of charges several facilities and that the Government shall exempt or bear cost of any taxes etc. in India. Assessee was under a *bona fide* belief that the receipt was exempt on the basis of the clauses in the agreement referring to the obligation of the Government referring to the obligation of the Government of India. Application for claiming exemption under S.10(8A) was moved subsequently on the advice given by the Tax Consultants. AO imposed penalty and held that certain amount was not exempt income added to the return of income. The penalty was confirmed by both CIT(A) and Tribunal. On further appeal in HC, HC held that there was not finding at any stage of the proceedings the acquisition of the seized gold was during any earlier Assessment Year. Statement was recorded from the assessee u/s. 132(4). Return having been filed within time showing income and there being payment of tax, the assessee was entitled to the benefit of Explanation 5 to Section 271(1)(c) and penalty imposed by the AO was set aside. (AY. 2005-06)

Lea International Ltd. v. ADIT (2015) 230 Taxman 245 / 273 CTR 515 / (2015) 55 taxmann.com 407 / 113 DTR 210 (Delhi)(HC)

2578 **S.271(1)(c) : Penalty – concealment – Scientific research – Bills not produced – Levy of penalty was held to be justified. [S.35(2AB)]**

Where out of 9 items in respect of capital expenditure of research and development, bills or supporting documents in relation to 6 items had not been produced by assessee, imposition of penalty under section 271(1)(c) after disallowance of said expenditure was justified. (AY. 2003-04)

Clariant Chemicals (India) Ltd. v. ACIT (2015) 229 Taxman 267 / 115 DTR 65 (Bom.)(HC)

S.271(1)(c) : Penalty – Concealment – Immunity against penalty under Explanation 5 is available even in return is not filed provided a statement is made during the search, explaining the manner of deriving the income and due tax & interest thereon is paid. [S.132(4), 153A, Explanation 5] 2579

Against the judgment of the Third Member of the Tribunal in *ACIT v. Kirit Dahyabhai Patel [2009] 121 ITD 159 (AHD.) (TM),* the High Court had to consider the following question of law: "Whether in the facts and circumstances of the case, the Income Tax Appellate Tribunal was right in law in restoring the penalty imposed under section 271(1)(c) of the Act holding that benefit under explanation 5 to Section 271(1)(c) of the Act would be available only for period where due date for filing the return under section 139(1) of the Act had not expired?" HELD by the High Court reversing the Third Member:

In order to get the benefit of immunity under clause (2) of Explanation 5 to Section 271(1)(c) of the Income-tax Act, it is not necessary to file the return before the due date provided that the assessee had made a statement, during the search and explained the manner in which the surrendered amount was derived, and paid tax as well as interest on the surrendered amount. It is not relevant whether any return of income was filed by the assessee prior to the date of search and whether any income was undisclosed in that return of income. In view of specific provision of section 153A of the I.T. Act, the return of income filed in response to notice under section 153(a) of the I.T. Act is to be considered as return filed under Section 139 of the Act, as the Assessing Officer has made assessment on the said return and therefore, the return is to be considered for the purpose of penalty under Section 271(1)(c) of the I.T. Act and the penalty is to be levied on the income assessed over and above the income returned under section 153A, if any. (AY. 2002-03)

Kirit Dahyabhai Patel v. ACIT (2015) 121 DTR 337 / 280 CTR 216 (Guj.)(HC)

Editorial: Decision of TM in ACIT v. Kirti Dahyabhai Patel (2009) 125 TTJ 145 (TM) (Ahd.)(Trib.) is reversed.

S.271(1)(c) : Penalty – Concealment – Book profit – Assessment under section 115JB on book profits basis – Search by excise authorities revealing concealment of income – Additions to income – Tax liability not changing – Penalty could not be imposed – Explanation 4. [S.115JB] 2580

The assessee declared a total income as "nil", after claiming deduction under section 80-IB of the Income-tax Act, 1961, and depreciation available. The assessee's book profits under section 115JB worked out to ₹ 3,78,87,230. In the scrutiny assessment, the Assessing Officer found that a search had been carried out at the premises of the dealers of the assessee by the excise authorities. Statements of the representatives of the dealers were recorded. Statements of the representatives of the assessee were also recorded. On the basis of such materials, the Assessing Officer came to the conclusion that during the previous years relevant to the assessment years 2003-04, 2004-05 and 2005-06 up to July 13, 2005 (i.e., the date of the search), the assessee had received a sum of ₹ 64,95,365 in cash. For the assessment year under consideration, the Assessing Officer apportioned a sum of ₹ 46,78,545 out of the cash receipts. He, accordingly, added this amount to the income of the assessee, both for normal computation as well as for

computing book profit under section 115JB. In his order of assessment the Assessing Officer ordered initiation of penalty proceedings. He imposed penalty. This was upheld by the Commissioner (Appeals) but the Tribunal held that even after the additions had been made during the course of the assessment proceedings, the income of the assessee remained "nil" and the assessee was liable to pay tax on the book profits under section 115JB. Hence, the Tribunal deleted the penalty. On appeal to the High Court :
The order in effect was that the addition for the normal computation was sustained but for the purpose of computation of the book profits, it was deleted. When the assessee's tax liability did not change despite unearthing of concealed income, no penalty could have been levied. The deletion of penalty was justified. (AY. 2005-06)
CIT v. Citi Tiles Ltd. (2014) 46 taxmann.com 344 / (2015) 370 ITR 127 / 122 DTR 74 / 278 CTR 245 (Guj.)(HC)

2581 **S.271(1)(c) : Penalty – Concealment – Nature of satisfaction of Assessing Officer – Must be evident from assessment order itself – Nature of satisfaction need not be in writing but factum of satisfaction must be in writing**
The AO imposed the penalty for concealment. Appellate authorities deleted the penalty on the ground that there was no endorsement in the order of assessment to the effect that penalty proceedings of the Act would be initiated. Dismissing the appeal of Revenue the Court held that the nature of satisfaction need not be in writing, though the factum of satisfaction must be in writing. (AY. 1995-96)
CIT v. Lotus Constructions (2015) 370 ITR 475 / 273 CTR 538 / 55 taxmann.com 182 / 113 DTR 388 (T&AP)(HC)

2582 **S.271(1)(c) : Penalty – Concealment – Furnishing inaccurate particulars – Claim of loss on sale of fixed assets in profit and loss account – Claim incorrect and contrary to principles of primary accountancy – Revised return not filed voluntarily or before issue of notice for penalty – Order of penalty sustainable. [Explanation 1]**
The claim of loss on accounts of sale plant and machinery was contrary to the elementary and well-known basic principles of accountancy. The case was not a case of a debatable issue and was a capital loss. Also, the assessee had not filed a revised return voluntarily but after the Assessing Officer confronted the assessee and it was asked to explain how and why the loss on account of sale of fixed assets was claimed in the profit and loss account. The loss, capital in nature and could not have been claimed in the profit and loss account. Therefore, the levy of penalty under section 271(1)(c) was justified. (AY. 2006-07)
CIT v. NG Technologies Ltd. (2015) 370 ITR 7 / 118 DTR 256 / 281 CTR 550 (Delhi)(HC)

2583 **S.271(1)(c) : Penalty – Concealment – Search and seizure – Discrepancy in accounts noted in search proceedings – Surrender of amount – Levy of penalty was held to be valid. [S. 153A]**
The assessee was carrying on jewellery business. There was a search under section 132 of the Income-tax Act, 1961, in its premises. Discrepancies were found in its accounts. Notice was issued under section 142(1) for the preceding six years, namely, with effect from the assessment year 2001-02 onwards. Notice under section 153A of the Act

was issued requiring the assessee to file the return of income in consequence of the search proceedings. In pursuance thereof, the assessee filed a return of income dated July 31, 2007 disclosing ₹ 1,06,48,173 comprising the amount from regular sources of income amounting to ₹ 48,27,928 and the balance amount of ₹ 58,20,245 attributable to the discrepancies found and after reconciling with the corroborative material facts containing material particulars. Subsequently, a revised return of income was filed declaring an income of ₹ 2,98,41,628 which included the amount of ₹ 48,41,628 from regular sources of income and additionally ₹ 2.50 crores attributable to discrepancies. The assessment was completed under section 143(3) read with section 153A. The assessment order was accepted and the tax was paid. Penalty was levied and this was confirmed by the Commissioner (Appeals). The Tribunal upheld the levy of penalty under section 271(1)(c) rejecting the prayer for admission of additional evidence. On appeal to the High Court : That no error or perversity could be pointed out in the findings recorded by the Assessing Officer, the Commissioner (Appeals) and the Tribunal which might call for interference. The levy of penalty was valid. (AY. 2007-08)
Jawahar Lal Jain (HUF) v. CIT (2015) 370 ITR 712 / 118 DTR 177 / 276 CTR 487 (P&H) (HC)

S.271(1)(c) : Penalty – Concealment – Matter remanded. [S.2(22)(e)] 2584
Assessing Officer made addition *inter alia* on account of unexplained investment and deemed dividend. He levied penalty under section 271(1)(c) in respect of unexplained investment. In respect of addition on account of deemed dividend, penalty proceedings were kept in abeyance in view of pendency of an appeal. On dismissal of that appeal subsequently, penalty was levied in respect of this addition also. On appeal, Commissioner (Appeals) and Tribunal upheld penalty. On appeal the Court held that since both appellate authorities went into merits of explanation offered by assessee on penalty and not on issue whether original authority had reserved his right to proceed under section 271(1)(c) relating to deemed dividend, matter was to be remanded to Tribunal to consider scope of second penalty order. Matter remanded. (AY. 2005-06)
S. Sathyanarayanan v. ACIT (2015) 229 Taxman 168 (Mad.)(HC)

S.271(1)(c) : Penalty – Concealment – Depreciation – cryptic order – Windmill – Reporting error by consultant – Matter remanded. [S. 32] 2585
Assessee-company charged depreciation on windmill under Companies Act and also under Income-tax Act but did not add back depreciation charged under Companies Act in final computation of income. AO levied the penalty. CIT(A) cancelled penalty holding that mistake was just a reporting error committed by tax consultant. On appeal by Revenue the Tribunal held that order passed by Commissioner (Appeals) was not only cryptic but also based on incorrect facts and, therefore, order of Commissioner (Appeals) was to be set aside and matter was to be remanded for fresh consideration. (AY. 2008-09)
Dy. CIT v. Khanna Industrial Pipes (P.) Ltd. (2014) 35 ITR 314 / (2015) 68 SOT 21 (URO) (Mum.)(Trib.)

2586 **S.271(1)(c) : Penalty – Concealment – No incriminating material was found – Best judgement assessment – Levy of penalty was held to be not justified. [S. 153A]**
No incriminating documents were found in the course of search proceedings. Merely because best judgment was made and loss was disallowed levy of penalty was held to be not valid. (AY. 2005-06)
Siraigo Pharma (P) Ltd. v. Dy. CIT (2015) 129 DTR 289 / 176 TTJ 216 (Jaipur)(Trib.)

2587 **S.271(1)(c) : Penalty – Concealment – Debatable claim – Levy of penalty was held to be not valid [S. 80IC]**
The Tribunal held that the claim of deduction was debatable at the time of making the return and therefore penalty under section 271(1)(c) is not leviable, more so as the assessee had disclosed all the particulars of income and claimed deduction under *bona fide* belief on the basis of advice of a Chartered Accountant. (AY. 2009-10)
S. S. Foods Industries v. ACIT (2015) 169 TTJ 250 / 38 ITR 90 (Chd.)(Trib.)

2588 **S.271(1)(c) : Penalty – concealment – Withdrawal of claim – Levy of penalty was held to be not valid. [S. 80IB(10)]**
The Tribunal held that the assessee has during the course of assessment proceedings filed a written letter before the Assessing Officer withdrawing claim of deduction under section 80IB. Even if the assessee has not withdrawn its claim of deduction and had insisted for allowance of deduction even then in the absence of any material brought on record to implicate the assessee by showing that his claim of deduction was not *bona fide,* it cannot be said that the assessee is guilty of filing inaccurate particulars of income. The Tribunal upheld the order of CIT(A) and held that penalty is not leviable under section 271(1)(c). (AY. 2008-09)
ACIT v. Navratan Techbuild (P) Ltd. (2015) 174 TTJ 326 / 127 DTR 105 (Indore)(Trib.)

2589 **S.271(1)(c) : Penalty – Concealment – Search – In the cases in which search is initiated, the penalty under section 271AAA comes into play in respect of undisclosed income of specified previous year and to that extent the provisions of section 271(1)(c) will not be applicable – Levy of penalty was deleted. [S. 271AAA]**
The Tribunal held that in the cases in which search is initiated, the penalty under section 271AAA comes into play in respect of undisclosed income of specified previous year and to that extent the provisions of section 271(1)(c) will not be applicable. Situations in which provisions of section 271AAA and the provisions of section 271(1)(c) can apply are inherently mutually exclusive in view of the clear mandate of section 271AAA(3). Accordingly provisions of section 271(1)(c) cannot be invoked on the facts of this case. Therefore, impugned penalty under section 271(1)(c) is not sustainable in law. (AY. 2008-09)
Naman A. Shastri (Dr.) v. ACIT (2015) 155 ITD 1003 / 174 TTJ 793 (Ahd.)(Trib.)
Chirag V. Mehta (Dr.) v. ACIT (2015) 155 ITD 1003 / 174 TTJ 793 (Ahd.)(Trib.)
Bharat Trivedi (Dr.) v. ACIT (2015) 155 ITD 1003 / 174 TTJ 793 (Ahd.)(Trib.)

S.271(1)(c) : Penalty – Concealment – Resolution to reduce purchase cost of electricity – Debatable – Levy of penalty was not justified. [S.41(1)] 2590

The Tribunal held that the addition made to the income does effectively raise a presumption against the assessee because of impact of Expl. 1 but it is entirely a rebuttable presumption. In this case the assessee having placed all the facts on record which are required for computation of income, it cannot be said that its explanation is not bonafide, also it cannot be said that there was some conscious act on the part of the assessee is not considering section 41(1) to the extent of benefit accruing to it *vide* G. R. dated 21st May, 1999. Therefore, there was no justification for levying penalty under section 271(1)(c). (AY. 2002-03)

Mula Pravara Electric Co-operative Society Ltd. v. DCIT (2015) 169 TTJ 92 (Pune)(Trib.)

S.271(1)(c) : Penalty – Concealment – No evidence that any seized material belonged to the assessee – No finding that the assessee's explanation is false or unsubstantiated – Levy of penalty was held to be not justified. [S. 132, 153A] 2591

Deleting the penalty the Tribunal held that it is a settled law that considerations, which arises in the penalty proceedings are separate and distinct from the assessment proceedings and the assessee can rely upon the same material and explanation to show that he is not guilty of either concealment of income or furnishing of inaccurate particulars. The assessee's explanation that no material was found from the possession of the assessee stands unrebutted even upto this stage. Department has not brought any material to show that the seized document belong to the assessee or assessee's explanation is false or has not been substantiated. Thus, on these facts, it cannot be held that any penalty u/s. 271(1)(c) can be levied against the assessee. Further, the deeming provision of Explanation 5 will also not apply for the reason that it postulates that the assessee should be found to be the owner of any money, bullion, jewellery or other valuable article or thing, which herein this case, is completely absent, because the assessee has not been found to be in possession of such things as mentioned in Explanation 5. Thus, we set aside the order of the CIT(A) and delete the penalty levied for all the aforementioned assessment years. (AY. 2005-06)

Joseph A. Pattathu v. ACIT (2015) 170 TTJ 337 / 39 ITR 548 (Mum.)(Trib.)

S.271(1)(c) : Penalty – Concealment – Revised return – Offering additional rental income – Levy of penalty was held to be not justified. [S. 22, 139] 2592

Allowing the appeal of assessee the Tribunal held that Assessing Officer could not pass penalty order u/s. 271(1)(c) in a case where assessee *suo motu* revised his return declaring additional rental income and paid taxes thereon before any detection of concealment by revenue authorities. (AY. 2010-11)

Harpreet Singh v. ITO (2015) 155 ITD 167 (SMC)(Chd.)(Trib.)

S.271(1)(c) : Penalty – Concealment – Admission – Levy of penalty was held to be justified. [S.69B] 2593

Dismissing the appeal the Tribunal held that when assessee himself admitted in presence of his Chartered Accountant that he had undisclosed income which was utilized for renovation of his bungalow, revenue authorities were not required to prove

by bringing any positive evidence of existence of undisclosed income. Levy of penalty was held to be justified. (AY. 2000-01)
Sudarshan P. Amin v. ACIT (2015) 155 ITD 130 / 174 TTJ 672 / (2016) 130 DTR 151 (Ahd.)(Trib.)

2594 **S.271(1)(c) : Penalty – Concealment – Satisfaction – A penalty notice u/s. 274 which does not strike out the irrelevant portion & which does not specify whether the penalty is for "concealment" or for "furnishing inaccurate particulars" renders the penalty order void. [S.274]**
Allowing the appeal of assessee the Tribunal held that in the case of *CIT & Anr. v. Manjunatha Cotton and Ginning Factory, 359 ITR 565 (Karn.)(HC)* has held that notice u/s. 274 of the Act should specifically state as to whether penalty is being proposed to be imposed for concealment of particulars of income or for furnishing inaccurate particulars of income. The Hon'ble High court has further laid down that certain printed form where all the grounds given in section 271 are given would not satisfy the requirement of law. The Court has also held that initiating penalty proceedings on one limb and find the assessee guilty in another limb is bad in law. It was submitted that in the present case, the aforesaid decision will squarely apply and all the orders imposing penalty have to be held as bad in law and liable to be quashed. It is clear from the aforesaid decision that on the facts of the present case that the show cause notice u/s. 274 of the Act is defective as it does not spell out the grounds on which the penalty is sought to be imposed. Following the decision of the Hon'ble Karnataka High Court, we hold that the orders imposing penalty in all the assessment years have to be held as invalid and consequently penalty imposed is cancelled. (AY. 2006-07)
Suvaprasanna Bhattacharya v. ACIT (2016) 175 TTJ 238 (Kol.)(Trib.)

2595 **S.271(1)(c) : Penalty – Concealment – Withdrawal of depreciation – Levy of penalty was not justified. [Ss. 132(4), 153A]**
Assessee withdrew claim for depreciation on IPR in statement during search and seizure operations undertaken on assessee but nothing incriminating was found during search which was concealed by assessees, penalty could not be levied merely on basis of statement during search. (AY. 2002-03 to 2006-07)
Financial Technologies (I) Ltd. v. ACIT (2015) 41 ITR 330 (Mum.)(Trib.)

2596 **S.271(1)(c) : Penalty – Concealment – Revised return – Deemed concealment – Explanation 5A to S. 271(1)(c) on deemed concealment despite income having been offered in the search return explained – Levy of penalty was held to be justified. [S.153A]**
Search and seizure action was carried out against the assessee on 9-12-2009. While travelling from Pune to Delhi by air, the assessee was found to be in possession of cash of ₹ 1,60,76,800/-. The assessee was searched by the Investigation Wing under section 132 of the Act on 9-12-2009 and residence was also searched and cash of ₹ 1.60 crores was seized during the search proceedings. In the course of recording of statement during the search proceedings, the assessee admitted that she had sold her ancestral property at Delhi for ₹ 3.40 crores, for which the Agreement was made for ₹ 1.70 crores and the balance amount was received in cash. In response to notice issued under section 153A

of the Act, the assessee offered 50% of the Agreement value i.e. ₹ 85 lakhs and 100% of the cash element i.e. ₹ 1.70 crores in her hand and computed the income from capital gains and declared total income of ₹ 2,04,91,850/- on 13-9-2010. Against the income from capital gains computed at ₹ 2,41,17,168/-, the assessee also claimed exemption under section 54 of the Act at ₹ 38,40,098/-, on account of investment in Mega Polis property. The Assessing Officer while completing assessment, noted that the assessee had not declared the sale consideration of ₹ 2.55 crores in the original return of income filed and subsequently after the search, the declaration was made on account of total amount of capital gains. The Assessing Officer rejecting the claim of the assessee that it had *suo motu* offered the income from long term capital gains, and no *mala fide* intention could be attributed to the said disclosure, hence, there was no merit in levy of penalty, held the assessee exigible to levy of penalty under section 271(1)(c) of the Act and levied penalty of ₹ 47,11,104/-. This was confirmed by the CIT(A). On appeal by the assessee to the Tribunal HELD dismissing the appeal:

(i) The deeming provisions of Explanation 5A under section 271(1)(c) of the Act are applicable to all the searches initiated under section 132 of the Act on or after first day of June, 2007. Reading the said provisions of the Explanation 5A to section 271(1)(c) of the Act, it is noted that the person is deemed to have concealed particulars of his income or furnished inaccurate particulars of such income, which is equivalent to the value of money, bullion, jewellery, valuable articles or things from the possession of the assessee during the course of search conducted on or after first day of June, 2007. Further, where any income is based on any entry in any books of account or other documents or transactions and he claims that all the above said represents his income for any previous year, then the Explanation lays down to that extent, the person would be deemed to have concealed his particulars of income or furnished inaccurate particulars of income.

(ii) Now, coming to the main provisions which constitute two portions i.e. what is concealment and quantum of penalty to be levied. The question is quantum of income on which penalty is to be levied. The said issue was before the Pune Bench of Tribunal in *ACIT v. Mulay Construction P. Ltd. & Ors. in ITA Nos. 116 to 119/PN/2012 & Ors.* Applying the said proposition to the facts of the present case, Tribunal hold that the income offered by the assessee pertaining to the cash seized from the assessee and the declaration of the assessee that the said cash relates to the unaccounted cash received *vide* the sale transaction entered into by the assessee, which in turn, was declared by the assessee in the return of income filed pursuant to issue of notice under section 153A of the Act, is the income detected during the course of search and seizure operation. The case of the assessee is squarely covered by the provisions of Explanation 5A to section 271(1)(c) of the Act and the assessee is exigible to levy of penalty on such income which was detected during the course of search and seizure operation, which in turn has been offered by the assessee in return of income filed pursuant to notice issued under section 153A of the Act. (AY. 2009-10)

Sarita Kaur Manjeet Singh Chopra v. ITO (2015) 174 TTJ 516 / 128 DTR 80 (Pune)(Trib.)

2597 **S.271(1)(c) : Penalty – Concealment – Income offered – Not voluntary – Levy of penalty was held to be justified. [S.153C, 153D, Explanation 1]**

The Tribunal held that the addition of ₹ 1.41 crore cannot be accepted as voluntary disclosure as no search was carried out. There cannot be any statutory safeguard for the assessee to claim that since it has made voluntary disclosure, therefore, no penalty should be imposed. The appeal filed by the assessee that penalty is not leviable was dismissed by the Tribunal on the ground that assessee has not offered any plausible explanation as to why it has not disclosed these donations in the original returns or in the returns filed in response to notice under S. 153C, it is liable to penalty under section 271(1)(c), Explanation 1 thereto. (AY. 2007-08 to 2009-10, 2011-12)

KPC Medical College & Hospital v. Dy. CIT (2015) 172 TTJ 204 / 122 DTR 379 (Kol.)(Trib.)
Kali Pradip Choudhuri Foundation v. Dy. CIT (2015) 172 TTJ 204 / 122 DTR 379 (Kol.) (Trib.)

2598 **S.271(1)(c) : Penalty – Concealment – If the notice does not clearly specify whether the penalty is initiated for "concealment" or for "filing inaccurate particulars", it is invalid. Mere fact that assessee has surrendered income does not justify penalty if his explanation is not found to be false/not *bona fide.* [S.274]**

(i) The notice issued by the AO u/s. 274 read with section 271 of the Act at the time of initiation of penalty proceedings states that it is issued for "concealment of particulars of income or furnishing of inaccurate particulars of income". The Assessing Officer has not specified that as to which limb the notice was issued, i.e., whether it is issued for concealment of particulars of income or furnishing of inaccurate particulars of income. The Assessing Officer should be clear about the charge at the time of issuing the notice and the assessee should be made aware of the charge. The penalty order is liable to be quashed as the AO has not correctly specified the charge (decision dated 11-10-2013 in Shri Samson Perinchery in ITA No.4625 to 4630/M/2013 and *CIT v. Manjunatha Cotton & Ginning Factory (2013) (35 taxmann.com 250)(Kar.)* dated 13-12-2012) followed)

(ii) Surrender of commission expenditure would not automatically lead to the *mala fides* of the assessee as presumed by the Assessing Officer, since the Assessing Officer has not afforded an opportunity to the assessee to contradict the documents that were relied upon by the AO. If we examine the explanations furnished by the assessee in terms of Explanation 1 to sec. 271 of the Act, we notice that the assessee has offered an explanation and the same has not been found to be false. It is pertinent to note that the revenue was having only suspicion about the genuineness of the payments at the time of search proceedings on the basis of enquiries conducted by them. However, the assessee has all through maintained that the payments were genuine. In support of the same, the assessee has stated that the payments were made by way of cheque, TDS were deducted and the service tax was also paid. Hence, in our view, it cannot be said that the explanation of the assessee was found to be false. Though the AO has expressed the view that the admission of the assessee proves *mala fides,* we are of the view that the explanation of the assessee was not proved to be not *bona fide* one. It is not the case of the Assessing Officer that the assessee has failed to furnish all facts and material relating to computation of income. Accordingly, we are of the view

the deeming provisions of Explanation-1 shall also not apply to the assessee. (ITA Nos. 6222/6223/Mum/2013, dated 2-9-2015) (AY. 2007-08, 2008-09)

Hafeez S. Contractor v. ACIT (Mum.)(Trib.); www.itatonline.org

S.271(1)(c) : Penalty – Concealment – The deeming provision of Explanation 1 to S. 271(1)(c) applies only to a case of "concealment of income" and not to a case of "furnishing inaccurate particulars of income" [S. 36(1)(va), 43B, 139(1)] 2599

(i) In the assessment order passed u/s.143(3), the AO initiated penalty for concealing the particulars of income. However, at the time of passing penalty order the AO levied penalty for filing of inaccurate particulars of income under the virtue of Explanation 1 to Section 271(1)(c) of the Act. From a reading of Explanation 1 to Section 271(1)(c) of the Act, it is apparent that, if the AO in the course of assessment proceedings is satisfied that, any person has concealed the particulars of income or furnished inaccurate particulars of such income, then he may levy penalty on the assessee. Thus, there are two different charges i.e. concealment of particulars of income or furnishing of inaccurate particulars of income. The penalty can be imposed only for a specific charge. Furnishing inaccurate particulars of income means, when the assessee has not disclosed the particulars correctly or the particulars disclosed by the assessee are found to be incorrect whereas, concealment of particulars of income means, when the assessee has concealed the income and has not shown the income in its return or in its books of account. Explanation 1 is a deeming provision and is applicable when an amount is added or disallowed in computation of total income which is deemed to represent the income in respect of which particulars have been concealed. Explanation 1 cannot be applied in a case where the assessee furnishes inaccurate particulars of income.

(ii) In the present case, the AO initiated penalty proceeding u/s. 271(1)(c) on the basis that the assessee has concealed the particulars of income and the penalty ultimately levied on the assessee has been for furnishing inaccurate particulars by observing that the case of the assessee is covered by the Explanation 1 to Section 271(1)(c).

(iii) It is also observed that mistake of the assessee was *bona fide* which has been corrected by filing revised return before completion of assessment. Merely because there were some discrepancies, it cannot be held that the assessee intended to evade tax. The assessee had rectified the same and had accepted the mistake before the AO. The assessee also chose not to prefer appeal before the first appellate authority, itself shows that the mistakes were not wilful. (AY. 2006-07)

Tristar Intech (P) Ltd. v. ACIT (2015) 43 ITR 279 / 174 TTJ 284 / 127 DTR 33 (Delhi)(Trib.)

S.271(1)(c) : Penalty – Concealment – Capital gains – Failure to apply s. 50C and offer capital gains as per the stamp value does not constitute concealment/furnishing of inaccurate particulars of income for levy of penalty. [S.50C] 2600

(i) As can be seen from the facts and materials on record, while the assessee computed capital gain on the basis of sale consideration mentioned in the registered sale deed, the AO computed the capital gain by invoking the provisions of section 50C of the Act as the registering authority of the State Government has

valued the property for the purpose of stamp duty at ₹ 2.55 crores. Though, it may be a fact that the ITAT while deciding assessee's quantum appeal has upheld application of section 50C of the Act for the purpose of computation of capital gain but that itself will not lead to the conclusion that assessee either has furnished inaccurate particulars of income or concealed the particulars of income. As can be seen from the language of section 50C it is a deeming provision. In a case where AO finds that the value determined by the stamp duty authority for the purpose of stamp duty is more than the consideration claimed to have been received by the party, then the value adopted by the SRO shall be deemed to be the consideration received by the assessee for the purpose of computation of capital gain.

(ii) Thus, for application of section 50C of the Act, it is not necessary for the AO to examine whether actually assessee has received anything over and above the amount mentioned in the sale deed as he simply has to go by the valuation adopted by the SRO. However, as far as imposition of penalty is concerned, there must be positive evidence before the AO to conclude that assessee has received the amount as valued by SRO for stamp duty purpose. Unless there are positive evidence to indicate receipt of on money to the extent of valuation made by SRO by the assessee, penalty under section 271(1)(c) cannot be imposed. Further, in the present case as is evident from the materials on record, the assessee in the course of assessment proceeding has furnished all necessary and relevant documents relating to the transaction of the property in question including registered sale deed. The assessee has not suppressed any material fact from the notice of the AO. In these circumstances, the imposition of penalty under section 271(1)(c) of the Act alleging furnishing of inaccurate particulars of income or concealment of income, in our view, is not appropriate. (ITA No. 565/Hyd/2015, dated 4-9-2015) (AY. 2008-09)

Bhavy Anant Udeshi v. ITO (Hyd.)(Trib.); www.itatonline.org

2601 **S.271(1)(c) : Penalty – Concealment – Claim that interest income is eligible for S.10B exemption, though upheld by the ITAT for an earlier year, is so implausible that it attracts penalty for concealment/ furnishing inaccurate particulars of income – Penalty was confirmed. [S.10B]**

The assessee claimed benefit u/s.10B on the interest income following the decisions in the case of *CIT v. Paramount Premises (P.) Ltd. [1991] 190 ITR 259 (Bom.)* and *CIT v. Nagpur Engineering Co. Ltd. [2000] 245 ITR 806 (Bom.)*. The claim was rejected by following the subsequent judgment of the apex court in Liberty India. The AO levied penalty u/s 271(1)(c). This was deleted by the CIT(A). On appeal by the department HELD allowing the appeal:

(i) As regards the decisions by the Hon'ble jurisdictional High Court relied upon, in our clear view, the same would be of no assistance to the assessee. As unequivocally clarified in Paramount Premises (P.) Ltd. (supra), the decision upholding the assessment of interest as business income is based squarely on the factual finding by the Tribunal to the effect that the interest income sprang from the business activity of the assessee-respondent, and did not arise out of the any independent activity. There is clearly little scope for the application of the said

decision in the facts of the present case, given the clear finding of no connection between the assessee's business activity and the deposits yielding interest income. In fact, even assessment as business income, as observed during hearing, would not by itself suffice inasmuch as it would require a further satisfaction of the condition of section 10B, i.e., of it being derived from such business, toward which we find no contention, much less basis, being, as apparent, with the deposits *per se*. The decision in the case of Nagpur Engineering Co. Ltd. (supra) is only by following the decision in Paramount Premises (P.) Ltd. (supra). It is well settled that what is binding and has precedent value, is the ratio dicendi of a decision. The said decision, rendered following the decision in Paramount Premises (P.) Ltd. (supra), thus, cannot be said to lay down any proposition independent and apart from that stated in Paramount Premises (P.) Ltd. (supra), and which we find as no different from that stated by the Hon'ble Apex Court in Govinda Choudhary and Sons (supra). That is, that it all depends on the facts of the case. The Hon'ble High Court, therefore, presumably and inferably, in the latter decision, i.e., Nagpur Engineering Co. Ltd. (supra), again found a direct nexus between the assessee's business and the interest income, leading it to being assessed as business income and, further, of the said nexus as being of first degree, as explained as far back as in Raja Bahadur Kamakhya Narayan Singh (supra), so that 8 ITA Nos. 3655 to 3657/M/06 & 2358 to 2360/ M/06 (AYs.1997-98, 1998-99 & 1999-2000) Cybertech Systems & Software P. Ltd. the primary condition of 'derived from', as against incidental or attributable to, as is again well settled, stands satisfied in the facts and circumstances of the case, as found by the Tribunal. That is, its decision again rests on the edifice of the factual findings by the Tribunal, the final fact finding authority. The said decisions, thus, on the contrary, support the Revenues' case. The finding by the Tribunal in the instant case, as apparent, is of it being a fit case for the impugned claim being disallowed in view of the decision in Liberty India (supra), so that there was no relation of first degree between the assessee's business, which it found as qualifying for deduction u/s. 10B, and the interest bearing deposit/s. The decision in the case of Liberty India (supra), it needs to be appreciated, is only in line and tandem with the earlier decisions, cited supra, by the Hon'ble Apex Court, which listing is again not exhaustive, so that the Apex Court does not thereby lay down any new law. Rather, the decisions by the Hon'ble jurisdictional High Court relied upon by the assessee are not inconsistent with the decision in Liberty India (supra) and, in fact, in consonance with the decision by the Hon'ble Apex Court in Govinda Choudhary and Sons (supra). Further, the assessee also has nowhere contested any of the several decisions relied upon by the Revenue, including by the Hon'ble Apex Court and the jurisdictional High Court cited supra, many of which are prior to the dates of the filing of the returns in the instant case, so that they represented the well settled/established law of the land; there being in fact a complete unanimity between the different High Courts on the subject, i.e., both with the regard to the nature of the receipt by way of interest, as explained in Govinda Choudhary and Sons (supra), as well as *qua* the scope of the words 'derived from'.

(ii) We, in view of the foregoing, find no merit in the assessee's case. It, to our mind, has not adduced any explanation, much less substantiated it, except for a bald assertion (i.e., of the said interest income as being a part of the assessee's business income). The reliance on the decisions by the Hon'ble jurisdictional High Court, which we have found to be in fact supportive of the Revenue's case, with the law in the matter being, in fact, well settled, is only a false plea or a ruse. Reliance on the decision by the Tribunal for a subsequent year (AY. 2000-01) is, under the circumstances, again, completely misplaced. A plausible explanation towards its' claim/s saves penalty u/s. 271(1)(c). (AY. 1997-98, 1998-99 & 1999-2000)

DCIT v. Cybertech Systems & Software P. Ltd. (2015) 126 DTR 119 / 173 TTJ 776 (Mum.) (Trib.)

2602 **S.271(1)(c) : Penalty – Concealment – If the notice does not clearly specify whether the penalty is initiated for "concealment" or for "filing inaccurate particulars", it is invalid – Change of head of income – Levy of penalty was held to be not valid – Penalty should not be imposed merely because the income has been offered to tax in a later year and not in the present year. [S. 274]**

The assessee contended that the penalty notice issued u/s. 274 of the Act is ambiguous to the extent for which the penalties are initiated. The said notice does not specify whether the present penalty is being levied for concealment of income or for furnishing of inaccurate particulars of income. CIT(A) did not strike of the irrelevant limb mentioned in the notice u/s. 274 of the Act. CIT(A) is not clear as to the relevant limb of the provisions of section 271(1)(c) of the Act for which penalty should be levied. Further, in the quantum order u/s. 250 of the Act, the CIT(A) initiated penalty for assessee's failure in furnishing inaccurate particulars in respect of estimated cost of future expenditure resulted in suppression of income. In the penalty order of the CIT(A), penalty was levied for "concealment of particulars of income – in respect of the change in estimated cost. By all these variations, the CIT(A) is not clear as to whether the penalties are levied for "concealment of income" or "furnishing of inaccurate particulars of income". Further, learned Counsel for the assessee brought our attention to various decisions of the Tribunal to support his argument that the penalty should not be levied when the CIT(A) is not clear in reasons for levying the penalty. Learned Counsel for the assessee also mentioned that the CIT(A) cannot initiate penalty for one reason and levy for other reasons. In this regard, learned Counsel for the assessee relied on the judgment of the Hon'ble Karnataka High Court in the case of *Manjunatha Cotton & Ginning Factory (92 DTR 111) (Kar. HC)* and the coordinate Bench decision in the case of Shri Samson Perinchery (ITA Nos. 4625 to 4630/M/2013), dated 11-10-2013, wherein one of us (AM) is a party to the said order of the Tribunal (supra). He also relied on the following decisions viz (i) M/s. Ittina Properties Pvt. Ltd. (ITA No.36/Bang/2014), dated 21-11-2014 (Bang); (ii) Dharini Developers (ITA No.1848 to 1851/M/2012), dated 7-1-2015 (Mum.) and others. All these general arguments relevant for all the 4 segments of the penalties discussed above. Per contra, no contrary judgments are brought to our notice by the learned DR. HELD by the Tribunal:

The concealment penalty was levied by the CIT(A) in this case on the issues which are not free from debate. In our opinion, the assessee would have got relief in most of

issues relating to additions based on the estimations, change of method of accounting, preponement of taxable income to AY 2009-10 etc. Taxation of interest receipt with or without netting is under the head "profit and gains from business or profession" or "income from other sources" is also a debatable issue. Therefore, the concealment penalty in the case is not sustainable on such addition/issues. Further, the decision in the case of Manjunatha Cotton & Ginning Factory (supra) helps the assessee considering the lack of clarity in the mind of the CIT(A), at the time when notice u/s. 274 was issued. Further also, it is demonstrated beyond doubt that there are no adverse tax implications to the Revenue if the profits are finally taxed in AY 2012-13, the year of completion. Therefore, we are of the opinion that this is not a fit case for levy of penalty u/s 271(1)(c) of the Act. Accordingly, all grounds raised by the assessee are allowed. (AY. 2009-10)

Parinee Developers Pvt. Ltd. v. ACIT (2015) 174 TTJ 137 / 127 DTR 19 (Mum.)(Trib.)

S.271(1)(c) : Penalty – Concealment – Furnishing inaccurate particulars – Claim to deduction of expenses and depreciation allowance against income from house property – Claim positively incorrect and contrary to provisions of Income-tax Act – Assessee knowingly making wrong claim – Levy of penalty is held to be justified. 2603

The assessee was a builder and promoter. During the year no business activity was carried on by the assessee and it earned rental income and interest on fixed deposits. The assessee declared rental income under the head "Income from house property" and claimed deduction of depreciation, building maintenance expenses, commission under section 24 of the Act. The Assessing Officer held that the expenses were not separately allowable as deduction because they were covered under the composite deduction allowable under the head "Income from house property". Therefore, he computed the total income by assessing the rental income under the head "Income from house property" as declared by the assessee without allowing any separate deduction for the expenses and imposed penalty in respect of the disallowance of deductions claimed by the assessee against the income under the head "Income from house property". The Commissioner (Appeals) confirmed this. On appeal : Held, that the provisions of Chapter IV-C do not allow any deduction for expenses of the nature claimed by the assessee within its ambit. As the assessee knowingly made a wrong claim to deduction of expenses and depreciation against income from house property which was patently inadmissible, the levy of penalty under section 271(1)(c) was justified. (AY. 2001-02)

Tera Construction P. Ltd. v. ITO (2015) 39 ITR 646 (Delhi)(Trib.)

S.271(1)(c) : Penalty – Concealment – Search and seizure – Seized materials found during search belonging to proprietary business of assessee's father in which assessee having no interest – Assessee offering additional income in his own hands to avoid litigation and to save aged father from harassment – No material to show seized material belonged to assessee or his statement false – Penalty cannot be levied. [S. 132, 153A] 2604

In a search and seizure operation conducted under section 132(1) of the Act, certain documents were found and seized from the premises of the assessee's father. The assessee contended that all the seized documents belonged to his father and his

proprietary business in which the assessee had no connection or interest. During the course of the assessment proceedings that ensued after notice under section 153A of the Act, the assessee had offered additional income worked out on the basis of seized documents in his own hands to avoid protracted litigation and to save his aged father from harassment. The Assessing Officer invoked Explanation 5 to section 271(1)(c) of the Act and levied penalty for furnishing inaccurate particulars of income. The Commissioner (Appeals) confirmed the order of the Assessing Officer. On appeal :
Held, allowing the appeal, that admittedly, the seized materials found at the time of search belonged to the proprietary concern of the assessee's father in which the assessee had no interest. The seized documents revealed that nothing belonged to the assessee but his father. The offer of additional income was only to buy peace and to save his aged father from protracted litigation. The explanation of the assessee that no material was found from his possession had not been rebutted by the authorities at any stage. Not only that, it was evident from the explanation submitted before the Assessing Officer that the assessee had reconciled the income and explained each and every entry. Hence penalty could not be levied under section 271(1)(c) and Explanation 5 would not apply for the reason that the assessee had not been found to be in possession of any money, bullion, jewellery or other valuable articles. The penalty was to be deleted. (AY. 2002-03 to 2005-06)
Joseph A. Pattathu v. ACIT (2015) 39 ITR 548 / 170 TTJ 337 (Mum.)(Trib.)

2605 **S.271(1)(c) : Penalty – Concealment – Revised return beyond time – Assessment was done just to validate in valid revised return – Levy of penalty was not justified. [S. 132, 147, 148, 153C]**
Tribunal held that no escapement of income was detected during the original assessment proceedings and no proceedings were initiated against the assessee, though it was found that the chartered accountant was operating bogus firms, pursuant to search action. The assessee had *suo motu* offered the additional income. The assessment proceedings under section 147 of the Act were carried out just to validate the invalid revised return and not on account of detection of escapement of income. Therefore, it was not a fit case for levy of penalty under section 271(1)(c) of the Act. (AY. 1998-99 to 2000-01)
Ravi Sud v. ACIT (2015) 39 ITR 356 (Mum.)(Trib.)
Ranjana Sud v. ACIT (2015) 39 ITR 356 (Mum.)(Trib.)

2606 **S.271(1)(c) : Penalty – concealment of income – Disallowance of claim – Short-term capital gain on sale of land was wrongly claimed as long-term capital gain by substituting year of acquisition – Levy of penalty was held to be justified. [S.54B]**
The assessee filed the return of income claiming the year of acquisition of the asset as 1999 instead of the correct year as 2004. Even though the period of holding of the asset sold was far less than 36 months and, therefore, the income did not fall within the long-term capital gain, the assessee never filed any revised return before the issue of notice under section 143(2). Therefore where short-term capital gain on sale of land was wrongly claimed by assessee as long-term capital gain by substituting year of acquisition

as 1999 instead of 2004 and said mistake was not brought to notice of AO *suo motu* before it was detected by department for which assessee had to finally surrender addition. Penalty was held to be justified. Appeal of revenue was allowed.(AY. 2007-08) *ACIT v. Vinay A. Joneja (2014) 163 TTJ 652 / 105 DTR 241 / (2015) 153 ITD 109 (Pune) (Trib.)*

S.271(1)(c) : Penalty – Concealment – Validity of assessment can be objected in penalty proceedings – Satisfaction was recorded of person searched – Donation was not disclosed in the original return – Belated return was filed- Revised return was held to be not valid – Levy of penalty was held to be justified. [S. 32(4), 139(5), 153C, 158BD] 2607

(i) The argument that the satisfaction ought to have been recorded by the AO of the searched person and copy of such satisfaction should be available in the record of searched person is not acceptable because the AO of the searched person as well as of the assessee is a common authority. The same AO has jurisdiction over both the assessees. He has recorded the satisfaction for satisfying himself that money belonged to the assessee was found at the premises of the assessee. His action is being challenged that he has recorded the satisfaction while taking cases of the present assessee i.e. when he took cases of such other persons, whereas he should have recorded satisfaction in the capacity of AO of searched person. There is built-in fallacy in the arguments of the assessee. The fallacy became evident if the argument if tested by envisioning to the facts of the present case. There is no dispute that notice under section 153C was issued by the AO after recording the satisfaction extracted supra. The AO is the same AO who has jurisdiction over the searched person as well as the other person i.e. the assessee. Let us take a situation, the AO was examining the file of Shri Bhaskar Ghosh. On perusal of his statement recorded under section 132(4) coupled with the fact of cash found during the course of search and buttressed by the Managing Director (Finance) of the KPC Group of companies, visualized that cash belonged to the assessee, he immediately took a piece of paper and recorded his satisfaction that the money belongs to the assessee, therefore notice under section 153C is to be issued in the case of assessee. The question is, where this paper was placed by him? Whether in the order sheet entries of Shri Bhaskar Ghosh's assessment proceedings; in a separate file or in cupboard available in his room. There is no dispute that this satisfaction was not recorded within the stages contemplated by the Hon'ble Supreme Court in the case of *CIT v. Calcutta Knitwears 362 ITR 673.* The attempt at the end of the assessee is that there should be a straightjacket system, whereby the satisfaction recorded even by the same AO then, that should be placed in the file of searched person and if it is placed in some other cupboard in his room by the AO then, there cannot be any satisfaction, we fail to appreciate that technical approach at the end of the assessee. The law does not require the manner and the procedure of keeping the files. The section only requires that a satisfaction be recorded and it should be during the period propounded by Hon'ble SC in *CIT v. Calcutta Knitwears 362 ITR 673,* that has been recorded in the present case. The second scenario can also happen that seized material of KPC group might be kept in a common bundle, wrapped in a cloth where all the files are emanating from search and survey are being placed. If the above satisfaction note was found to be

tagged with other file would it be held that no satisfaction was recorded. In our understanding the reply will be that satisfaction was recorded

(ii) The most important feature of section 271(1)(c) is deeming provisions regarding concealment of income. The section not only covered the situation in which the assessee has concealed the income or furnished inaccurate particulars, in certain situation, even without there being anything to indicate so, statutory deeming fiction for concealment of income comes into play. This deeming fiction, by way of Explanation I to section 271(1)(c) postulates two situations; (a) first whether in respect of any facts material to the computation of the total income under the provisions of the Act, the assessee fails to offer an explanation or the explanation offered by the assessee is found to be false by the Assessing Officer or CIT (Appeal); and, (b) where in respect of any fact, material to the computation of total income under the provisions of the Act, the assessee is not able to substantiate the explanation and the assessee fails, to prove that such explanation is *bona fide* and that the assessee had disclosed all the facts relating to the same and material to the computation of the total income. Under first situation, the deeming fiction would come to play if the assessee failed to give any explanation with respect to any fact material to the computation of total income or by action of the Assessing Officer or the learned CIT (Appeals) by giving a categorical finding to the effect that explanation given by the assessee is false. In the second situation, the deeming fiction would come to play by the failure of the assessee to substantiate his explanation in respect of any fact material to the computation of total income and in addition to this the assessee is not able to prove that such explanation was given *bona fide* and all the facts relating to the same and material to the computation of the total income have been disclosed by the assessee. These two situations provided in Explanation 1 appended to section 271(1)(c) makes it clear that that when this deeming fiction comes into play in the above two situations then the related addition or disallowance in computing the total income of the assessee for the purpose of section 271(1)(c) would be deemed to be representing the income in respect of which inaccurate particulars have been furnished. On examination of the facts, we find that firstly, there is no explanation at the end of assessee, why it has not disclosed these donations in the original return(s)? There is no *bona fide* in the alleged explanation of the assessee that it had received the money through account payee cheque and, therefore, harboured a belief that donations are genuine. This explanation is wholly for the sake of explanation. The assessee failed to spell out specific facts and circumstances or reason which operated in the minds of its Managing Director, finance while preparing the return and treating these donations as genuine. Looking to the facts of these five donors, no prudent man would, however, harbor a belief that such companies can give donation. It is pertinent to note that it cannot be a co-incidence or a chance that five companies managed by a common director, having assets of less than ₹1 lakh, not done any business but would give donations of ₹33 crores. These circumstances in itself suggest a well designed scheme at the behest of the assessee, because it is the assessee who is ultimately getting the benefit. Therefore, there was no explanation at the end of assessee for not showing these donations

as its income in the original return(s) or in the return(s) filed in response to notice under section 153C. The CIT(A) has rightly confirmed the penalty upon the assessee. (AY. 2007-08 to 2009-10)

KPC Medical College & Hospital v. DCIT (2015) 172 TTJ 204/ 122 DTR 379 (Kol.)(Trib.)

S.271(1)(c) : Penalty – Concealment – Where Explanation 1 is simply relied by A.O while levying penalty, without actually pointing out any specific charge, the basis of levy of penalty is not in accordance with law [Explanation 1] 2608

Assessment proceedings u/s. 143(3) was completed by AO by making an addition of ₹ 60.17 lakhs on account of bad debts. Subsequently, AO initiated penalty proceedings u/s. 271(1)(c) without mentioning whether the penalty has been initiated for concealment of particulars of income or furnishing inaccurate particulars of income. However, the AO imposed and levied by simply relying on Explanation 1 to S. 271(1)(c) for furnishing inaccurate particulars. The Tribunal held that Explanation 1 is not applicable in a case of furnishing inaccurate particulars of income. Therefore, the basis of levy of penalty itself is not correct and deserves to be quashed. (AY. 2003-04)

DCIT v. Nepa Ltd. (2014) 122 DTR 212 / (2015) 167 TTJ 124 (Ind.)(Trib.)

S.271(1)(c) : Penalty – Concealment – Search and seizure – Commissioner (Appeals) examining levy on basis of different provision – Matter remanded. [S. 271AA] 2609

During the previous year relevant to the assessment year 2009-10, a search and seizure action under section 132 of the Income-tax Act, 1961, in respect of the P group of companies, of which the assessee was a part, led to a disclosure of undisclosed income by the assessee. The assessment was completed determining the total income of the assessee at a figure higher than that declared in the return. The Assessing Officer imposed penalty under section 271AAA of the Income-tax, Act, 1961. The Commissioner (Appeals) deleted the penalty. On appeal : Held, that while deciding the case, the Commissioner (Appeals) recorded the ingredients of Explanation 5 to section 271(1)(c) of the Act, instead of section 271AAA of the Act. Even the decision relied upon by him was in the context of section 271(1)(c) of the Act. The two sections 271(1)(c) and 271AAA of the Act were not only worded differently, but also with different scopes and mandated to operate exclusively. Therefore, as the Commissioner (Appeals) examined the levy on the basis and anvil of a different provision, the matter required to be examined afresh by him. Matter remanded. (AY. 2009-10)

ACIT v. Prakash Steelage Ltd. (2015) 153 ITD 493 / 169 TTJ 137 / 38 ITR 582 / 166 DTR 337 (Mum.)(Trib.)

S.271(1)(c) : Penalty – Concealment – Claim under section 80-IC based on High Court decision – Reversal of High Court by Supreme Court a few days before return was filed – Short gap between publication of decision and filing of return – Not everybody aware of decision – Filing of return on advice of chartered accountants under *bona fide* belief – Issue debatable at time of making return – Penalty cannot be levied – No concealment of income or furnishing of inaccurate particulars. [S. 80-IC] 2610

The assessee filed its return of income on September 30, 2009 claiming deduction on account of export incentive under section 80-IC of the Act. The Assessing Officer

rejected the claim of the assessee and levied penalty under section 271(1)(c) of the Act on the ground of furnishing inaccurate particulars as the claim was against the decision of the Supreme Court. The Commissioner (Appeals) confirmed this. On appeal :
Held, allowing the appeal, that the decision rendered by the High Court on February 19, 2008 was favourable to the assessee and according to the High Court decision the assessee had a right to claim the deduction. The issue was decided against the assessee by the Supreme Court on August 31, 2009 and published for the first time on September 17, 2009. It was not necessary that everybody would became aware of a new decision. There was only short gap between publication of the decision and filing of the return. It was also possible that the return might have been finalised before publication of the decision. Therefore, at the time of filing the return the issue was debatable and penalty could not have been levied. Once proper disclosures were made penalty was not attracted. Further the return was filed on the basis of a certificate issued by a chartered accountant and even if it was a mistake on the part of the chartered accountant, the assessee could always take the shelter that deduction was claimed on the basis of advice under a *bona fide* belief. Therefore, this was not a fit case for levy of penalty. (AY. 2009-10)
S. S. Foods Industries v. ACIT (2015) 38 ITR 90 / 169 TTJ 250 (Chd.)(Trib.)

2611 **S.271(1)(c) : Penalty – Concealment – Disallowance of claim of deduction – *Bona fide* claim was made for deduction u/s. 80-IB with complete disclosure of facts – Penalty is rightly deleted. [S.80-IB]**
Assessment proceedings u/s. 143(3) was completed by AO by making an addition of ₹ 60.17 Lakhs. Subsequently, AO initiated penalty proceedings u/s. 271(1)(c) as it was observed the assessee did not qualify as small scale industry as the investment in plant and machinery was more than monetary limit prescribed. Tribunal held that the assessee made a *bona fide* claim of deduction u/s. 80-IB as it was a small scale industry. Therefore, it is not a case of filing of inaccurate particulars of income or concealment of particulars of income and hence, penalty is not leviable. (AY. 2008-09)
DCIT v. Parabolic Drugs Ltd. (2015) 167 TTJ 683 / 37 ITR 16 / 113 DTR 371 (Chd.)(Trib.)

2612 **S.271(1)(c) : Penalty – Concealment – Disallowance of expenditure for failure to deduct TDS does not attract penalty. [Ss.40)(a)(ia), 194C]**
In this case, the penalty has been levied for disallowance of expenditure u/s. 40(a)(ia) of the Act. It is not a case of furnishing of inaccurate particulars of income or concealment of income. The failure to deduct the TDS on the part of the assessee has resulted in disallowance of expenditure. The assessee had not furnished any inaccurate particulars of income or expenditure. The assessee has already faced the consequences by way of disallowance of expenditure for non-deduction of TDS as per the provisions of section 194C of the Act. It is not the case of the Revenue that the assessee had not incurred the expenditure claimed or that the claim of expenditure was bogus or incorrect. The disallowance of expenditure was attracted due to non-deduction of TDS and it cannot be said to be a case of concealment of income or furnishing of inaccurate particulars of income. The levy of penalty u/s. 271(1)(c) of the Act is not attracted. (ITA No. 6684/Mum/2012, dated 4-3-2015) (AY. 2007-08)
Rushi Builders and Development v. ACIT (Mum.)(Trib.); www.itatonline.org

S.271(1)(c) : Penalty – Concealment – Rental income – Income from house property – Business income – Disclosing income but classifying it under a wrong head amounts to furnishing inaccurate particulars and attracts penalty [S. 22, 28(i)] 2613

The assessee's argument supra of the same being only a differential treatment of the very same, i.e., rental, income, so that there has been thus neither any concealment nor furnishing of inaccurate particulars of income, though appealing, is misconceived. The reason is simple. Yes, the assessee has apparently stated the quantum and nature of the income correctly. However, penalty u/s. 271(1)(c) is not only *qua* the misstatement of fact/s but also of law. When the law is clear and well settled, as in the facts of the present case, the so called 'differential treatment', which the law does not admit of, i.e., *qua* the admitted nature of the income, is only admittedly a wrong claim in law. Income has to be necessarily computed under separate, mutually exclusive heads of income, allowing deductions as per the computational provisions of the respective head of income, and toward which the Assessing Officer has relied on *United Commercial Bank Ltd. v. CIT [1957] 32 ITR 688 (SC)* and *CIT v. Chugandas and Co. [1965] 55 ITR 17 (SC)*. In fact, the 'differential treatment' would be rendered as of no consequence, so that no penalty could be levied, where it carries the same or a similar tax burden; the whole premise thereof being only a lesser tax liability, so that whole issue therefore boils down to whether it is the case of tax avoidance, which is legally permissible, or of tax evasion, which the law seeks to penalize, and which therefore has to be adjudged on the basis or edifice of the assessee's explanation for its adopted treatment. The term 'differential treatment', which is thus to be examined on the touchstone of the validity or plausibility, or otherwise, of the legal claim, carries no legal meaning in itself. How could, one may ask, the assessee justify its' claim of the declared nature of the income as 'rent', when it declares as it as 'business income', claiming all expenses there-against? That is, could it be said that the assessee has furnished accurate particulars of income when it, *de hors* settled law, claims all regular, business expenditure, including depreciation on building, thereagainst, so that the assessee's claim of having stated 'fact/s' correctly is also highly suspect, consequently penalty stands correctly levied. (ITA No. 258/Mum/2011, dated 13-3-2015) (AY. 2005-06)

Shubhamangal Portfolio Pvt. Ltd. v. CIT (Mum.)(Trib.); www.itatonline.org

S.271(1)(C) : Penalty – Concealment – Deemed income – Loans or advances – Deposit – Deeming provision and has to be strictly construed. Assessee can discharge onus by pointing to 'preponderance of probability' and if explanation is not found to be false then, even if amounts are assessed as 'deemed dividend', penalty cannot be levied. [S.2(22)(e), 271(1)(c), Explanation 1] 2614

Dismissing the appeal of revenue, the Tribunal held that :

(i) It is an undisputed fact that assessee is major shareholder in M/s. Exim Multi Media P. Ltd.; M/s. Edge Fine Print P. Ltd. and M/s. Shipping Times (I) Pvt. Ltd. From these companies, the assessee has received money which has been contended to be in the form of refundable security deposits for letting the properties owned by the assessee to these companies for their business purpose. List of properties owned by the assessee and given for use to these company were filed before the authorities during the quantum proceedings. Along with these details, the assessee had also filed internal bank payment voucher by these companies which

show that amount has been given as "deposit" for the use of the property. These bank vouchers mentions the cheque number, name of the assessee, the amount of deposits given and the detail of the property. All these evidences though filed in the course of the quantum proceedings, have not been taken into cognizance by any of the appellate authorities. It has been brought to our notice by the learned counsel that, assessee has not received any rent from these companies, instead she had received only security deposits.

(ii) In light of these facts, it cannot be conclusively held that the amounts given by these companies are in the form of loan or advance. This fact is further corroborated by the fact that, neither there is any entry of loan in the books of the assessee nor in the books of these companies. How such an amount received by the assessee is considered in the nature of loan is not borne out from the records. Be it that as may be, it is well settled proposition of law that the finding given in the quantum proceedings are quite relevant and have a probative value, but such a finding alone may not justify the imposition of penalty, because the considerations that arise in the penalty proceedings are separate and distinct from those in the assessment proceedings. Even though matter has been concluded in the quantum assessment proceedings, then also, they are not conclusive so far as penalty proceedings are concerned. The matter in the penalty proceedings has to be examined afresh from the angle whether the assessee is guilty of concealment of income or furnishing of inaccurate particulars of income. The assessee may adduce fresh evidence in the penalty proceedings to establish that the material and relevant facts goes to prove the *bona fide* of the claim or take a different plea upon the same existing material that there is no concealment of income or furnishing of inaccurate particulars. The degree of proof necessary under the Explanation 1 to section 271(1)(c) can be discharged by the assessee by pointing out the factors and the material in his favour, because explanation merely raises a rebuttal presumption to which assessee can always discharge his onus by pointing out the factors relating to preponderance of probability. In this case, the assessee's explanation that the money received from these companies were in the nature of refundable security deposits received by the assessee in lieu of letting of the properties owned by her has not been found to be false and in fact has been substantiated by the evidence in the form of internal bank vouchers and the entries in the books of account of the assessee as well as of the companies. The revenue has no material to rebut such an evidence or that the assessee's explanation is false based on material on record. The assessee's onus in the penalty proceedings stands fully discharged. Once, it has been shown that the amount has been received not as loan but as deposits, the deeming fiction of 2(22)(e) cannot be stretched to hold that the payment made by a company to a shareholder by way of deposit in lieu of usage of property for its business purpose is in the nature of loan. It is a trite law that the deeming fiction has to be strictly construed and such legal fiction cannot be extended for any kind of payment by a company to its shareholder. Therefore, deleting the penalty is legally and factually correct. (ITA No. 3767/mum/2012, dated 25-3-2015) AY. 2006-07)

ITO v. Dipti Nikhil Modi (Mum.)(Trib.); www.itatonline.org

S.271(1)(c) : Penalty – Concealment – Amounts not deductible – Mistake in claiming deduction of interest expenditure – Levy of penalty was justified. [S.43B] 2615

(i) The assessee's case rests on its claim being an inadvertent mistake, and which stood corrected in the first instance. However, as pointed out by the Revenue authorities, the same cannot be said to be voluntary, but only on the Revenue making a specific enquiry in the matter. Further, the assessee's contention of being constrained for want of necessary or relevant information is without substantiation. Why would not the bank give or share the relevant information with the assessee? It would rather be a contradiction in terms to suggest that while the assessee is in the know of the amount of the interest charged by the bank for the year, and for both its accounts, duly reflected as interest accrued and due in its balance-sheet as at the relevant year-end, it does not know if, or to the extent, the same is paid up;

(ii) The assessee is a regular assessee, well serviced by tax and audit professionals. The latter issuing a disclaimer for being unable to state the amount disallowable u/s.43B in the absence of the relevant information, defeats its case of it being an inadvertent mistake. On what basis, then, one may ask, was the deduction claimed? The only course, in the absence of the information, was that the assessee seek leave to revise its return, which the law even otherwise extends, i.e., where subsequently it discovers a claim as arising in the facts of its case. A legal claim, in fact, could be pressed at any stage of the assessment proceedings;

(iii) The assessee's plea of no loss to the Revenue is of no consequence in view of the clear provision of law defining the term 'tax sought to be evaded', under Explanation 4 thereto, and therefore, with reference to which the penalty is levied and confirmed. (ITA No. 8125/Mum/2010, dated 25-3-2015) (AY. 2003-04)

Trans Polyurethane Pvt. Ltd. v. DCIT (Mum.)(Trib.); www.itatonline.org

S.271(1)(c) : Penalty – Concealment – Surrender of income after questionnaire does not mean it is not voluntary. If surrender is on condition of no penalty and assessment is based only on surrender and not on evidence, penalty cannot be levied. [Ss.69A, 132(4)] 2616

From the record found that at the very first instance share application money was surrendered by assessee with a request not to initiate any penalty proceedings. The AO passed order u/s.143(3) adding surrendered amount u/s.69A on the plea that assessee has surrendered amount only after issue of notice. It is not disputed by the department that sum which was added u/s.69A was one which was surrendered by the assessee itself. Neither there was any detection nor there was any information in the possession of the department except for the amount surrendered by the assessee and in these circumstances it cannot be said that there was any concealment. In case of *CIT vs. Suresh Chandra Mittal 251 ITR 9 (SC),* Hon'ble Supreme Court observed that if the assessee has offered the additional income to buy peace of mind and to avoid litigation penalty u/s.271(1)(c) of the Act cannot be levied. In the instant case, there was no *mala fide* intention on the part of the assessee and the AO had not brought any evidence on record to prove that there was concealment of income. At the time of surrender itself contention of not initiating any penalty proceedings was there. No additional matter was discovered to prove that there was concealment of income. The AO has included the

amount of share capital in the total income of assessee merely on the basis of assessee's declaration/surrender. The AO did not point out or refer any evidence or material to show that the amount of share capital received by the assessee was bogus. It is also not the case of the revenue that material was found at the assessee's premises to indicate that share application money received was an arranged affair to accommodate assessee's unaccounted money. Thus there was no detection by the AO that share capital was not genuine. The surrender of share capital after issue of the notice u/s.143(2) could not lead to any inference that it was not voluntary. Admittedly the assessee has offered the amount of share capital for taxation voluntarily and it was not the case of revenue that the same was done after its detection by the department. It is quite clear from the record that this entire transaction was not detection of the AO that the share capital was not genuine and that the assessee had offered the amount without any specific query. Even surrender of amount by the assessee after receipt of questionnaire could not be lead to any inference that it was not voluntary, in the absence of any material on record to suggest that it was bogus or untrue. The contention that in every case where surrender is made inference of concealment of income must be drawn under S.58 of Evidence Act, cannot be accepted in view of the decision of Punjab & Haryana High Court in the case of *Careers Education & Infotech (P) Ltd., (2011) 336 ITR 257 (P&H).* When no concealment was ever detected by the AO, no penalty was impassable. The decision of Hon'ble Supreme Court in the case of *Union of India & Ors. v. Dharmendra Textile Processors & Ors. (2008) 306 ITR (SC) 277* that the judgment of Hon'ble Supreme Court in the case of Dharmendra Textiles cannot be read as laying down that in every case where particulars of income are inaccurate, penalty must follow. What has been laid down is that qualitative difference between criminal liability under s. 276C and penalty under s. 271(1)(c) had to be kept in mind and approach adopted to the trial of a criminal case need not be adopted while considering the levy of penalty. The concept of penalty has not undergone change by virtue of the said judgment. It was categorically observed that penalty should be imposed only when there is some element of deliberate default and not a mere mistake. Hon'ble Supreme Court in the case of *CIT v. Suresh Chandra Mittal 251 ITR 9 (SC)* observed that where assessee has surrendered the income after persistent queries by the AO and where revised return has been regularized by the Revenue, explanation of the assessee that he has declared additional income to buy peach of mind and to come out of vexed litigation could be treated as bona fide, accordingly levy of penalty under s. 271(1)(c) was held to be not justified. (ITA No. 2292/Mum/2013, dated 8-4-2015) (AY. 2009-10)
Heranba Industries Ltd. v. DCT (Mum.)(Trib.); www.itatonline.org

2617 **S.271(1)(c) : Penalty – Concealment – Estimated addition – Penalty cannot be levied on estimated addition. [S.80-IC]**
Tribunal held that penal action could not be taken on the basis of estimated additions. The levy of penalty under section 271(1)(c) of the Act was not justified. (AY. 2005-06)
Octave Exports v. Dy. CIT (2015) 37 ITR 100 (Chd.)(Trib.)

S.271(1)(c) : Penalty – Concealment – Allowances in form of reimbursement cannot be treated as income in hands of assessee – No concealment of income – Penalty cannot be levied 2618

On appeal by assessee, allowing the appeal, the Tribunal held that the letter issued by the engineering college mentioned that the allowances were in the nature of reimbursement towards hospitality allowances and telephone allowances. As the amounts were reimbursement, they could not be treated as income in the hands of the assessee. Consequently, non-inclusion of the amount in the assessee's return could not be treated as concealment of income. Therefore, the penalty was to be deleted. (AY. 2005-06)

Soumya Prakash Pattnaik v. ACIT (2015) 37 ITR 35 (Cuttack)(Trib.)

S.271(1)(c) : Penalty – Concealment – Penalty based on addition to income – High Court admitting substantial question of law on question of addition – Penalty cannot be imposed on debatable question [S.260A] 2619

Held, allowing the appeal, that when the jurisdictional High Court had admitted a substantial question of law on the question of an addition, the addition made became debatable. Therefore, the penalty imposed under section 271(1)(c) of the Income-tax Act, 1961, on the basis of the addition could not survive. If at any stage, the order of the Tribunal on the quantum addition was upheld by the High Court, the Department was free to proceed in accordance with law on penalty proceedings. (AY. 2004-05)

Schrader Duncan Ltd. v. Add. CIT (2015) 37 ITR 674 (Mum.)(Trib.)

S.271(1)(c) : Penalty – Concealment – Revised ROI filed after issue of s. 143(2) notice amounts to voluntary disclosure if AO has not sought specific particulars in the notice [S.139, 143(2)] 2620

Even though the assessee filed the revised return of income after the receipt of notice u/s. 143(2) of the Act, yet the admitted fact remains that the Assessing Officer did not seek any type of particulars in that notice. Hence the mistake in the Long term capital gain could not have come to the notice of the AO at that point of time, meaning thereby, it should be construed that the assessee has declared the higher amount of Long term capital gain voluntarily upon its detection. Hence, we are unable to agree with the view of the tax authorities that the revised return of income was not voluntary one, but the assessee was constrained to enhance the Long term capital gain only upon the receipt of notice u/s. 143(2) of the Act. Accordingly, we delete the penalty levied *(ACIT v. Ashok Raj Nath (2013)(33 taxmann.com 588 followed) (ITA No. 8653/Mum/2011, dated 7-1-2015.)* (AY. 2004-05)

Prema Gopal Rao v. DCIT (Mum.)(Trib.); www.itatonline.org

S.271(1)(c) : Penalty – Concealment – Excess claim of depreciation on plant and machinery – Levy of penalty was held to be not justified – Excess Claim of depreciation on land – Penalty was held to be justified. 2621

The assessee claimed depreciation on plant and machinery @ 40% instead of the correct 25%. Similarly, depreciation @ 10% was claimed on land as well. The AO made the adjustments in the assessment order and levied penalty for the same in penalty proceedings.

The assessee explained that a depreciation chart of the current year was prepared through the computer system by adopting the relevant figures from the immediately preceding year. However, the rate of depreciation relating to the plant and machinery was inadvertently omitted to be modified to 25% from 40% and the said error came to be noticed only when the AO pointed out the same. Accordingly it was submitted that the mistake has occurred due to inadvertence. The Tribunal found it to be undisputed that the assessee was eligible to claim higher rate of depreciation @ 40% in the immediately preceding year and that it was quite natural in the computer era to prepare depreciation chart by downloading the relevant figures from the chart of the immediately preceding year. The Tribunal accepted the explanation of the assessee on the ground that it was quite possible that the depreciation rate may escape the attention while preparing the depreciation chart. Hence, penalty on this issue was deleted.
However, the Tribunal found that the assessee had given no explanation as regards claim of depreciation on land and that the same was a wrong claim even in the immediately preceding year. Therefore, penalty on this ground was upheld. (ITA No. 6510/M/2012 dated 18-2-2015) (AY. 2004-05)
Bunge India Pvt. Ltd. v. JCIT (Mum.)(Trib.) www.ctconline.org

Section 271AAA : Penalty where search has been initiated.

2622 **S.271AAA : Penalty – Search initiated on or after 1st June, 2007 – Amount disclosed in the statement – Manner of undisclosed income was derived – Levy of penalty was held to be not justified. [S.132(4)]**
The assessee has disclosed the income in the statement u/s. 132(4) of the Act and also paid the tax together with interest of the undisclosed income. AO and CIT(A) held that the assessee has not disclosed/substantiated the manner in which the undisclosed income was derived hence confirmed the levy of penalty. On appeal following the Cuttack Bench in *Ashok Kumar Sharma v. DCIT (2012) 149 TTJ 33 (URO)(CTK)* and *Nagpur Bench Tribunal in Concrete Developers v. ACIT* in ITA No.381 /Nag/2012 dated 20-3-2013, deleted the levy of penalty.) (AY. 2004-05 to 2008-09)
Uday C. Tamhankar v. DCIT (2015) 127 DTR 41 / 174 TTJ 151 (Mum.)(Trib.)

2623 **S.271AAA : Penalty – Search initiated on or after 1st June, 2007 – Undisclosed income – "dumb" document – Surrender of income – Levy of penalty was held to be not justified. [Ss. 132(4), 292C]**
(i) Undisclosed income means "any income represented by any documents" found during the course of search, which are not recorded in the books of account of the assessee. In the instant case, the additions of cash expenses and payments of ₹ 71,90,623 is the result of cash available out of the disclosed cash of ₹ 6.84 crores which was included in the disclosure petition. Further, addition of ₹ 15 lakh on account of alleged cash receipts from Sampoorna Logistics, which was alleged to be reimbursement, it is clear that expenditure recorded in the books of accounts can be held to be undisclosed income of the assessee if the said expenditure is found to be false. It is the Department on whom, onus of proving that expenditure recorded in the books is bogus or false based on documentary evidences found

in the course of search. Here in the present case, no documentary evidences establishing the falsity of claim of transportation charges paid to Sampoorna Logistics was found in the course of search. According to us the said expenditure cannot be held to be undisclosed income of the assessee for the purpose of levying penalty u/s. 271AAA of the Act;

(ii) A charge can be levied on the basis of document only when the document is a speaking one. The document should speak either out of itself or in the company of other material found on investigation and/or in the search. The document should be clear and unambiguous in respect of all the four components of the charge of tax. If it is not so, the document is only a dumb document. No charge can be levied on the basis of a dumb document. A document found during the course of a search must be a speaking one and without any second interpretation, must reflect all the details about the transaction of the assessee in the relevant assessment year. Any gap in the various components for the charge of tax must be filled up by the Assessing Officer through investigations and correlations with other material found either during the course of the search or on investigations. A document was bereft of necessary details about the year of transaction, ownership, nature of transaction, necessary code for deciphering the figures cannot be relied upon;

(iii) Penalty cannot be levied merely on the admission of the assessee and there must be some conclusive evidence before the AO that entry made in the seized documents, represents undisclosed income of the assessee. Where the assessee for one reason or the other agrees or surrenders certain amounts for assessment, the imposition of penalty solely on the basis of the assessee's surrender will not be well-founded. (AY. 2008-09)

SPS Steel & Power Ltd. v. ACIT (2015) 171 TTJ 749 / 122 DTR 248 (Kol.)(Trib.)
Dy. CIT v. Concast Steel & Power Ltd. (2015) 171 TTJ 749 / 122 DTR 248 / (Kol.)(Trib.)

S.271AAA : Penalty – Search initiated on or after 1st June, 2007 – Assessee having surrendered certain income in course of search – Amount was duly disclosed and taxes were paid – Sufficient compliance – Penalty order deserved to be set aside. [S. 132(4)] 2624

If the assessee during the course of search admits certain undisclosed income and pays taxes on the same then penalty cannot be levied in terms of sub-section (1) of this section. In the instant case, the amount of ₹ 4 crore which was surrendered during search has been declared by the assessee in the return and taxes have been paid accordingly. Therefore the assessee is normally entitled for the immunity provided in section 271AAA itself. The assessee has disclosed the manner in which income has been earned. Thus, impugned penalty order deserve to be set aside. (AY. 2010-11)

ACIT v. Munish Kumar Goyal (2015) 152 ITD 453 (Chd.)(Trib.)

S.271AAA : Penalty – Search initiated on or after 1st June, 2007 – Assessee cannot be expected to further substantiate manner of earning of income if no questioning done under section 132(4) – Penalty cannot be levied. [S.132(4)] 2625

Pursuant to search operations the assessee surrendered an amount to tax. The income was assessed on returned income after considering surrendered income and the Assessing Officer imposed penalty under section 271AAA of the Act on the ground

that the assessee had not substantiated the manner in which the income was earned or furnished details of commission or of the transaction or property in respect of which income was earned. The CIT(A) confirmed this. On appeal by the assessee contending that no questions were asked regarding the manner of earning income :
Held, allowing the appeal, that if no question was asked during the statement recorded under section 132(4) of the Act, the assessee could not be expected to further substantiate the manner of earning of income. Since taxes were already paid, penalty could not be levied. (AY. 2009-10, 2010-11)
Sunil Kumar Bansal v. Dy. CIT (2015) 37 ITR 576 / 70 SOT 137 (Chd.)(Trib.)

Section 271B : Failure to get accounts audited.

2626 **S.271B : Penalty – Failure to get accounts audited – Delay in filing audit report – No tangible evidence was produced – Levy of penalty was held to be justified [S. 44AB]**
No tangible evidence or material either in the form of affidavit or otherwise of the person who claimed that he had presented the return of income along with the audit report before the AO at Bharatpur was placed. Change in jurisdiction was not challenged before any authority. Penalty u/s. 271B for delay in filing audit report was sustainable.
Jaimal Ram & Party v. CCIT (2015) 113 DTR 234 (Raj.)(HC)
Raja Ram & Party v. CCIT (2015) 113 DTR 234 (Raj.)(HC)
Shri Raja Ram & Party v. CCIT (2015) 113 DTR 234 (Raj.)(HC)

2627 **S.271B : Penalty – Failure to get accounts audited – Builder – Purchases cannot be included in qualifying amount [S.44AB, Companies Act, 1956, S. 224]**
The assessee-company is in the business as builders and developers, following the project completion method for recognizing and returning income, have no sales during the year. It was observed by the AO that while assessee had filed audit report under the Companies Act, separate report in Form 3CA, as required u/s. 44AB of the Act, had not been filed. As per AO for obtaining and furnishing audit report under 44AB the basis is not only to have the sales, turnover, gross receipt but also purchases, which in the instant case were to the tune of ₹ 280 lakhs resulting increase in WIP. The AO considered few cases related to sales tax where purchases deemed part of turnover. Held as under income tax legislation there is no specific definition to include purchases in turnover unlike under sales tax laws, hence there was, as such, no reason for not complying with the provision of section 44AB, leading to the levy of penalty u/s.271B of the Act. The penalty, even where the provision stands attracted, may lawfully be not levied where the default is not found to be a result of a conscious disregard by the tax payer of his legal obligations or a conduct contumacious, which is clearly not the case in the instant case. (AY. 2005-06)
Esque Finmark (P) Ltd. v. ACIT (2014) 151 ITD 465 / (2015) 169 TTJ 532 (Mum.)(Trib.)

2628 **S.271B : Penalty – Failure to get accounts audited – The requirement in S. 44AB that the tax audit report has to be obtained "before" the specified date has to be interpreted to mean "on or before" the specified date – Even if the audit report is obtained "on" the specified date, there is no default. [S.44AB]**
The assessee, a partnership firm filed its return of income on 30th March, 2009. The tax Audit report was signed on 30th September 2008. The AO held that tax audit report

should have been obtained before the specified date i.e. 30th September, 2008. As the assessee had obtained the tax audit report on 30th September 2008 and not before 30th September, 2008, the AO, levied penalty of ₹ 1,00,000/- u/s. 271B of the IT Act. Against this, assessee-preferred appeal before the CIT(A) who confirmed penalty holding that assessee has committed a default by not getting its accounts audited before the due date. On further appeal by the assessee HELD allowing the appeal:
The term "before" specified date in section 44AB means "on or before" the specified date. Therefore, though audit report is signed on 30th September 2008 and the requirement of law is to be construed as tax audit report required to be obtained on or before 30th September, 2008. Hence, the assessee has obtained tax audit report in time and there is no default u/s. 271B. In P*rem Chand Nathmal Kothari v. Kishanlal Bachharaj Vyas & Ors. dated 5th April, 1975 reported in AIR 1976 Bombay 82* the Bombay High Court, relying on the Chambers Dictionary, held that word 'before' means 'previous to the expiration of'. Therefore, before 30th September, 2008 means before the end of 30th September, 2008. (ITA No. 6199/Del/2013, dated 21-10-2015) (AY. 2008-09)
Chopra Properties v. ACIT (Delhi)(Trib.); www.itatonline.org

S.271B : Penalty – Failure to get accounts audited – At time of filing its e-return – inadvertently filled details of audit u/s. 44AB wrongly as 'No' – No penalty would be leviable. [S. 44AB] 2629
Assessee company, at time of filing of e-return had wrongly answered a question regarding whether it is liable for audit under section 44AB as 'No' and, consequently, did not furnish details related to auditor. The copy of said e-return had duly furnished all details under 'Part A-01' of said return of income. The assessee had inadvertently filled relevant column wrongly as 'No' penalty u/s. 271B would not be leviable. (AY. 2009-10)
Sujata Trading (P.) Ltd. v. ITO (2015) 152 ITD 492 / 118 DTR 372 / 170 TTJ 396 / 44 ITR 584 (Mum.)(Trib.)

Section 271C : Penalty for failure to deduct tax at source.

S.271C : Penalty – Failure to deduct at source – Interest other than interest on securities – Interest paid to partnership firm – Levy of penalty was held to be justified. [S.194A, 273B] 2630
Assessees, who were partners of a firm, had paid interest to firm on overdrawn funds without deducting tax at source. Assessing Officer levied penalty under section 271C. Tribunal deleted penalty holding that belief entertained by assessees that they were not liable to deduct tax at source on interest paid by them to partnership firm could be considered as a reasonable cause as contemplated under section 273B. On appeal of revenue allowing the appeal the Court held that language of section 194A does not leave scope for any ambiguity on liability of a partner to deduct tax on interest paid by him to firm and, therefore, alleged belief of assessee, who admittedly were having services of chartered accountant, could not be considered as a reasonable cause under section 273B and declaration of receipt of income by firm or that it did not have liability to pay tax could be taken as defence in proceedings under section 271C. (AY. 2006-07)
CIT v. Thomas Muthoot (2015) 233 Taxman 557 / 128 DTR 295 (Ker.)(HC)

2631 **S.271C : Penalty – Failure to deduct at source – Gift coupons – *Bona fide* beliefs – Levy of penalty was held to be not justified.**
Assessee, a public sector undertaking, was awarded prestigious safety award. To commemorate event corporation decided to give coupons to employees. Assessee believed that value of gift coupons not to be a payment in lieu of salary or perquisites and, therefore, did not deduct tax at source on same. High Court held that since huge TDS payment was made by assessee from regular salary, there was no reasons as to why it would not pay TDS on such small amount and therefore, assessee's contention that it was under a *bona fide* belief that gift coupons being in nature of mementos were not in nature of payment of salary, was to be accepted and, hence, penalty under section 271(1)(c) was not exigible. (AY. 1996-97)
CIT v. Indian Petrochemicals Corporation Ltd. (2015) 231 Taxman 418 (Guj.)(HC)

2632 **S.271C : Penalty – Failure to deduct at source – Publicity of a brand or logo – *Bona fide* belief – Levy of penalty was held to be not justified. [S.194C, 201(1)]**
As the deductor was under *bona fide* reasonable cause for non deduction of TDS, penalty for non-deduction of TDS cannot be levied. Deductee has already filed income tax returns with loss of income and hence no revenue loss due to non-deduction of TDS, hence based on various Apex Court judgments to examine case it has been set-aside. (AY. 2003-04 to 2007-08)
DCIT v. Sahara India Commercial Corporation Ltd. (2015) 169 TTJ 292 / 67 SOT 318 / 117 DTR 59 (Luck.)(Trib.)

2633 **S.271C : Penalty – Failure to deduct at source – Purchase of satellite rights – Penalty was not leviable. [S.194J, 201(1), 201(IA)]**
Assessee is in the business of broadcasting and telecasting, paid a certain sum towards purchase of satellite rights said payment not being royalty, penalty could not be levied for non-deduction of TDS on same. (AY. 2008-09, 2009-10)
Aishwarya Art Creations P. Ltd. v. ITO (2015) 41 ITR 4 / 70 SOT 644 (Hyd.)(Trib.)

2634 **S.271C : Penalty – Failure to deduct tax at source – Rent – Hiring buses – Not a rent – Penalty cannot be levied. [S.194C, 194-I, 201]**
Payments to contractors for hiring buses is payment for carriage of goods and passengers by any mode of transport other than railways is covered under section 194C and not "rent" for hire of plant and machinery under section 194-I. Penalty cannot be levied. (AY. 2008-09, 2009-10)
Regional Manager, UPSRTC (Ghaziabad Depot) v. Dy. CIT (TDS) (2015) 37 ITR 487 / 68 SOT 316 (URO) (Delhi)(Trib.)

Section 271D : Penalty for failure to comply with the provisions of section 269SS.

2635 **S.271D : Penalty – Acceptance of loan or deposit otherwise than by crossed cheque – Assessment made afresh after remand containing no such satisfaction – Penalty cannot be levied. [S. 269SS]**
For the assessment year 1992-93, the assessment order was passed on the assessee on February 26, 1996, *ex parte*. While framing the assessment, the Assessing Officer observed that the assessee had contravened the provisions of section 269SS of the

Income-tax Act, 1961, and because of this the Assessing Officer was satisfied that penalty proceedings under section 271D of the Act were to be initiated. On appeal, the Commissioner (Appeals) by order dated December 5, 1996, set aside the assessment order with a direction to frame the assessment *de novo* after affording adequate opportunity to the assessee. Meanwhile penalty under section 271D was levied by order dated September 23, 1996, i.e., before the appeal of the assessee against the original assessment order was heard and allowed thereby setting aside the assessment order itself. After remand, the Assessing Officer passed a fresh assessment order but in this assessment order, no satisfaction regarding initiation of penalty proceedings under section 271D of the Act was recorded. The Tribunal as well as the High Court held that the penalty order passed on the basis of the original assessment order could not still survive when that assessment order had been set aside because the satisfaction recorded therein for the purpose of initiation of the penalty proceedings would also not survive. On further appeals, affirming the judgment of High Court the Court held that Original assessment order containing satisfaction set aside in appeal the penalty proceedings do not survive. Though penalty order passed before order setting aside assessment had satisfaction, then assessment made afresh after remand containing no such satisfaction hence penalty cannot be levied. (AY. 1991-92, 1992-93)
CIT v. Jai Laxmi Rice Mills (2015) 379 ITR 521 / (2016) 286 CTR 159/ 237 Taxman 375 (SC)

S.271D : Penalty – Acceptance of loan or deposit otherwise than by crossed cheque – Exceeding prescribed limit – limitation – Explanation was reasonable – Levy of penalty was held to be justified – Limitation to be computed from date of initiation of proceedings by Joint Commissioner. [Ss.269SS, 269T, 271E, 273B, 275(1)(c)] 2636
Dismissing the appeal the Court held that a reading of the reply given by the assessee showed that the amount in cash was taken from the partners of the firm to meet certain urgent business expenditure. The explanation offered was considered by the Assessing Officer and he examined the question whether this was a reasonable cause as provided under section 273B. The Assessing Officer, the Commissioner (Appeals) and the Tribunal held that the explanation was not reasonable. This concurrent finding of fact did not give rise to a substantial question of law. The imposition of penalty was valid. Court also held that the assessment order wherein the Assessing Officer had stated that penalty proceedings were being initiated under sections 271D and 271E was dated November 6, 2007. However, notice was issued by the Joint Commissioner on March 28, 2008. The order levying penalty was passed on July 29, 2008. Since the initiation of the penalty proceedings was not by the Assessing Officer but by the Joint Commissioner, the order levying penalty passed by the Joint Commissioner was within the time prescribed in section 275(1)(c). (AY. 2005-06)
Grihalakshmi Vision v. Addl. CIT (2015) 379 ITR 100 / 128 DTR 182/(2016) 286 CTR 9 (Ker.)(HC)

S.271D : Penalty – Acceptance of loan or deposit otherwise than by crossed cheque – Explanation was not considered – Matter remanded. [S.269SS, 269T, 271D] 2637
Court held that the consistent stand taken by the assessee before the authorities below was that he was deprived of valuable opportunity to defend his case for want of a copy

of the statement given by the financier and the copy of the materials seized from him and without giving him an opportunity to cross-examine the financier. Matter remanded to the Assessing Officer. (AY. 2008-09, 2009-10)
CIT v M. Ramakrishnan (2015) 378 ITR 437 / 63 taxmann.com 321 (Mad.)(HC)

2638 **S.271D : Penalty – Acceptance of loan or deposit otherwise than by crossed cheque – No explanation offered – Not a *bona fide* transaction – Sufficient opportunities given by Assessing Officer – Levy of penalty is held to be valid. [S. 269SS, 269T, 271E, 273B]**

(i) Held, the entire transactions took place in Pondicherry, a major city and there was no reason why the assessee should not have repaid the amount by cheque or demand draft through the bank, assuming he had received the loan in cash. The entire transaction between the assessee, a financier and the financier who was also financing a large number of persons, was apparently to evade tax, which came to light after a survey was conducted and some documents and records were seized. Therefore, it was a case of infraction of law and could not be said to be a mere technical or venial breach. Indeed, it was a clear case of prejudice caused to the Revenue because the nature of transactions conducted by the financier with the assessee and third parties were clearly not in accordance with the provisions of the Act. In one statement the financier clearly stated that he used to conduct money-lending business in the names of third parties. The assessee on his part had repeatedly, for every assessment year, conducted the business in the same manner receiving and repaying the loan amount in cash. Hence, these could not be called bona fide transactions and there was no reasonable cause. The conduct of the parties is important to exercise the discretion under section 273B. As the assessee had not passed the test of reasonable cause showing his *bona fides*, the provisions of section 273B were not attracted, especially since no explanation had been offered in spite of repeated chances therefor having been afforded. On the facts, there was no justification to claim the benefit of section 273B.

(ii) That the Assessing Officer, after giving repeated reasonable opportunities, finding no explanation whatsoever, was unable to exercise his discretion under section 273B and, accordingly, imposed the penalty under sections 271D and 271E. This finding had been affirmed by both the appellate authority and the Tribunal. When the finding of facts had been reached by all the authorities below, taking note of the conduct of the assessee, who was given sufficient opportunities by the Assessing Officer, the prayer for remanding the matter to any of the authorities below could not be accepted.

(iii) That after taking repeated adjournments before the assessing authority, the assessee neither came forward to file any reply nor bothered to take part in the enquiry to explain the genuineness of the transaction. In addition thereto, as the financier had been carrying on money-lending business for 30 years giving and taking back loans in cash, there had been a huge revenue loss to the Exchequer. It was not a case of business exigency. Hence, the contention that there was no revenue loss to the Exchequer was not tenable plea. Therefore, the penalty orders passed by the assessing authority were in consonance with law. (AY. 2008-09 to 2012-13)

P. Muthukaruppan v. JCIT (2015) 375 ITR 243 / 234 Taxman 394 / 127 DTR 140 (Mad.) (HC)

S.271D : Penalty – Acceptance of loan or deposit otherwise than by crossed cheque – Not shown the urgency to avail cash loan – Levy of penalty was held to be justified. [S.269SS] 2639

The assessee availed a loan in cash in excess of ₹ 20,000. The AO levied penalty u/s. 271D for contravening the provision of section 269SS of the Act. The CIT(A) and Tribunal upheld the order of the AO. On an appeal by the assessee the High Court, the High Court confirmed the order of the lower authorities since the assessee was unable to show any urgency to avail the loan in cash. (AY. 1998-99)

Nandhi Dhall Mills v. CIT (2015) 373 ITR 510 / 119 DTR 232 (Mad.)(HC)

S.271D : Penalty – Acceptance of loan or deposit otherwise than by crossed cheque – Business exigency – Reasonable explanation – Levy of penalty was not justified. [S.269SS, 269T, 271E, 273B] 2640

Held, dismissing the appeals, that the assessee had shown the receipt of cash and repayment thereof due to business exigency and that would amount to reasonable cause. The genuineness of the transaction to meet the immediate necessity was accepted by the Tribunal in the quantum appeal and that would amount to reasonable cause in terms of section 273B. The deletion of penalties under section 271D and section 271E was justified. (AY 2006-07)

CIT v. T. Perumal (Indl.) (2015) 370 ITR 313 / 53 taxmann.com 17 (Mad.)(HC)

S.271D : Penalty – Acceptance of loan or deposit otherwise than by crossed cheque – Book adjustment of funds by assessee to its sister concern – Not a loan or deposit – No identification of loanee or depositor – Penalty could not be imposed. [S. 269SS, 269T, 271D, 271E) 2641

Held, allowing the appeal, that except making reference to the relevant provisions of the Act and the allegation contained in the show-cause notices, the Assessing Officer did not indicate the method of payment. It was simply mentioned that everything was done in cash. The very fact that from the same agencies, amounts were said to have been received and repaid, as reflected in the books, disclosed that it was nothing but book adjustment. Making book adjustment of the funds by a firm *vis-a-vis* its sister concern, could not be said to be violation or contravention of section 269SS and section 269T. Levy of penalty was deleted. (AY. 1992-93, 1993-94)

Gururaj Mini Roller Flour Mills v. Addl. CIT (2015) 370 ITR 50 / 118 DTR 218 / 277 CTR 53 / 231 taxman 662 (T&AP)(HC)

S.271D : Penalty – Acceptance of loan or deposit otherwise than by crossed cheque – Cash received from wife for purchase of house property – Levy of penalty was deleted. [S.269SS] 2642

Tribunal held that the cash received from wife for purpose of acquisition of property jointly which was eventually returned to her for the reason that the deal could not materialize. It cannot be said to be a loan or advance covered under section 269SS and therefore penalty under section 271D is not leviable. (AY. 2007-08, 2008-09)

ACIT v. Inderpal Singh Wadhawan (2015) 168 TTJ 561 / 38 ITR 247 (Delhi)(Trib.)

ACIT v. Vardaan Fashion (2015) 168 TTJ 561 / 38 ITR 247 (Delhi)(Trib.)

2643 **S.271D : Penalty – Acceptance of loan or deposit otherwise than by crossed cheque – Cash loans from husband carrying on another proprietorship business on account of business exigencies for making payments to labourers and lenders – No violation of provision of 269SS – penalty was set aside. [S. 269SS]**

Assessee carried on proprietor business. Her husband was also carrying on a proprietor business in different name. Assessee had accepted cash loans from her husband on account of business exigencies for making payments to labourers and lenders. It was also undisputed that transactions in question were genuine and element of black money was totally ruled out. Since these transactions are genuine, element of black money is totally ruled out. The assessee has given an explanation and is based on business exigencies also for payments to labourers and lenders. Under these circumstances, the transactions being genuine and the assessee having offered reasonable explanation justifying these cash transactions, hence, penalty u/s. 271D is not leviable. (AY. 2006-07)

Kusum Dhamani (Smt.) v. Addl. CIT (2015) 152 ITD 481 (Jaipur)(Trib.)

2644 **S.271D : Penalty – Acceptance of loan or deposit otherwise than by crossed cheque – Share application money cannot be termed as loan or deposit for purpose of S. 269SS – Levy of penalty was not justified. [S. 269SS]**

The assessee has received some cash payments which have been initially credited to the current account of various directors and later on transferred to the share application money account. The account of director clearly shows that money has not come only through cash but through cheques also on various dates. Money has been credited to the current accounts. The money has been transferred at the end of the every year to share application account which only shows that intention was very clear that the money contributed by the various directors and their relatives were to be treated as share capital. The applicability of section 27ID has to be seen at the precise moment of receipt even then the money has gone into current account. The money coming into current account also cannot be called loan or deposit. As per Companies (Acceptance and Deposit) Rules, 1975 deposit would not include any amount received from the director or, shareholder of the company, therefore, this amount cannot be termed as loan or deposit for the purpose of section 269SS r/w s. 27ID and therefore, penalty could not have been imposed. There is no default because the share application money or deposit in the current account cannot be included in the definition of deposit. The Assessee Company was constructing a hotel for which bank loans were not sanctioned and, therefore, directors had to contribute the money towards construction of the hotel. The payment was generally required for labour payments and other cash items. Money coming into current account cannot be called loan or deposit, if money is accepted as share application money, same cannot be construed as loan or deposit for purpose of section 269SS. (AY.2003-04 & 2005-06 to 2007-08)

Eqbal Inn & Hotels Ltd. v. Jt. CIT (2014) 161 TTJ 359 / (2015) 152 ITD 455 (Chd.)(Trib.)

Section 271E : Penalty for failure to comply with the provisions of section 269T.

S.271E : Penalty – Repayment of loan or deposit otherwise than by account payee cheque or draft – Statement of creditor that he wanted payment in cash – Reasonable explanation – Penalty could not be imposed. [S.269SS, 269T, 271D] 2645
Court held that the Tribunal, after having duly appreciated the difficulty faced by the borrower in the hands of the financier and his compulsion to accept the terms imposed by the money lender, accepted the explanation and deleted the penalty. This was justified. (AY. 2008-09, 2009-10)
CIT v. M. Ramakrishnan (2015) 378 ITR 437 / 63 taxmann.com 321 (Mad.)(HC)

S.271E : Penalty – Repayment of loans or deposits otherwise than by account payee cheque or draft – Repayment by cheque mentioned as cash payment due to clerical mistake – No violation of section 269T – Order deleting penalty justified. [S. 269T] 2646
The assessee availed of loan from two individuals to purchase land and repaid the loan. The Director of Income-tax (Exemptions) imposed penalty under section 271E of the Income-tax Act, 1961, on the ground that the assessee had repaid the loan in cash instead of account payee cheque and violated the provisions of section 269T of the Act. The assessee contended that the loan was actually repaid by account payee cheque but due to clerical mistake it was wrongly shown as cash payment in the audited books of account. The Commissioner (Appeals) deleted the penalty. On appeal by the Department: Held, dismissing the appeal, that the bank statements had established that the cheques in question was credited to the respective bank accounts of the two individuals from whom the assessee had taken the loan and admittedly, the repayments through cheques were wrongly mentioned in the books of account as cash payments as a result of clerical mistake. Hence, there was no violation of section 269T of the Act, attracting the penal provision of section 271E. There was no infirmity in the order of the Commissioner (Appeals) in deleting the penalty. (AY. 2008-09)
DIT(E) v. Social Action for Rural Education, Health and Loving Life of Abundance Society (2015) 38 ITR 784 (Hyd.)(Trib.)

Section 271FA : Penalty for failure to furnish statement of financial transaction or reportable account

S.271FA : Penalty – Annual information return – Failure to furnish – Appeal is maintainable before Tribunal and CIT(A). [S.253] 2647
Assessee had preferred appeal against order of DIT passed u/s. 271FA before Tribunal. The Revenue had raised preliminary objection on ground that appeal against an order passed under section 271FA can only be filed before CIT(A) and the Tribunal had no jurisdiction to entertain same. The Tribunal held, as per clauses (d) and (e) of section 253(1), if AO had passed an order with approval of the Principal commissioner or Commissioner or pursuant to directions of the Dispute Resolution Panel, which comprises of Officers in the rank of Commissioner, same can only be challenged before Tribunal. Though there was no specific reference of order passed under section 271FA of the Act by the Director of Income-tax in section 253(1) of the Act for the purpose of

filing an appeal against the said order, but an analogy drawn from reading of section 253(1) of the Act is that the order passed by CIT or an Officer who is equal in rank can only be challenged before the Tribunal, which is higher in rank. The Tribunal further pointed out that, as per definition of appellate jurisdiction, appeals are to be filed before a forum which is higher in rank than forum which passed the impugned order. The order under section 271FA was passed by DIT who is equivalent in rank with CIT(A). Therefore, order of DIT cannot be challenged or assailed by filing an appeal before an Officer i.e. CIT(A), who is equivalent in rank with DIT. Hence, Appeal could only be filed before a higher forum than forum whose order was to be challenged and higher forum was only ITAT and before it order of the Director of Income-tax could only be challenged by filing an appeal. Hence, Appeal by assessee had been rightly filed before the Tribunal and the Tribunal was competent to adjudicate appeal on merit, hence Revenue's preliminary objection dismissed. (AY. 2012-13)
Raebareilly District Co-operative Bank Ltd. v. DIT (2015) 114 DTR 321 / 38 ITR 27 / 168 TTJ 274 / 54 taxmann.com 382 (Luck.)(Trib.)

Section 271G : Penalty for failure to furnish information or document under section 92D.

2648 **S.271G : Penalty – Documents – International transaction – Transfer pricing – No mandate or affirmative direction in the order of TPO that penalty shall be imposed by AO – Levy of penalty was not justified**
In the absence of mandate or affirmative direction that penalty shall be imposed by the Assessing Officer for failure of particulars to be furnished within a stipulated period of issuing notice. Penalty is not sustainable. (AY. 2005-06)
CIT v. Bumi Hiway (I) (P) Ltd. (2015) 273 CTR 11 (Delhi)(HC)

2649 **S.271G : Penalty – Documents – International transaction – Transfer pricing. [S. 92D]**
Assessing Officer imposed penalty on assessee on ground that assessee had not filed Rule 10D documentation as desired by Transfer Pricing Officer within prescribed time-limit. CIT(A) and Tribunal specifically recorded a finding that documentation was submitted by assessee within extended period of 30 days, i.e., within 60 days, and hence, no penalty was leviable. On appeal by revenue the High Court affirmed the order of Tribunal.
CIT v. Johnson Matthey India (P.) Ltd. (2016) 380 ITR 43 / (2015) 229 Taxman 453 / 127 DTR 257 (Delhi)(HC)

Section 272A : Penalty for failure to answer questions, sign statements, furnish information, returns or statements, allow inspections, etc.

2650 **S.272A : Penalty – Failure to answer questions – Sign statements – Furnish information – Where assessee, a State Government undertaking, did not furnish half yearly return in Form No. 27EC well in time, it was not a mere technical mistake and, thus, impugned penalty order passed by authorities was to be upheld. [S. 206C(5A)]**
The assessee was a State of UP undertaking and was under obligation as per section 206C(5A), read with Rules 37E of the Income-Tax Rules, 1962 to prepare and furnish

Form No. 27EC for the period 1-4-1994 to 30-9-1994 and submit the half yearly report. The assessee had not filed half yearly return well in time and there was an extraordinary delay, so the Assessing Officer levied the penalty under section 272A(2)(c) which was sustained not only by the First Appellate Authority but also by the Tribunal.
On appeal:
It is the mandatory provision to furnish half yearly return in all the cases. The returns were furnished on 12-6-1996. It is not a procedural or technical mistake. The D.D.O. is responsible for furnishing the return, so the plea taken by the assessee, that it was supposed to be furnished by the Headquarters cannot be accepted. It is the duty of the D.D.O. to furnish the return. It shows gross negligence on the part of the D.D.O., who has not furnished the return in Form No. 27EC well in time. It is not a technical mistake. The liability cannot be shifted on the Chartered Accountant or Headquarters. Such plea is not sufficient to make out the reasonable cause. When it is so, there is no reason to interfere with the impugned order passed by the Tribunal. In the result, appeal filed by the assessee is dismissed.
Divisional Logging Manager v. CIT (2015) 229 Taxman 432 (All.)(HC)

S.272A : Penalty – Delay in filing TDS statements – Matter was to be remanded back for disposal afresh. [S. 200(3), Rule 31] 2651

Assessee was Zonal Offices of Greater Hyderabad Municipal Corporation ('GHMC'). AO found that there was a failure on part of assessee to file quarterly returns of TDS in Forms 24Q and 26Q for year under consideration within stipulated time as required by sub-section (3) of section 200, read with Rule 31A(2) of Income-tax Rules, 1962. He passed a penalty order u/s. 272A(2)(k). Assessee's plea was that in view of insertion of second proviso to section 272A(2)(k) w.e.f. 1-7-2012, penalty order was not sustainable. Another objection raised by assessee was that there was a delay on part of concerned deductees to furnish their PAN details and same constituted a reasonable cause which prevented it from filing relevant TDS returns within stipulated time. The ITAT held that as first plea taken by assessee was concerned, since relevant TDS returns were to be delivered by assessee before 1-7-2012, assessee's reliance on second proviso to section 272A(2)(k) was misplaced. Objection relating to delay in filing PAN, in interest of justice, matter was to be remanded back for disposal afresh. (AY. 2011-12)
ACIT v. Greater Hyderabad Municipal Corporation (2015) 155 ITD 865 (Hyd.)(Trib.)

S.272A : Penalty – Deduction of tax at source – Delay in filing return of tax deduction at source – Assessee not aware that return to be filed at branch level –Reasonable cause – No loss of Revenue on account of late filing of return – Penalty to be deleted. [S. 272A(2)(K), 273B] 2652

The person responsible to file quarterly tax deduction at source return for the assessee failed to file it by due date. The Assessing Officer levied penalty under section 272A(2)(k) of the Income-tax Act, 1961. The Commissioner (Appeals) confirmed this. On appeal: Held, allowing the appeal, that according to section 273B of the Act, if reasonable cause for the failure to file the return of tax deducted at source was proved, penalty was not imposable. In the assessee's case, the assessee explained that it was not aware of the fact that a return was to be filed at the branch level. Thus there was reasonable cause for failure to comply with the requirement. The tax was deducted on time and paid to the Department and the necessary return was also filed. Therefore, no loss of revenue had

occurred on account of late filing of the return. Thus, the penalty was merely technical in nature and since levy of penalty was not mandatory, depending upon the facts of the case, the penalty was to be deleted. (AY. 2011-12)
State Bank of Bikaner and Jaipur v. Add. CIT (2015) 38 ITR 535 / 169 TTJ 29 (Chd.)(Trib.)

Section 272B : Penalty for failure to comply with the provisions of section 139A.

2653 **S.272B : Penalty – Permanent account number – Reasonable cause – Levy of penalty was not justified. [S.139A]**
Failure to quote the permanent account number due to ignorance and not with any *mala fide* intention. Levy of penalty was deleted. (AY. 2006-07)
Halimaben Jamalbhai Momin v. ACIT (2015) 155 ITD 367 / 39 ITR 556 (Ahd.)(Trib.)

Section 273 : False estimate of, or failure to pay, advance tax.

2654 **S.273 : Penalty – Advance tax – False estimate – Failure to pay – The assessee's plea of ignorance could have been accepted, if petitioner would offered an explanation before Assessing Officer, since it was not so done, orders passed by Assessing Officer or revisional authority suffered from no error. [S.80J(3)]**
Assessing Officer observed that assessee was partner of a firm entitled to one half shares. Firm filed return but assessee did not file his return. Thus, Assessing Officer issued notice to assessee for imposing penalty. Assessee did not attend nor submitted reply-Assessing Officer held that since assessee had without reasonable cause failed to furnish his return within time, penalty should be imposed. In writ, petitioner submitted that, as in assessment year 1979-80, petitioner was not liable to file return with respect to income, in accordance with section 80J(3) and imposition of penalty was not warranted. Though section 80J(3) was introduced by Finance Act No. 2 of 1980 with retrospective effect from 1-4-1972, petitioner was of a *bona fide* belief that in view of pendency of challenge to *vires* of section 80J before High Court, he was not required to file a return and, thus, penalty and interest might be waived. Dismissing the petition the Court held that the assessee's plea of ignorance could have been accepted, if petitioner would offered an explanation before Assessing Officer, since it was not so done, orders passed by Assessing Officer or revisional authority suffered from no error. (AY. 1979-80)
Lajpat Rai (HUF) v. CIT (2015) 231 Taxman 656 (P&H)(HC)

Section 275 : Bar of limitation for imposing penalties.

2655 **S.275 : Penalty – Bar of limitation – Initiation of penalty proceedings by Joint CIT was valid and within limitation period. [Ss.271D, 271E]**
Dismissing appeal of the assessee the Court held that the competent authority to levy penalty is Jt. CIT and only then they can initiate proceedings for levy of penalty. Statement in the assessment order that the proceedings u/s. 271D and 271E are initiated is inconsequential. If that be so, initiation of penalty proceedings is the issuance of notice issued by the Jt. CIT to the assessee to which they have filed their reply. Order levying penalty passed by the JT. CIT was within the time prescribed in section 275(1)(c). (AY. 2005-06)
Grihlaxmi Vision v. ACIT (2015) 379 ITR 100 /128 DTR 182 / (2016) 286 CTR 9 (Ker.)(HC)

S.275 : Penalty – Bar of limitation – Penalty proceedings initiated on issues unrelated to assessment of income (such as for section 269SS/269T & TDS defaults), time limit runs from date of initiation of penalty proceedings and not from date of CIT(A)'s order. [Ss. 269T, 271E, 275(1)(c)] 2656

The AO initiated penalty proceedings as per assessment order passed u/s. 143(3) dated 28-12-2007. The AO passed a penalty order u/s. 271E dated 20-3-2012. The AO held that the time limit for passing of the penalty order had to be reckoned from the date of the passing of the order of the CIT(A) in the quantum appeal. The assessee claimed that the order of the CIT(A) was on a totally different issue and had no bearing on the issue on which penalty u/s. 271E was imposed. The CIT(A) accepted the assessee's claim and held that the penalty order should have been passed within the financial year itself in which the penalty proceedings were initiated or within six months from the end of the month in which the penalty proceedings were initiated, whichever period expires later, and in the present case the penalty order could have been passed on or before 30-6-2008. He held that the penalty order passed u/s. 271E on 20-3-2012 is barred by limitation and deserves to be quashed on this ground alone. On appeal by the department, the Tribunal dismissed the appeal. On further appeal by the department to the High Court HELD dismissing the appeal:

(i) In terms of section 275(1)(c), there are two distinct periods of limitation for passing a penalty order, and one that expires later will apply. One is the end of the financial year in which the quantum proceedings are completed in the first instance. In the present case, at the level of the AO, the quantum proceedings was completed on 28th December 2007. Going by this date, the penalty order could not have been passed later than 31st March 2008. The second possible date is expiry of six months from the month in which the penalty proceedings were initiated. With the AO having initiated the penalty proceedings in December 2007, the last date by which the penalty order could have been passed is 30th June 2008. The later of the two dates is 30th June 2008.

(ii) Considering that the subject matter of the quantum proceedings was the non-compliance with Section 269T of the Act, there was no need for the appeal against the said order in the quantum proceedings to be disposed of before the penalty proceedings could be initiated. In other words, the initiation of penalty proceedings did not hinge on the completion of the appellate quantum proceedings. This position has been made explicit in the decision in *CIT v. Worldwide Township Projects Limited (2014) 269 CTR 444* in which the Court concurred with the view expressed in Commissioner of *Income-Tax v. Hissaria Bros. (2007) 291 ITR 244 (Raj).* (AY. 2005-06)

PCIT v. JKD Capital & Finlease Ltd. (2015) 378 ITR 614 /(2016) 136 DTR 309 (Delhi)(HC)

Editorial: Refer, ITO v. JKD Capital & Finlease Ltd. (2015) 43 ITR 683 (Delhi)(Trib.)

S.275 : Penalty – Bar of limitation – Penalty – Concealment – Period of limitation within six months from the end of the financial year in which the order is received by the Commissioner – Challenge by assessee to validity of penalty order entertained in Dept's appeal despite lack of Cross-objection or cross-appeal by assessee – Penalty order was held to be barred by limitation. [S.271(1)(c)] 2657

On a combined reading of section 275(1)(a) along with its proviso it becomes clear that main section 275(1)(a) talks of a period of six months from the date on which

the order is received by Commissioner and main section also talks of orders passed by Commissioner appeals as well as by Tribunal talk whereas the proviso which is applicable from 1-6-2003 talks about orders passed by Commissioner Appeals only and here, the period of limitation for passing penalty order is one year from the date Commissioner receives Tribunal order. We find that in the present case quantum proceedings travelled up to Hon'ble ITAT and therefore, main section 275(1)(a) will be applicable wherein the period of limitation has been mentioned as six months from the end of financial year in which order is received by Commissioner. The proviso to section 275(1)(a) will not be applicable. Proviso talks about orders passed by Commissioner (Appeals) only. Admittedly, the quantum order in the present case was received on or before 11-5-2007 as noted in reply to RTI application and therefore, penalty order should have been passed on or before 30th Nov., 2007 whereas, the penalty order has been passed on 10-1-2008 which is beyond the limitation period of six months. In view of above, as the penalty order has not been passed within six months from the end of month in which order was received by Commissioner, the penalty order passed by AO is bad in law and is therefore, quashed. (AY. 2001-02)
ITO v. Pandit Vijay Kant Sharma (Delhi) (Trib.); www.itatonline.org

Section 276C : Wilful attempt to evade tax, etc.

2658 **S.276C : Offences and prosecutions – False verification in return – Conviction and sentence confirmed – Liberty to Department to consider application for compounding offence. [S.277]**
The Trial Court convicted the assessee under sections 276C and 277 of Income-tax Act and sentenced him accordingly. The conviction and sentence of the Trial Court were confirmed by the Appellate Court. On a criminal revision petition :
Held, dismissing the petition:
(i) That the complaint showed that it was only after getting proper sanction that the complaint had been lodged against the assessee and was taken cognizance of by the Trial Court.
(ii) That the Court left it open to the Department to consider the application of the assessee for compounding the offence if made by the assessee within a period of ninety days. The Court gave a further direction that the Court's revision order shall be given effect to by the Income-tax Officer, after a finality was reached in the assessee's Writ Petition pending before the court. (AY.1996-97, 1997-98)
B. Gopi. v. G. Thiyagarajan, ITO (2015) 370 ITR 353 (Mad.)(HC)

Section 276D : Failure to produce accounts and documents.

2659 **S.276D : Offences and prosecutions – Failure to produce accounts or documents – Accounts had been submitted when criminal complaint was issued – Sanction for prosecution was held to be not valid [S.279, Criminal Procedure Code, 1973, S. 482]**
A criminal complaint was issued under section 276D of the Income-tax Act, 1961, for the assessment year 2006-07 and on February 10, 2015 the authorisation was granted under section 279(1). On a petition under section 482 of the Criminal Procedure Code, 1973, quash the sanction.

Held, that it was submitted by the petitioner that all details of his bank account had been furnished to the Income-tax Department in a letter dated February 11, 2015. It was an admitted position that the complaint was filed on February 12, 2015, when the letter dated February 11, 2015, was admittedly received by the Department. The factum of receipt of the letter was not mentioned in the complaint. The complaint was not valid and was liable to be quashed. (AY. 2006-07, 2007-08)
Shravan Gupta v. ACIT (2015) 378 ITR 95 / 277 CTR 360 / 58 taxmann.com 114 (Delhi) (HC)

Section 277A : Falsification of books of account or document, etc.

S.277A : Offences and prosecutions – Falsification of books – False TDS certificate –Tax practitioner – Refund on the basis of TDS certificates – Respondent had no role in preparing TDS certificates – ITO could not initiate criminal proceedings for commission of offences punishable under IPC. [IPC, S. 378 (4), 418, 465, 471] 2660
Respondent-accused, an advocate, was a tax practitioner. Main assessee, a Railway contractor, had engaged him for purpose of submission of his returns and supplied him requisite documents, including TDS certificates. Respondent filed return on behalf of main assessee and claimed a refund on basis of TDS certificates. Complainant – ITO opined that TDS certificates were not genuine and refund was wrongly claimed. He thus filed complaint against respondent-accused for commission of offences punishable under sections 418, 465, 468 and 471 of IPC. Trial Court dismissed the said complaint. On appeal to High Court dismissing the appeal of revenue the Court held that since complainant ITO had miserably failed to point out that respondent was liable for preparing false documents which were rather supplied to him by main assessee, Trial Court was justified in dismissing complaint filed against him. (AY. 1988-89)
T.D. Gandhi, ITO v. Sudesh Sharma (2015) 230 Taxman 572 (P&H)(HC)

Section 282 : Service of notice generally.

S.282 : Service of notice – The postal authorities are the agent of the recipient. There is a presumption that handing over notice to the postal department means that it has been served on the assessee. [S. 143 (2), 147, 148, CPC, Order V Rule 19A] 2661
The provisions of section 282 of the Act with regard to the service of notice have been duly complied with by the Revenue. Since the notice u/s. 143(2) of the Act has not been received back unserved within thirty days of its issuance, there would be presumption under the law that notice has been duly served upon the assessee. The notice was under transmission by handing over to the postal authority who acted as an agent of the recipient. The speed post notice has not been returned mentioning the address as wrong or undelivered which is a standard practice of the postal Department. Assessee's AR in the initial hearings never indicated that 148 notice was not properly served. The lame objection is taken at the fag end of assessment, which clearly smack of a design. (AY. 2003-04)
ITO v. Shubhashri Panicker (Jaipur)(Trib.); www.itatonline.org

Section 292B : Return of income, etc., not to be invalid on certain grounds.

2662 **S.292B : Return of income not to be invalid on certain grounds Assessment – Amalgamation of companies – Effect – Amalgamating company ceases to exist – Order of assessment on amalgamating company – Not valid – Not a procedural irregularity to be cured by section 292B. [S. 159, 170, 176]**

Section 170(2) of the Income-tax Act, 1961, makes it clear that in the case of amalgamation, the assessment must be made on the successor (i.e., the amalgamated company). Section 176 which contains provisions pertaining to a discontinuation of business, does not apply to a case of amalgamation. The language of section 159 evidently only applies to natural persons and cannot be extended through a legal fiction, to the dissolution of companies. Once it is found that assessment is framed in the name of non-existing entity it does not remain a procedural irregularity of the nature which could be cured by invoking the provisions of section 292B. Participation by the amalgamated company in assessment proceedings would not cure the defect because "there can be no estoppel against law". Held, dismissing the appeals, that the orders of assessment were invalid. (AY. 2003-04 to 2008-09)

CIT v. Dimension Apparels P. Ltd. (2014) 52 taxmann.com 356 / (2015) 370 ITR 288 (Delhi)(HC)

Section 292BB : Notice deemed to be valid in certain circumstances.

2663 **S.292BB : Notice of demand to be valid in certain circumstances – Notice – After expiry of prescribed limitation period – Assessment was held to be bad in law. [S.143(2)]**

For relevant year assessee filed its return declaring certain income. AO having issued notice under section 143(2), made certain additions to assessee's taxable income. On appeal, assessee raised an objection that notice under section 143(2) had been issued after expiry of prescribed period of twelve months. CIT(A) held that objections raised by assessee was not tenable as per provisions of section 292BB. Tribunal, however, set aside impugned addition holding that section 292BB was not applicable to assessee's case. Since provision of section 292BB was inserted by Finance Act, 2008, with effect from 1-4-2008, it was not applicable to assessment year in question, therefore, impugned order of Tribunal was to be upheld. (AY. 2007-08)

CIT v. Mohammad Khaleeq Commercial Taxes (2015) 229 Taxman 566 (All.)(HC)

2664 **S.292BB : Notice of demand to be valid in certain circumstances – Reassessment – Dead person – Issue of notice in the name of the deceased person renders the assessment order null and void even if the order is passed in the name of the legal heir. The fact that the legal heir attended the proceedings does not make it a curable defect u/s. 292BB. [S. 69, 143(2), 147, 148]**

The AO recorded the reasons for issuing the notice u/s. 148 of the Act in the name of the deceased assessee and got the approval of the Addl. CIT also in the same name. The AO issued notice dated 31-3-2010 u/s. 148 of the Act in the name of the deceased assessee and also mentioned in the body of the assessment order that the notice u/s. 148

of the Act was issued and served upon the assessee by post within the statutory time period prescribed. Though the legal heir of the deceased assessee informed the AO that the assessee had expired and the return in the name of deceased assessee was filed by the legal heir, the AO did not issue any notice u/s. 148 of the Act or 143(2) of the Act in the name of the legal heir. Therefore, the assessment framed by the AO on the basis of the notice issued u/s. 148 of the Act in the name of the deceased assessee was invalid and void *ab initio*. (AY. 2003-04)
ITO v. Late Som Nath Malhotra (Delhi)(Trib.); www.itatonline.org

Section 292C : Presumption as to assets, books of account, etc.

S.292C : Presumption as to assets, books of account – On money – Loose papers – The presumption that documents found during search correctly reflect the facts is a 'discretionary presumption' & not a 'compulsory presumption' – The presumption does not apply if the documents are inchoate – Primary requirement of satisfaction of section 37(1) is not met by assessee – No evidence of suppliers of scrap and their address – Addition was held to be justified. [Ss. 69C, 132, 158B(b), 158BC] 2665

(i) The reliance is placed on section 292C of the Act which was introduced by the Finance Act, 2007 with retrospective effect from 1st October 1975 by the appellant to submit that the documents found during the course of search are presumed to correctly reflect the facts. It is on the basis of the documents found during the course of search that the Assessing Officer had classified them into three different categories indicating the alleged heads of expenditure. This evidence is submitted in view of the retrospective amendment of the Act by section 292C of the Act be accepted and the onus to establish that the expenditure referred to in documents is not correct is on the Revenue.

(ii) In the present facts, we find that the documents found during the course of the search are inchoate. It does not indicate the person to whom the payment has been made, the address of the recipient, the person by whom the payment is made and the documents itself indicates that it is prepared for either seeking of funds or reimbursement of funds. Therefore even if the presumption is to be applied and the documents are accepted as true, it would not lead to the conclusion that payments have been made in cash so as to claim the expenditure. Thus no purpose would be served in remanding the issue to the Tribunal. Further Section 292 of the Act provides that where any documents are found in possession or control of any person in the course of search under section 132 of the Act, then it may be presumed in any proceedings under this Act that the contents of such documents are true and correct. It will be noted that the section uses the word 'may presume' and not 'shall presume' or 'conclusively presume'. The words 'may presume' are in the nature of discretionary presumption different from a compulsory presumption. Therefore this presumption has to be invoked by the authorities passing an order under the Act particularly when the invocation of such presumption is discretionary on the authorities. During the course of the assessment proceedings, the assessee sought to explain the fact that these expenses on which the deduction is claimed had in fact been incurred. This was in response to the show cause

notice issued to the appellant. Thereafter Explanation offered by the appellant was not found satisfactory on the basis of the evidence available before the authorities and the Tribunal. In this view of the matter, the amendment to Section 292C of the Act even though with retrospective effect would not bring about any material change in the conclusion arrived at upon the existing facts. (BP. 1-4-1996 to 12-9-1996)

Harish Textile Engineers Ltd. v. DCIT (2015) 379 ITR 160 / 128 DTR 145 / (2016) 236 Taxman 420 (Bom.)(HC)

Section 293 : Bar of suits in civil courts.

2666 **S.293 : Bar of suits in civil Courts – Since there was no allegation of fraud against department, jurisdiction of civil Court to entertain suit against Income-tax department was barred.**

Respondent deposited certain amount with a firm. Said firm did not pay income tax dues and, therefore, its accounts were attached and money in those accounts was appropriated towards arrears of income-tax. Respondent filed civil suit against department for recovery of amount deposited by him with firm. He also alleged that he was induced by a fraud to deposit said amounts. The department opposed the suit on the ground of lack of jurisdiction of the civil Court. The Trial Court as well as the first appellate court held that jurisdiction of the civil Court was not barred as money was received by the defaulter firm by playing a fraud. On Revenue's appeal before the High Court: Allowing the appeal the Court held that; in terms of section 293 a civil court is prohibited from entertaining a suit to set aside or modify any order or proceedings initiated under Act and exception would be available only where order passed or proceedings initiated are vitiated by fraud and then also if fraudulent act is attributed to an officer exercising power under Act. Since there was no allegation of fraud against department, jurisdiction of civil Court to entertain suit against Income-tax department was barred under section 293. Consequently, the suit filed by plaintiff/respondent was not maintainable against the Income-tax department.

CIT v. Nachhattar Singh (2015) 234 Taxman 390 (P&H)(HC)

Section 295 : Power to make rules.

2667 **S.295 : Power to make rules – Higher depreciation – *Vires* of Notification No. 10 of 2009 dt. 19-1-2009 – Constitutionally valid. [Constitution of India, Art. 14]**

If the clause of higher depreciation @ 50% on the acquisition of new commercial vehicles was extended by Government of India *vide* its Notification No. 37 of 2009 dated 21-4-2009 as well as Notification No. 10 of 2009 dated 19-1-2009, for or specific period of time, the same should not be viewed from a partisan angle or violative of the right of the assessee under Article 14 of the Constitution as the law related to economic activities should command greater value than the civil law. (AY. 2010-11)

R. Surendran v. UOI (2014) 369 ITR 536 / (2015) 274 CTR 43 / 230 Taxman 590 (Ker.) (HC)

Gift-tax Act, 1958

S.2(xxii) : Property – Share and membership in stock exchange is not an asset – Transfer of said share is not liable to Gift-tax – Tribunal adopting composite value of share as well as ticket for purpose of Gift-tax was held to be not justified 2668

Assessee, for the assessment year 1992-93, declared a gift of ₹ 2,85,504. This pertained to the gift of one share of the Delhi Stock Exchange Ltd. by the assessee to his son. The Assessing Officer was of the view that the donee, as a result of the gift, acquired the right to enter into the trading ring on the floor of the stock exchange as a broker. According to the Assessing Officer, the composite value of the gift of the share comprised both the share itself and the right to enter into the trading ring as a member of the stock exchange Thus, he worked out the value of the gift at ₹ 40 lakhs. This was confirmed by the Commissioner (Appeals) and the Special Bench of the Tribunal. On a reference :

Held, that the membership of the Delhi Stock Exchange was not an asset of the assessee and transfer thereof was not exigible to Gift-tax. Thus, the Tribunal was not justified in adopting the composite value of the share as well as the ticket for the purpose of Gift-tax. (AY. 1992-93)

Jagan Nath Sayal (Deceased) v. CGT (2015) 376 ITR 395 (Delhi)(HC)

S.4 : Deemed gift – Firm – Dissolution – Family settlement – Accrual of property to partner, as a result of partition or dissolution of a firm cannot be treated as a gift [S.2(xii)] 2669

The assessee, his brother and their mother jointly owned a building. In addition, two brothers also held an open land in common. Further they constituted partnership and said properties were made asset of firm. Subsequently, the firm was dissolved. Accordingly, building was allotted towards share of the mother, open land to one of the sons and the assessee was allotted some liquid assets. He showed a value of building at ₹ 6.21 lakh in his returns.

The AO took view a that a transaction of gift had taken place from the assessee to his mother to extent of his 1/3rd share in house. Therefore, he assessed value of house at ₹ 20.28 lakh through method of capitalization.

The CIT(A) as well as the Tribunal upheld order of the AO. On appeal to High Court:

A firm is not a recognised legal personality and no partner can hold any item of the assets, exclusively for himself. To put it in positive terms, each partner can be said to have held the entire assets, but to the extent of his share. Here again, the actual entitlement of the partner comes to be translated if only the dissolution takes place and the item of property is allotted to his share. The occasion for the member of a joint family or a co-owner or a partner to make a gift would arise only after his share is determined in the process of partition or dissolution, as the case may be. What has accrued as a result of partition or dissolution does not amount to any transfer at all. The Assessing Authority proposed to treat the accrual of the property to the mother of the applicant, as a result of partition or dissolution of firm as a gift. This is contrary to the unequivocal law, laid down by the Supreme Court in *Jagatram Ahuja v. CGT (2000) 246 ITR 609(SC), CIT v. Keshavlal Lallubhai Patel (1965) 55 ITR 637 (SC))*

Rajkumar v. CGT (2015) 228 Taxman 338 (Mag.) / 122 DTR 411 (AP)(HC)

Interest-tax Act, 1974

2670 **S.2(5) : Chargeable interest – RBI permitting financial institutions to recover amount payable by way of interest-tax from customers – Such amount not part of interest on loans and advances – Excludible from chargeable interest. [S. 2(7), 5, 6]**
Court held that recovery of amount payable by way of interest-tax from customers, such amount not part of interest on loans and advances hence excludible from chargeable interest. [AY. 1995-96, 1996-97]
CIT v. State Bank of India (2015) 378 ITR 632 (Guj.)(HC)

2671 **S.2(7) : Interest – Discounted bills of exchange – Right to charge overdue interest on discounted Bills of Exchange is not "interest" as it does not arise on account of delay in repayment of any loan or advance – The right arises on account of default in the payment of amounts due under a discounted bill of exchange. [S.4]**
Section 2(7) itself makes a distinction between loans and advances made in India and discount on bills of exchange drawn or made in India. It is obvious that if discounted bills of exchange were also to be treated as loans and advances made in India there would be no need to extend the definition of "interest" to include discount on bills of exchange. Indeed, this matter is no longer res integra. The Karnataka High Court's view is directly contrary to the view of this Court in *CIT v. Sahara India Savings & Investment Corpn. Ltd., (2009) 17 SCC 43,* and, therefore, cannot be countenanced. "Loans and advances" has been held to be different from "discounts" and the legislature has kept in mind the difference between the two. It is clear therefore that the right to charge for overdue interest by the assessee banks did not arise on account of any delay in repayment of any loan or advance made by the said banks. That right arose on account of default in the payment of amounts due under a discounted bill of exchange.
State Bank of Patiala v. CIT (2015) 281 CTR 381/ 127 DTR 369/(2016) 383 ITR 244 /237 Taxman 380 (SC)

2672 **S.2(7) : Charge of tax – Finance agreement – Bank is liable to pay interest-tax on interest component of amount paid by lessee**
Allowing the appeal of Revenue the Court held that on facts, Agreement was a finance agreement hence the Bank is liable to pay interest-tax on interest component of amount paid by lessee. (AY. 1996-97)
CIT v. Axis Bank Ltd. (2015) 377 ITR 293 (Guj.)(HC)

2673 **S.2(7) : Interest – Hire charges received under hire purchase agreement – Not chargeable to tax**
Allowing the appeal the Court held that Assets under hire purchase shown as current assets of assessee. Assessee is owner nothing to show that assessee lent money to hirer for purchasing vehicle. Nothing to show that vehicle originally belonged to assessee and assessee in consideration of hirer promising to pay price in instalments delivered possession thereof to hirer. Hire charges received under hire purchase agreement is not chargeable to tax.
Rani Leasing and Finance Ltd. v. CIT (2015) 377 ITR 220 (Cal.)(HC)

S.13 : Penalty – Concealment – chargeable interest – *Bona fide* belief that interest under Banks Bill Re-discounting Scheme not assessable under Interest-tax Act – Penalty could not be imposed. Difference between section 13 of the Interest-tax Act and section 271(1)(c) of the Income-tax Act. [S.271(1)(c)] 2674

Section 13 of the Interest-tax Act, 1974, stipulates that penalty can be imposed when an assessee has furnished inaccurate particulars of interest or concealed particulars of chargeable interest. The section does not use the word "deliberately", "wilful" or "wilfully". However, the section does not have any Explanation as in the case of section 271(1)(c) of the Income-tax Act, 1961. To this extent the two provisions are not in *pari materia.* The net effect is that in the absence of an Explanation the onus will not shift to the assessee. When two legal interpretations are plausible and there is an honest and *bona fide* difference of opinion, penalty for concealment or furnishing of inaccurate particulars, should not and cannot be imposed. If the view taken by the assessee requires consideration and is reasonably arguable, he should not be penalised for taking the position. Taxing statutes are complex and there can be a *bona fide* difference of opinion on legal interpretation and understanding of a provision. (AY 1992-93)

CIT v. Oriental Insurance Co. Ltd. (2014) 110 DTR 326 / (2015) 372 ITR 100 (Delhi)(HC)

Editorial : Order in Asst. CIT v. Oriental Insurance Co. Ltd. (2014) 35 ITR 474 (Delhi) (Trib.) is affirmed.

Kar Vivad Samadhan Scheme, 1988
Finance Act, 1988

2675 **S.87 : Arrears of tax – Scope of expression – Additional tax imposed is not a tax but a penalty – Revenue prohibited from adding the element of additional tax for purposes of Scheme. [S. 143(1)(a)]**

The levy of additional tax bears all the characteristics of a penalty. When additional tax has the imprint of penalty, the levy of additional tax is not automatic under section 143(1)(a) of the Income-tax Act, 1961. If additional tax could be levied, it will amount to punishing the assessee for no fault of his and this cannot be the legislative intent.

The assessee, for the assessment years 1994-95 and 1995-96, submitted a declaration under the Kar Vivad Samadhan Scheme, 1998, promulgated by the Finance (No. 2) Act, 1998. The Assessing Officer added additional tax levied under section 143(1)(a) of the Act to the declaration made by the assessee. On a Writ Petition, the single judge held that additional tax was also part of the tax as payable and imposed under section 147 and, therefore, no error had been committed by the Revenue in adding the additional tax while assessing the income of the assessee for the assessment years 1994-95 and 1995-96 under the 1998 Scheme. On appeal:

Held, the imposition of additional tax in the facts and circumstances of the case as done was not permissible. The additional tax levied under the 1998 Scheme was to be deleted and the matter was remanded to the Assessing Officer for proceeding to assess the matter afresh. *CIT v. Hindustan Electro Graphites Ltd. [2000] 243 ITR 48 (SC)* followed. (AY. 1994-95, 1995-96)

Namrita Choudhary (Mrs.) v. CIT (2015) 372 ITR 418 / 128 DTR 6 (MP)(HC)

Editorial: Decision of the single judge in H.L. Taneja v. CIT [2008] 300 ITR 384 (MP) reversed.

2676 **S. 87 : Tax arrears – Disputed tax – Amount of tax was payable at 30% and not 50% – Petition was allowed. [S.88]**

The Writ Petition involves the interpretation of some of the provisions of KVSS, 1998. The Petitioner was an individual assesee working in construction for Indian Railways. He submitted IT return declaring certain income which AO made certain addition. On appeal before CIT (A), the taxable income was marginally reduced .Aggrieved by the relief; the Petitioner approached the ITAT by filing a further appeal. The scheme came into operation when the appeal was pending before ITAT. Therefore the Petitioner submitted an application in prescribed form claiming benefit thereunder. The contention of the Petitioner in writ Petition was that though an application was filed in the prescribed form and the stipulated amount was paid, the 1st Respondent passed the impugned order, contrary to the provisions of the scheme. Revenues' contention was that Petitioner was under an obligation to pay the amount at 50% of the arrears of tax, under Cl.(a)(iv) of S.88 of the Finance Act 1998. It was further stated that when doubt arose in this behalf, clarification was given, and the impugned order was passed in accordance

with the same. The HC allowed the Writ Petition and held that that once the case falls under cla(a)(iii) of S.88 , the amount is payable at 30% of the disputed income. To determine this, one has to fall back upon the disputed tax, which in the instinct case is ₹ 1,05,977. If this figure is multiplied by 100/40, the figure representing the disputed income would emerge, being ₹ 2,64,940. Assesee rightly deposited 30% thereof at ₹ 79,483. CIT(A) was not justified in holding that the assessee was liable to pay 50% of all the three components of tax, interest and penalty. (AY.1996-97)
R. Damodar Reddy v. CIT (2015) 273 CTR 99 (AP)(HC)

S.95 : Discrimination – Validity of provision – Provision denying benefit to persons who had acquired income or property illegally or were under prosecution – Denial of benefit had nexus with the objective of Scheme – Classification not violative of Article 14 – Section 95 valid. [Constitution of India, Art. 14] 2677

While Article 14 of the Constitution forbids class legislation, it does not forbid reasonable classification for the purposes of legislation. However, in order to pass the test of permissible classification two conditions must be fulfilled, namely: (i) the classification must be founded on an intelligent differentia which distinguishes persons or things that are grouped together from others left out of the group, and (ii) the differentia must have a rational relation to the object sought to be achieved by the statute in question.

The benefit of the Scheme was to all those whose income/property were acquired through legally permissible process but not disclosed. However, the benefit of the Scheme was not extended to persons who had acquired income/property by illicit means and if the income/property was a subject of prosecution as listed out in section 95(iii) of the Finance (No. 2) Act, 1998. There is a policy underlying the exclusion u/s. 95(iii) of the Act. The classification made by Parliament has a nexus to the objective of the Act. This has nexus to the object of the Scheme to settle disputes with regard to those who are honest. Section 95 of the Act is valid. (AY 1993-94 to 1995-96)
Amit Hemendra Jhaveri v. UOI (2015) 281 CTR 245 / 64 taxmann.com 28 (2016) 380 ITR 60 (Bom.)(HC)

Remittances of Foreign Exchange and Investment in Foreign Exchange Bonds (Immunities and Exemptions) Act, 1991

2678 **S.6 : Income from undisclosed sources – Foreign remittances – India Development Bonds – Bond holder – Immunities – Immunity against disclosure of nature and source of investment in bonds to non-resident Indian or overseas corporate body owning bonds and to Indian resident to whom gift of such bonds made by non-resident Indian or overseas corporate body – Only on full satisfaction of requirements. [Ss. 69A, 7, India Development Bonds Scheme, 1991, S. 5]**

The immunity provided by the Remittances of Foreign Exchange and Investment in Foreign Exchange Bonds (Immunities and Exemptions) Act, 1991, must fulfil the requirements of section 6(1). Under clause (a) of sub-section (1) of section 6 of the 1991 Act, the immunity would extend only against the disclosure of the nature and source of the investment in the bonds. The immunity would be available to a non-resident Indian or overseas corporate body who or which owns the bonds on the one hand and, on the other hand, to a resident of India to whom a gift of such bonds has been made by a non-resident Indian or overseas corporate body. Where this requirement of section 6(1)(a) is not fulfilled, the immunity will not be attracted. The judgment of the Division Bench would have to be read down so as to confer an immunity only on compliance with the conditions of section 6 and to the extent legislated. *CIT v. Smt. Usha Omer [2011] 338 ITR 448 (All.)* modified (AY. 1997-98)

Rajendra Kumar Gupta v. CIT (2015) 372 ITR 730 / 276 CTR 408 / 118 DTR 88 / 231 Taxman 820 (FB)(All.)(HC)

Usha Omer v. CIT (2015) 372 ITR 730 / 276 CTR 408 / 118 DTR 88 (FB)(All.)(HC)

Anupam Kumar Gupta v. CIT (2015) 372 ITR 730 / 276 CTR 408 / 118 DTR 88 (FB)(All.)(HC)

Wealth-tax Act, 1957

S.2(ea) : Asset – Factory premises – Let out – Commercial establishment – Could not be included in net wealth 2679

Factory premises let out and used for productive purpose is in nature of commercial establishment, hence could not be included in net wealth of assessee. (WTA Nos. 47/48 (Kol.) 2000 dated 15-2-2015) (AY.2003-04, 2004-05)

WTO v. Ferrolite Products Ltd. (2015) 68 SOT 60 (URO) (Kol.)(Trib.)

S.2(ea)(b) : Asset – Agricultural land – Within municipal limit – Urban land – Standing tree – Construction was not permissible without permission from competent authorities – Entitle to exemption and not liable to wealth tax 2680

Though the land situated within the municipal limits but still it is an agricultural land, on which construction is not permissible without the permission of the Municipality Corporation Building Bye-Law and Town and Country Planning Act. Thus, the land does not fall within the ambit of sec 2(ea)(b) to carry out construction. Eligible to exemption and not liable to wealth tax.

Amin Chand Mehta v. CWT (2015) 274 CTR 150 / 232 Taxman 353 (HP)(HC)

S.4(1)(a)(i) : Net wealth – Transfer of assets – Wife of assessee purchasing residential house and jewellery out of interest – free cash loan given by assessee – Cash loan not "asset" – No transfer of asset – Amount cannot be added to net wealth of assessee. [IT Act, S. 64, 2(ea)] 2681

On appeal by assessee:

Held, allowing the appeal, that according to the provisions of the Act, extending a cash loan, to the wife, by the assessee would not come within the definition of "asset". Also, cash was not included in "capital asset", "tangible asset" and "intangible asset" defined in the Income-tax Act, 1961. Therefore, there was no "transfer of asset" by the assessee, rather, an asset was purchased in the form of a residential house after taking an interest-free cash loan from the assessee. The assessee was not the owner of the asset which was transferred to the wife, rather out of the interest-free loan, the wife of the assessee purchased "new asset" in her own name from the third parties. As there was no "transfer", section 64 of the 1961 Act was also not attracted. The assessee had given a loan to his wife and it having been duly declared, this was not a case of tax avoidance. The wife of the assessee had an independent source of income, filed her return and even subsequently repaid part of the loan taken from the (AY. 2006-07)

Shah Rukh Khan v. ACWT (2014) 52 taxmann.com / (2015) 67 SOT 390 / 167 TTJ 73 / 37 ITR 1 (Mum.)(Trib.)

S.7 : Valuation of property – Vacant land subject to the Land Ceiling Act – Excess land would have to be valued at ₹ 2 lakh for valuation of wealth tax. [S. 2(e), 2(m), 2(q), 3, Urban Land Ceiling Act, 1962, S. 6,11(6), 20] 2682

The Supreme Court had to consider whether for the purposes of Wealth Tax Act, the market value of the vacant land belonging to the assessee should be taken at the price

which is the maximum compensation payable to the assessee under the Urban Land Ceiling Act, 1962?

The factual position is as follows:

(i) The Assessment Years in respect of which question was to be determined were 1977-78 to 1986-87.

(ii) Ceiling Act had come into force w.e.f. 17-2-1976 and was in operation during the aforesaid Assessment Years.

(iii) The Competent Authority under the Ceiling Act had passed orders to the effect that as per Section 11(6) of the Ceiling Act, the maximum compensation that could be received by the assessee was ₹ 2 lakh. In accordance with section 30 of the Ceiling Act, the declaration dates back to 17-2-1976 on which date the Ceiling Act was promulgated in Karnataka.

(iv) The order of the Competent Authority was challenged by the assessee by filing appeal before the Karnataka Appellate Tribunal. This appeal was, however, dismissed on 15-7-1998.

Against that order, Writ Petition was filed wherein provisions of the Ceiling Act were also challenged. Because of the pendency of these proceedings or due to some other reason, notification under section 10(1) of the Ceiling Act was not passed.

(v) In the year 1999, Ceiling Act was repealed. At that stage, the Writ Petition filed by the assessee was still pending. The effect of this Repealing Act was that the property in question remained with the assessee and was not taken over by the Government.

HELD by the Supreme Court:

(i) It is clear that the valuation of the asset in question has to be in the manner provided under section 7 of the Act. Such a valuation has to be on the valuation date which has reference to the last day of the previous year as defined under Section 3 of the Income-tax Act if an assessment was to be made under that Act for that year. In other words, it is 31st March immediately preceding the assessment year. The valuation arrived at as on that date of the asset is the valuation on which wealth-tax is assessable. It is clear from the reading of section 7 of the Act that the Assessing Officer has to keep hypothetical situation in mind, namely, if the asset in question is to be sold in the open market, what price it would fetch. Assessing Officer has to form an opinion about the estimation of such a price that is likely to be received if the property were to be sold. There is no actual sale and only a hypothetical situation of a sale is to be contemplated by the Assessing Officer.

(ii) Thus, the Tax Officer has to form an opinion about the estimated price if the asset were to be sold in the assumed market and the estimated price would be the one which an assumed willing purchaser would pay for it. On this reckoning, the asset has to be valued in the ordinary way.

(iii) The High Court has accepted, and rightly so, that since the property in question came within the mischief of the Ceiling Act it would have depressing effect insofar as the price which the assumed willing purchaser would pay for such property. However, the question is as to what price the willing purchaser would offer in such a scenario?

(iv) The combined effect of the aforesaid provisions, in the context of instant appeals, is that the vacant land in excess of ceiling limit was not acquired by the State Government as notification under section 10(1) of the Ceiling Act had not been issued. However, the process had started as the assessee had filed statement in the prescribed form as per the provisions of section 6(1) of the Ceiling Act and the Competent Authority had also prepared a draft statement under section 8 which was duly served upon the assessee. Fact remains that so long as the Act was operative, by virtue of section 3 the assessee was not entitled to hold any vacant land in excess of the ceiling limit. Order was also passed to the effect that the maximum compensation payable was ₹ 2 lakh. Let us keep these factors in mind and on that basis apply the provisions of Section 7 of the Wealth-tax Act.

(v) One has to assume that the property in question is saleable in the open market and estimate the price which the assumed willing purchaser would pay for such a property. When the asset is under the clutches of the Ceiling Act and in respect of the said asset/vacant land, the Competent Authority under the Ceiling Act had already determined the maximum compensation of ₹ 2 lakh, how much price such a property would fetch if sold in the open market? We have to keep in mind what a reasonably assumed buyer would pay for such a property if he were to buy the same. Such a property which is going to be taken over by the Government and is awaiting notification under Section 10 of the Act for this purpose, would not fetch more than ₹ 2 lakh as the assumed buyer knows that the moment this property is taken over by the Government, he will receive the compensation of ₹ 2 lakh only. We are not oblivious of those categories of buyers who may buy "disputed properties" by taking risks with the hope that legal proceedings may ultimately be decided in favour of the assessee and in such a eventuality they are going to get much higher value. However, as stated above, hypothetical presumptions of such sales are to be discarded as we have to keep in mind the conduct of a reasonable person and "ordinary way" of the presumptuous sale. When such a presumed buyer is not going to offer more than ₹ 2 lakh, obvious answer is that the estimated price which such asset would fetch if sold in the open market on the valuation date(s) would not be more than ₹ 2 lakh. Having said so, one aspect needs to be pointed out, which was missed by the Commissioner (Appeals) and the Tribunal as well while deciding the case in favour of the assessee. The compensation of ₹ 2 lakh is in respect of only the "excess land" which is covered by Sections 3 and 4 of the Ceiling Act. The total vacant land for the purpose of Wealth Tax Act is not only excess land but other part of the land which would have remained with the assessee in any case. Therefore, the valuation of the excess land, which is the subject matter of Ceiling Act, would be ₹ 2 lakh. To that market value of the remaining land will have to be added for the purpose of arriving at the valuation for payment of Wealth Tax. (AY. 1977-78 to 1986-87)

S. N. Wadiyar (Dead) Through LR v. CWT (2015) 378 ITR 9 / 280 CTR 233 / 125 DTR 330 / 234 Taxman 881 (SC)

2683 **S.18B : Penalty – Reduction/Waiver of – while considering prayer for reduction/waiver of penalty, Commissioner shall consider such factors as are enumerated in section 18B and no other factor – Matter was set aside**

Assessment years 1977 to 1985 – Petitioner/assessee filed returns for assessment years under consideration collectively and voluntarily. Assessing Officer passed orders imposing penalty. Assessee's application under section 18B for reduction/waiver of penalty was rejected by Commissioner without considering factors set out for exercise of jurisdiction of section 18B. On Writ the Court held that while considering prayer for reduction/waiver of penalty, Commissioner shall consider such factors as are enumerated in section 18B and no other factor. Therefore, Writ Petition of assessee was to be allowed and matter was to be remitted to Commissioner to decide petition in accordance with law. (AY. 1977 to 1985)

Hans Raj (HUF) v. CWT (2015) 229 Taxman 567 (P&H)(HC)

2684 **S.27A : Appeal – High Court – Framing of question of law – Matter remitted to High Court for framing question of law and hearing of appeal again**

An appeal was decided by the High Court committing an error by not framing the substantial question of law as per section 27A(3) of the Wealth-tax Act, 1957. Matter remanded back to the High court so that a substantial question of law can be framed, if any, and the appeal can be heard again.

P. A. Jose v. CWT (2015) 376 ITR 448 / 124 DTR 287 / 279 CTR 533 / 233 Taxman 511 (SC)

2685 **S.34A : Refunds – Interest – Assessee would be entitled to interest on refund of wealth-tax where return was filed on self assessment. [S. 16]**

Dismissing the writ appeals the Court held that, with respect to refund and interest payable on refund, nature of assessment is not relevant, therefore, an assessee would be entitled to interest on refund of wealth-tax where return was filed on self assessment.

CWT v. Nazim Zacheria (2015) 230 Taxman 64 (Ker.)(HC)

2686 **S.35(1)(e) : Appellate Tribunal – Rectification of mistake – No jurisdiction to recall final order passed on merits – Mere oral concession by one or other counsel is also no ground for recalling the order – Recall of order to bring asset to tax – Not permissible. [S. 2(ea), S.254 (2)]**

On miscellaneous petitions filed by the Revenue, the Tribunal held that *prima facie* there was a mistake in the order passed by the Tribunal. Therefore, the Tribunal recalled its earlier decision and again reinstated in the rolls of the Tribunal for fresh hearing and disposal. Thereafter, the Tribunal took up the appeals for rehearing and decided the issue against the assessee. On appeals :

Held, allowing the appeals, (i) that the Tribunal in the first instance had given benefit to the assessee and, thereafter, the Department filed miscellaneous petitions to recall the order on the legal plea that the benefit of exclusion of asset would not apply in terms of section 2(ea). This issue was a legal issue, which the Department, if aggrieved would have to canvass in appeal. The Department could not be allowed to raise this issue in a petition filed for rectification that was not raised in the appeal. The Tribunal exceeded its jurisdiction in invoking the power under section 35(1)(e) to recall the final

order in the guise of rectification. The Tribunal can only exercise its jurisdiction under section 35(1)(e) in the manner indicated in the provision and *de hors* the provisions in the Act, it has no jurisdiction to recall its final order passed on the merits of the case. (AY. 1997-98, 1998-99)
Vyline Glass Works Ltd. v. CWT (2015) 373 ITR 355 / 231 Taxman 535 / 127 DTR 168/ 281 CTR 317 (Mad.)(HC)

S.40 : Finance Act, 1983 – Company – Exemption – Building used for business – Used by subsidiary – Not exempt 2687
Portion of factory building used by subsidiary of assessee for carrying out job work for assessee. Assessee charging subsidiary licence fee and subsidiary charging assessee for work done. Independent entities--Portion of building used by subsidiary not used by assessee for purpose of its business. Dismissing the appeal the Court held that user must be by assessee for purposes of its business hence on facts the assessee is not entitle to claim exemption. (AY. 1984-1985)
Kapri International (P) Ltd. v. CWT (2015) 373 ITR 50 / 231 Taxman 34 / 277 CTR 463 / 277 CTR 463/ 231 Taxman 34 (SC)
Editorial: Decision in Kapri International (P) Ltd. v. CWT (2002) 258 ITR 656 (Delhi) (HC) is affirmed. 2688

S.40 : Finance Act, 1983 – Asset – Land – Leasehold right – 95 years – Belong to assessee and liable to wealth tax. [Transfer of Property Act, 1882]
Though there is a difference between leasehold right and ownership right as per the Transfer of Property Act, a leasehold land in the possession of the assessee for a term of 95 years is "belonging" to the assessee and is liable for wealth-tax. (AY. 1988-89)
Jaya Hind Sciaky Ltd. v. DCIT (2016) 383 ITR 25 / 286 CTC 76 (Bom.)(HC)

S.40 : Fianace Act, 1983 – Net wealth – Building let out – Land obtained on lease for ninety-nine years – Building constructed on land and sub-leased to bank – Value of land and building assessable. [S.7] 2689
In the present case, the building had been leased out to Central Bank of India for which rent was being collected by the assessee. It, therefore, followed that the building constructed by the assessee would fall within the definition of specified asset for the purpose of determining the net wealth of the assessee liable to wealth-tax. The value adopted by the Tribunal at ₹ 82 lakh for the purpose of computation of net wealth was just and proper and called for no interference, as the value of the building alone was taken as composite value for the purpose of computation of the value of the land and building.
South India Structural Corporation Ltd v. Dy. CWT (2015) 375 ITR 445 / 279 CTR 421 / 122 DTR 393 (Mad.)(HC)

Companies (Profits) Surtax Act, 1964

2690 **S.24AA : Exemption – Agreement with foreign company – Mineral Oils – Scope of exemption cannot be expanded by a judicial pronouncement – Principles of interpretation of a law conferring an exemption or concession**

The Supreme Court had to consider the scope of Notification bearing No.GSR 307(E) dated 31-3-1983 issued under section 24AA of the Surtax Act by which exemption was granted in respect of surtax in favour of foreign companies with whom the Central Government has entered into agreements for association or participation of that Government or any authorized person in the business of prospecting or extraction or production of mineral oils. ONGC was notified as the "authorized person". The question was whether the exemption could be extended to agreements entered into by ONGC with different foreign companies for services or facilities or for supply of ship, aircraft, machinery and plant, as may be, all of which were to be used in connection with the prospecting or extraction or production of mineral oils. Such agreements did not contemplate a direct association or participation of ONGC in the prospecting or extraction or production of mineral oils but involved the taking of services and facilities or use of plant or machinery which is connected with the business of prospecting or extraction or production of mineral oils. HELD by the Supreme Court:

(i) The law is well-settled that a person who claims exemption or concession has to establish that he is entitled to that exemption or concession. A provision providing for an exemption, concession or exception, as the case may be, has to be construed strictly with certain exceptions depending upon the settings on which the provision has been placed in the statute and the object and purpose to be achieved. If exemption is available on complying with certain conditions, the conditions have to be complied with. The mandatory requirements of those conditions must be obeyed or fulfilled exactly, though at times, some latitude can be shown, if there is a failure to comply with some requirements which are directory in nature, the non-compliance of which would not affect the essence or substance of the notification granting exemption.

(ii) Section 24-AA of the Surtax Act was brought into the statute book by Act 16 of 1981 i.e. Finance Act, 1981 with effect from 1-4-1981. The explanatory notes on the provisions of Finance Act [Paragraphs 11(4) and 26(1)] clearly go to show that the legislative intent behind inclusion of section 24-AA is to encourage foreign companies to enter into participating contracts with the Union Government in the business of oil exploration or production. The further legislative intent was to seek greater participation of foreign companies in the matter of providing services including supply of ships, aircrafts, machinery or plant in connection with business of extraction or production of mineral oils. The aforesaid legislative intent which is two-fold is manifested by the two limbs of sub-section 2 of section 24AA of the Surtax Act to which the power of exemption was intended to operate i.e. sub-section 2(a) and 2(b) of section 24AA. If out of the two limbs where the power of exemption was intended to operate, the repository of the power i.e. Central Government, had consciously chosen to grant exemption in one particular field i.e., foreign companies covered by sub-section 2(a) of section 24-AA, the scope of

the grant cannot be enhanced or expanded by a judicial pronouncement which is what the arguments made on behalf of the appellants intend to achieve. Any such interpretation must, therefore, be avoided. Consequently, we see no reason to depart from the basic principles of interpretation, as already noticed, that should govern the present issue. We, accordingly, do not find any merit in any of the appeals under consideration. (AY. 1986-87)

Oil & Natural Gas Corporation Limited v. CIT (2015) 377 ITR 117 / 121 DTR 302 / 278 CTR 166 / 233 Taxman 79 (SC)

Interpretation of taxing Statutes

2691 **Interpretation of taxing statutes – Central Board of direct taxes – CBDT & Government are bound by their own interpretation of a statutory provision. [S. 119]**
Central Board of direct taxes- CBDT & Government are bound by their own interpretation of a statutory provision. Principle of "*contemporanea expositio*". The word "or" can be interpreted as "and" if the former leads to unintelligible and absurd results. (CA No. No. 1978 of 2007, dt. 9-10-2015)
Spentex Industries Ltd. v. CCE 62 taxman 101 (SC); www.itatonline.org

2692 **Precedent – Binding nature – Judicial discipline – Decision of Co-ordinate Bench of High Court is binding on another co-ordinate Bench**
Division Bench of the High Court having disagreed with the earlier opinion of the Co-ordinate Bench ought to have referred the matter to a Larger Bench instead of rendering a contrary decision. Decision of Co-ordinate Bench of High Court is binding on another Co-ordinate Bench.
ACIT v. Victory Aqua Farm Ltd. (2015) 379 ITR 335 / 280 CTR 32 / 234 Taxman 598 (SC)

2693 **Interpretation of taxing statutes – Exemptions – Strict interpretation – Scope of exemption cannot be enhanced by Court – Companies (Profits) Surtax Act, 1964**
If out of two limbs where the power of exemption was intended to operate, the repository of the power, i.e. the Central Government, had consciously chosen to grant exemption in one particular field i.e., foreign companies covered by sub-section 2(a) of section 24AA, the scope of grant cannot be enhanced or expanded by a judicial pronouncement. Any such interpretation must, therefore, be avoided.
Oil & Natural Gas Corporation Limited v. CIT (2015) 377 ITR 117 / 121 DTR 302 / 278 CTR 166 233 taxman 79 (SC)

2694 **Interpretation – Income-tax – General principles – Law as on first day of assessment year – Not absolute, exception by express or necessary implication is possible.**
The cardinal principle of tax law that law has to be the law in force in the assessment year is qualified by exception when it is provided otherwise expressly or by implication. That the law which is in force in the assessment year would prevail is not an absolute principle and exception can be either express or implied by necessary implication. It is the cardinal principle of interpretation that a construction resulting in unreasonably harsh and absorbed results must be avoided. (CA No.4476 of 2015, dated 15-5-2015)
CIT v. Sarkar Builders (2015) 375 ITR 392 / 277 CTR 301 / 119 DTR 241 / 232 Taxman 731 (SC)

2695 **Interpretation of taxing statutes – Precedent – Third judge is bound by the decision of division Bench**
On difference of opinion between two judges of Division Bench, matter was referred to Third Judge. Referral Third Judge was left only to choose one from two differing

opinions of differing judges which was close to correct legal position. Decisions of Division Benches on similar issue would be binding on Referral Third Judge.
CIT v. Vallabhdas Vithaldas (2015) 232 Taxman 57 (Guj.)(HC)

Interpretation of taxing Statutes – Principle of equity 2696
The plain or literal interpretation of a statutory provision is not to be adopted if it produces manifestly unjust results or absurdly unreasonable consequences which could never have been intended. To obviate injustice flowing from mechanical interpretation and to bring about rationality, it is permissible, even in the field of taxation, to prefer such construction as results in equity over such literal meaning as is unjust.
CIT v. Suresh Nanda (2015) 375 ITR 172 / 233 Taxman 4 / 278 CTR 21 / 120 DTR 329 (Delhi) (HC)

Interpretation of taxing Statutes – *Res judicata* – Not applicable to Income-tax Proceedings 2697
The principles of *res judicata* do not apply to income-tax proceedings and an error in the preceding need not be repeated or ignored in the subsequent years.
Thomson Press (India) Ltd. v. CIT (2015) 379 ITR 222 / 281 CTR 271 (Delhi)(HC)

Interpretation of taxing statutes – Word "may" used in sub-section (2) of section 145 cannot be read as "shall". [S. 145(2)] 2698
That the word "may" normally indicates that the provision is not mandatory. It is also true that the word "may" can also be used in the sense "shall" or "must" by the Legislature. The intent of the Legislature, however, will have to be gathered from the scheme of the relevant provision, Chapter or the relevant statute and also judicial pronouncements dealing with the relevant provision. Having regard to the provisions contained in section 145 the word "may" used in sub-section (2) thereof cannot be read as "shall". Merely because the Central Government has not notified in the Official Gazette "accounting standards" to be followed by any class of assessees or in respect of any class of income, it could not be stated that the "accounting standards" prescribed by the Institute of Chartered Accountants of India or the accounting standards reflected in the "guidance note" cannot be adopted as an accounting method by an assessee. (AY. 1996-97 to 1999-2000)
Chandana Leaphin Finance Ltd v. CIT (2015) 374 ITR 681 / 125 DTR 189 / 234 taxman 17 (T&AP)(HC)
Pact Securities and Financial Ltd v. CIT (2015) 374 ITR 681 / 125 DTR 189 / 234 Taxman 17 (T&P)(HC)

Interpretation of taxing statutes – Amendments in taxing statute – Prospective unless a different legislative intention is clearly expressed. 2699
Amendments in the taxing statute, unless a different legislative intention is clearly expressed, shall operate prospectively. (AY. 2009-10)
CIT v. Nitish Rameshchandra Chordia (2015) 374 ITR 531 / 126 DTR 116 / 231 taxman 724 (Bom.)(HC)

2700 **Interpretation of taxing statutes – Provision in another statute not relevant**
The provisions made in the Wealth-tax Act, 1957, will not in any manner influence the interpretation of section 250(4).
Rallis India Ltd. v. CIT (2015) 374 ITR 462 / 276 CTR 351 / 230 Taxman 483 / 116 DTR 217 (Bom.)(HC)

2701 **Interpretation of taxing statutes – Precedent – Two judgments of same High Court holding contrary opinions – High Court deciding similar case – Entitled to follow either decision**
Held that if a High Court is faced with two precedents rendered by itself, one in conflict with the other, it has every right to choose between the two and by doing so, it does not do any violence to the other. At the most, it may be an occasion for the superior court to resolve the rule on ostensible conflict. (AY. 1995-96)
CIT v. Live Well Home Finance P. Ltd. (2015) 373 ITR 188 (T&AP)(HC)

2702 **Interpretation of taxing statues – General principles – No taxation without specific sanction**
One of the cardinal principles of taxation is that no amount shall be brought under the purview of taxation, unless there is specific legislative sanction for it. If one takes into account the complex and complicated scheme under the Income-tax Act, 1961, it is evident that Parliament has taken every precaution to ensure that no amount is subjected to taxation twice, unless the relevant provision specifically permits it. There is nothing in the Act which permits interest on corporate deposits, to be taxed twice.
CIT v. Nagarjuna Fertilizers and Chemicals Ltd. (2015) 373 ITR 252 / 231 taxman 643 (T&AP)(HC)

2703 **Interpretation of taxing statutes – Interpretation upholding validity of provision. [S.234E, Constitution of India, Art, 226, 227]**
It is now well-settled that even though the Court exercising jurisdiction under Article 226 of the Constitution of India has the power to declare a statute (or any provision thereof) unconstitutional, it should exercise great restraint before exercising such a power. It is equally well-settled that a statute relating to economic activities should be viewed with greater latitude than laws touching civil rights such as freedom of speech, freedom of religion, etc. As regards economic and other regulatory legislation, it is imperative that the Court exercises judicial restraint and grants greater latitude to the Legislature whilst judging the Constitutional validity of such a statute. This is for the simple reason that the Court does not consist of economic and administrative experts and has no expertise in these matters.
Rashmikant Kundalia v. UOI (2015) 373 ITR 268 / 275 CTR 138 / 229 taxman 596 (Bom.) (HC)

2704 **Interpretation – Precedent – Duty to follow direction of High Court – "*obiter dicta*" – Observations made in disposing of case cannot be considered to be "*obiter dicta*".**
Obiter dicta are mere observations by a judge on a legal question suggested by the case before him, but not arising in such a manner as to require decision by him.

Observations made in disposing of case cannot be considered to be "*obiter dicta*". (AY 2000-01)
Nassar Yusuf (Dr.) v. CIT (2015) 377 ITR 595 / 63 taxmann.com 298 (Ker.)(HC)

Interpretation of taxing statutes – Precedent – Judgment of a non-jurisdictional High Court has to be preferred over the judgment of a Special Bench of the ITAT 2705
There is a conflict of opinion between the judgment of the ITAT Special Bench in *DCIT v. Times Guaranty Limited (2010) 4 ITR (Trib.) 210 Mum. (SB)* and that of the Gujarat High Court in *General Motors India Pvt. Ltd. v. DCIT [(2013) 354 ITR 244 (Guj.)* on the question whether unabsorbed depreciation for the assessment years prior to the amendment made to s. 32(2) w.e.f. AY 2002-03 can be treated as "current depreciation" and set-off against non-business income and be available for carry forward indefinitely. A judgment of the non-jurisdictional High Court binds the Tribunal Benches as held in *CIT v. Godavaridevi Saraf (1978) 113 ITR 589 (Bom.)* and has to be followed over a judgment of the Special Bench. AY. 2009-10)
Minda Sai Ltd. v. ITO (2015) 167 TTJ 689 / 114 DTR 50 (Delhi)(Trib.)

Allied laws

2706 **Advocates, Act, 1961 – Bar Council of India**

Admission by counsel – Client is not bound by the statement or admission. [Constitution of India, Articles 226, 227]

The Supreme Court had to *inter alia* consider the following issues:

(a) Whether the counsel appearing for an appellant-Society could make concession for or on behalf of the appellant-Society without any express instructions/ authorisation in that regard by the Society?

(b) Whether such a concession would bind the appellant-Society and its members?

(c) Since the subject matter of the concession made by the counsel was not the issue before the Writ Court, whether the same would bind the appellant-Society and its members?

The Supreme Court held that the client is not bound by a statement or admission which he or his lawyer was not authorised to make. The lawyer generally has no implied or apparent authority to make an admission or statement which would directly surrender or conclude the substantial legal rights of the client unless such an admission or statement is clearly a proper step in accomplishing the purpose for which the lawyer was employed.

Himalayan Cooperative Group Housing Society v. Balwan Singh (2015) 7 SCC 373 | AIR 2015 SC 2867 (SC); www.itatonline.org

2707 **Law Commission and the Bar Council of India should consider whether Advocates should be tested for fitness and competence to argue matters**

In the Uber rape trial case, the accused claimed that his counsel representing him earlier was incompetent, being a novice and that he is entitled to recall all the prosecution witnesses now that he has engaged a new counsel. The Trial Court rejected the plea on the ground that the competence of a lawyer is subjective and the date of his enrolment with the Bar Council can certainly not be said to be a yardstick to measure his competence. It was also stated that the submission that the earlier advocate was not competent to appear as an Advocate inasmuch as he had not even undergone screening test as required by Bar Council of Delhi Rules and was not issued practice certificate was not fortified by any record. However, the High Court reversed the Trial Court and directed re-examination of some of the witnesses. On appeal by the State to the Supreme Court HELD reversing the High Court:

(i) While advancement of justice remains the prime object of law, it cannot be understood that recall can be allowed for the asking or reasons related to mere convenience. It has normally to be presumed that the counsel conducting a case is competent particularly when a counsel is appointed by choice of a litigant. Taken to its logical end, the principle that a retrial must follow on every change of a counsel, can have serious consequences on conduct of trials and the criminal justice system. Witnesses cannot be expected to face the hardship of appearing in court repeatedly, particularly in sensitive cases such as the present one. It can result in undue hardship for victims, especially so, of heinous crimes, if they are required to repeatedly appear in Court to face cross-examination.

(ii) The interest of justice may suffer if the counsel conducting the trial is physically or mentally unfit on account of any disability. The interest of the society is paramount and instead of trials being conducted again on account of unfitness of the counsel, reform may appear to be necessary so that such a situation does not arise. Perhaps time has come to review the Advocates Act and the relevant Rules to examine the continued fitness of an advocate to conduct a criminal trial on account of advanced age or other mental or physical infirmity, to avoid grievance that an Advocate who conducted trial was unfit or incompetent. This is an aspect which needs to be looked into by the concerned authorities including the Law Commission and the Bar Council of India.

AG v. Shiv Kumar Yadav (2016) 2 SCC 402 / AIR SC 3501 (SC); www.itatonline.org

Evidence Act, 1872

2708 **S.3 : Document – A "Compact Disc" (CD) is a "document" and is admissible as evidence. [Code of Criminal Procedure, 1973 S. 294, 313]**

(i) Word "document" is defined in section 3 of the Indian Evidence Act, 1872, as under: 'Document' means any matter expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means, intended to be used, or which may be used, for the purpose of recording that matter.

(ii) In *R. M. Malkani v. State of Maharashtra (1973) 1 SCC 471: 1973 (2) SCR 417,* this Court has observed that tape recorded conversation is admissible provided first the conversation is relevant to the matters in issue; secondly, there is identification of the voice and, thirdly, the accuracy of the tape recorded conversation is proved by eliminating the possibility of erasing the tape record.

(iii) In *Ziyauddin Barhanuddin Bukhari v. Brijmohan Ramdass Mehra and others (1976) 2 SCC 17: 1975 (Supp) SCR 281,* it was held by this Court that tape-records of speeches were "documents", as defined by section 3 of the Evidence Act, which stood on no different footing than photographs, and that they were admissible in evidence on satisfying certain conditions.

(iv) In view of the definition of 'document' in Evidence Act, and the law laid down by this Court, as discussed above, we hold that the compact disc is also a document. It is not necessary for the Court to obtain admission or denial on a document under sub-section (1) to Section 294 CrPC personally from the accused or complainant or the witness. The endorsement of admission or denial made by the counsel for defence, on the document filed by the prosecution or on the application/report with which same is filed, is sufficient compliance of Section 294 CrPC. Similarly on a document filed by the defence, endorsement of admission or denial by the public prosecutor is sufficient and defence will have to prove the document if not admitted by the prosecution. In case it is admitted, it need not be formally proved, and can be read in evidence. In a complaint case such an endorsement can be made by the counsel for the complainant in respect of document filed by the defence.

Shamsher Singh Verma v. State of Haryana (2015) (12) SCALE 597/ 2016 (1) RCR (Criminal) 167 (SC); www.itatonline.org

Central Excise and Salt Act, 1944

S.11 : Legal representatives – A dead person's property, in the form of his or her estate, cannot be taxed without the necessary machinery provisions in a tax statute – There is no machinery provision similar to Income-tax Act, 1961 – [S.11A, Income-tax Act 1961, S. 159, 168, General Clauses Act, S. 3(42)] 2709

The Supreme Court had to consider whether a dead person's property, in the form of his or her estate, can be taxed without the necessary machinery provisions in a tax statute. The question was whether an assessment proceeding under the Central Excise and Salt Act, 1944, can continue against the legal representatives/estate of a sole proprietor/ manufacturer after he is dead. HELD by the Supreme Court:

(i) The individual assessee has ordinarily to be a living person and there can be no assessment on a dead person and the assessment is a charge in respect of the income of the previous year and not a charge in respect of the income of the year of assessment as measured by the income of the previous year. *Wallace Brothers & Co. Ltd. v Commissioner of Income-tax.* By section 24B of the Income-tax Act the legal representatives have, by fiction of law, become assessees as provided in that section but that fiction cannot be extended beyond the object for which it was enacted. As was observed by this Court in *Bengal Immunity Co. Ltd. v. State of Bihar* legal fictions are only for a definite purpose and they are limited to the purpose for which they are created and should not be extended beyond that legitimate field. In the Income-tax Act the fiction is limited to the cases provided in the three sub sections of section 24B and cannot be extended further than the liability for the income received in the previous year.

(ii) A reading of sections 2(f), (3), section 4(3)(a), sections 11 and 11A as they stood at the relevant time would show that unlike the provisions of the Income-tax Act, there is no machinery provision in the Central Excise and Salt Act for continuing assessment proceedings against a dead individual. An assessee under the said Act means "the person" who is liable to pay the duty of excise under this Act and further stressed the fact that in cases of short levy, such duty can only be recovered from a person who is chargeable with the duty that has been short levied. Under the Central Excise Rules and Rules 2(3) and 7 in particular, there is no machinery provision contained either in the Act or in the Rules to proceed against a dead person's legal heirs. (Civil Appeal No. 5802 of 2005, dated 29-7-2015)

Shabina Abraham & Ors v. Collector of Central Excise (2015) 61 taxmann.com 95 (SC); www.itatonline.org

Chartered Accountant Act, 1949

2710 **Professional misconduct – Claiming AC first class rail fare while he travelled by second AC – Punishment of respondent for professional misconduct was to be reduced to that of reprimand**

A complaint was filed against Chartered Accountant for claiming inflated amount towards expenses incurred in performance of his duty during course of audit of Cotton Corp. of India (CCI). Disciplinary Committee found no case of professional misconduct in respect of two charges but held respondent guilty of misconduct in claiming AC first class rail fare while he travelled by second AC. ICAI recommended removal of name of respondent from Register of Members for a period of one month. Respondent raised a plea that complaint against him was revengeful because he made adverse comments as statutory auditor. Court held that since two of three charges against respondent were baseless and exaggerated, same lent credence to plea of respondent of complaint against him being revengeful, however since there was no finding of Disciplinary Committee on plea of respondent of his having in fact incurred expenditure on travel more than even first AC fare, punishment of respondent for professional misconduct was to be reduced to that of reprimand.

Council of The Institute of Chartered Accountants of India v. Gyan Prakash Agarwal (2015) 232 Taxman 143 (Delhi)(HC)

Constitution of India

Article 14 : Service Matters – Action of respondents of not regularising services was arbitrary and vilative of Article 14 of the Constitution of India. [Article 15] 2711

Petitioner was engaged to work as driver by fourth respondent i.e. Director (Intelligence) initially on a contingent basis but further on regular basis pursuant to internal communication dated 8-8-2000 – He had been paid salary out of expenditure as per proceedings of Director of Income-tax (Intelligence) dated 28-10-2014. There was correspondence between Additional Director of Income-tax and Chief Commissioner of Income-tax (respondent Nos. 4 and 5) *vide*, letter dated 15-11-2007 with regard to regularisation of service of daily wage workers and names of four persons were forwarded. Petitioner submitted that out of four persons services of only two persons had been regularised since they had completed 10 years of service. Allowing the petition in view of fact that from date of initial engagement, petitioner had put in more than 14 years of service, impugned action of respondents of not regularising his services was arbitrary and violative of Articles 14 and 15 of Constitution of India.

Shrikanth v. UOI (2015) 231 Taxman 419 (Karn.)(HC)

Article 226 : Constitution of India – Central Administrative Tribunal – Promotion – Central Administrative Tribunal – Writ is not maintainable. [S. 120] 2712

Where petitioners working on different posts with respondent/CBDT, raised a grievance with regard to their promotions, they were required to approach Central Administrative Tribunal (CAT) in first instance and, thus, writ petition filed by them straightaway in High Court after bypassing forum of Tribunal was not maintainable.

Sanjay Pandey v. CBDT (2015) 229 Taxman 323 (Delhi)(HC)

Article 226 : Service matters – Restructuring of cadre (Tax Assistant) – Constitutionally valid. 2713

Where due to massive induction of information technology, restructuring of cadres was done in tax department in terms of order issued by Chairman, CBDT, since there was no discrimination pointed out by petitioner, i.e., employees of tax department in said order same was to be regarded as constitutionally valid.

K. A. Santhosh Kumar v. UOI (2015) 232 Taxman 243 (Ker.)(HC)

Article 226 : Allotment of residential accommodation to ITAT Members should be dealt with by the Govt. fairly and on a high-priority basis to enable them to discharge judicial work efficiently. 2714

(i) The issue pertaining to allotment of residential accommodation to the Members of the ITAT was considered and dealt with in an order dated 19th September, 2003 of the Supreme Court in Special Leave Petition (C) Nos. 6904-6905 of 1998. Thereafter, the matter has been dealt with in a judgment of a Division Bench of the Rajasthan High Court in *Rajasthan Tax Consultants vs. Union of India [1998] 97 Taxman 48 (Raj.)*. An order of a Division Bench of the Bombay High Court dated 6th March, 1997 in *Shri K. Shivaram & Anr. v. Union of India & Ors. Writ Petition No. 2464 of 1996* is annexed to these proceedings.

(ii) The learned Additional Solicitor General has stated that the matter of allotment of residential accommodation to members of the ITAT shall be dealt with fairly and on a priority basis. We are of the view that the same principle should be followed for the future so as to obviate writ petitions being required to be filed by members of the Tribunal or on their behalf before this Court. Unless proper accommodation is made available to the members of the ITAT, the work on the judicial side cannot be expected to be discharged with a degree of efficiency. This is a matter which should be dealt with on a high priority in all respects. We record the assurance of the ASG as noted above.

(iii) We also direct the learned Standing Counsel to communicate a copy of this order to the Collector and District Magistrate so that the request of the members of the ITAT for the allotment of appropriate accommodation in the Circuit House or in a guest house commensurate with the officer is duly considered subject to normal exigencies. (PIL No. 53462 of 2015, dated. 17-9-2015)

The Income Tax Bar Association v. UOI (All.)(HC); www.itatonline.org

Companies Act, 1956

S.232 : Amalgamation – Protective assessment – Initiation – Regional Director is entitled to vice his doubt/apprehension before Court at time Court considers grant of sanction to scheme – Scheme of amalgamation as proposed is sanctioned subject to the certain conditions. [S. 394. I.T. Act, S. 139(5), 143(3)] 2715

Court held that if Regional Director nurtures any doubt *qua* any of clauses in a scheme of amalgamation, including date chosen as appointed date, and finds that same is contrary to law or apprehends that on strength of such a clause contained in scheme, company, after obtaining sanction from Court, may use or misuse same for contravention of any law including provisions of Income-tax, he is entitled to voice his doubt/apprehension before Court, at time Court considers grant of sanction to scheme and it is always open to Court to consider doubt/apprehension expressed by Regional Director and pass necessary orders either rejecting scheme or sanctioning same with/or without necessary clarifications. Since Court is required to ensure that a scheme of amalgamation does not contravene any provision of law, Regional Director is not only entitled to but is duty bound to bring to attention of Court any provision in scheme which may contravene/circumvent provisions of any law including law pertaining to Income-tax. Legislature intended that Regional Director will examine a scheme from all aspects and place his observations and views before Court and Court will consider same before sanctioning scheme. Merely because a protective assessment is made, it does not mean that Income-tax Department has accepted a scheme of amalgamation. The Regional Director prays that the petitions ought to be dismissed on the ground of suppression alone. According to him, a party should not be shown any latitude and indulgence in such matters. Ordinarily, one would have agreed with the Regional Director. However, in the facts of the present case and particularly in view of the final order instead of dismissing the Petitions on this ground, imposition of costs on each of the petitioners will meet the ends of justice. In the circumstances, the scheme of amalgamation as proposed is sanctioned subject to the certain conditions.

Casby CFS (P.) Ltd., In re (2015) 231 Taxman 89 (Bom.)(HC)

S.391 : Company – Capital gains – Recovery of tax – Scheme of arrangement between group companies for transfer of infrastructure assets – Sanction of scheme – Supreme Court – Rights of Income-tax Department to recover tax due from transferor or transferee company or any person under law not to be affected. [S. 394] 2716

A scheme of arrangement proposed by the respondent-company provided for transfer of passive infrastructure assets of the transferor companies to the transferee company without consideration as the transfer was within companies belonging to one group. The Income-tax Department objected to the scheme and the single judge refused to sanction the scheme under sections 391 and 394 of the Companies Act, 1956. On appeal the Division Bench granted sanction to the scheme of arrangement while protecting the right of the Income-tax Department to recover the dues in accordance with law irrespective of the sanction of the scheme. On a petition by the Department for special leave to appeal against the decision of the High Court, The Supreme Court dismissed the special leave

petitions but stated that the Income-tax Department was entitled to take out appropriate proceedings for recovery of any tax statutorily due from the transferor or transferee company or any other person liable for payment of such tax due.

Dept. of Income tax v. Vodafone Essar Gujarat Ltd. (2015) 373 ITR 525 (SC)

Editorial: Decision in Vodafone Essar Gujarat Ltd. v. Department of Income-tax [2013] 353 ITR 222 (Guj.) affirmed.

Contempt of Courts Act, 1971

S.15 : Engaging in e-mail communications with Standing Counsel levelling allegation against them and not with drawing such allegation despite stating so in High Court, and making allegations of fraud against Dept's Counsel and claiming that they deliberately presented weak case seeks to prejudice and interfere with due course of judicial proceedings & *prima facie* constitutes criminal contempt of court. 2717

On 15-1-2015, the Court noted by its order that Sh. Rakesh Kumar Gupta's intervention application was rejected. He, however, sent an e-mail to counsel appearing on behalf of the Revenue, levelling several allegations which were shown to the Court. In the course of hearing, the Court pointed this out to Sh. Rakesh Kumar Gupta, who stated that he would be withdrawing the allegations levelled against the Revenue's counsel. However, after the conclusion of hearing, on 9-2-2015, Sh. Gupta filed yet another affidavit titled as "Intervener Affidavit". In the affidavit, after stating that the intervener informed this Court in the hearing that the Income Tax Department had "deliberately presented weak case", and quoting the order dated 16-10-2014, other averments were made including that the "To help the taxpayer, terms was used incomplete assignment instead of illegal assignment". When Sh. Gupta was asked whether he wishes to unconditionally withdraw the affidavit and the allegations, to which he agreed conditionally. The condition proposed by him was that even whilst he was willing to withdraw the affidavit and the allegations with respect to the Standing Counsel and the conduct of the case before this Court, he would feel free to press those allegations elsewhere. He also stated that he had no desire and did not wish to withdraw any other allegations against the officers or the officials of the Income Tax Department, the CIT (Appeals) and the department generally, and that the allegations of fraud etc. against the assessees should remain as a matter of record. HELD by the Court:

(i) The Court is of the opinion that given the nature of the conduct displayed by Sh. Gupta, i.e. preferring an application for intervention which was rejected; thereafter engaging in e-mail communications with the Standing Counsel and levelling allegations against them; addressing e-mails directly to this Court and finally, placing on record an affidavit detailing the allegations even while stating that he would withdraw some of them vis-a-vis the Standing Counsel, but would nevertheless press those allegations against the same individuals elsewhere, *prima facie* amounts to criminal contempt punishable in accordance with law. This Court has been informed that two of the Standing Counsels – Sh. Balbir Singh and Sh. Rohit Madan, who had previously appeared, have already recused themselves from the matter. The behaviour outlined above amounts to seeking to prejudice and interfere or tending to interfere with the due course of proceedings in the present appeals;

(ii) The Court is of the opinion that consequently appropriate action and further proceedings under Section 15 of the Contempt of Courts Act, 1971 is warranted. In the circumstances, Sh. Rakesh Kumar Gupta is issued with Show Cause Notice, returnable on 9-4-2015 to give his explanation why he should not be proceeded with under Section 15 of the Contempt of Courts Act, 1971 in respect of the above allegations. The notice shall also annex a copy of this order and the copy of the

Intervener Affidavit filed by him. The Registry is directed to register a separate criminal contempt proceeding and file the originals of the Intervener Affidavit which is part of the record in ITA No.1428/2006 in the said criminal contempt proceedings. Besides, the Registry shall place on record a copy of the e-mail and fax communication numbering 100 pages which was addressed by Sh. Rakesh Kumar Gupta directly to this Court. These shall be annexed along with the Show Cause Notice to be served upon Sh. Rakesh Kumar Gupta on the next returnable date, i.e. 9-4-2015. Sh. Rakesh Kumar Gupta is present in Court and has been apprised of this order.

CIT v. Escorts Limited (2015) 234 Taxman 366 (Delhi)(HC)

CIT v. Big Apple Clothing Ltd. (Delhi)(HC); www.itatonline.org.

The Code of Criminal Procedure, 1973

S.167 : Fundamental rights – Right to speedy Trial – Suspension – Reasoned order must be passed – Suspension order should not extend beyond three months. [Constitution of India, Article 21] 2718

Currency of a suspension order should not extend beyond three months if within this period memorandum of charges/chargesheet is not served on delinquent officer/ employee; if memorandum of charges/chargesheet is served, a reasoned order must be passed for extension of suspension.

Ajay Kumar Choudhary v. UOI (2015) 233 Taxman 54 (SC)

The Karnataka Agricultural Income-tax Act, 1957

2719 **Retrospective amendment made to section 26(4) of Karnataka Agricultural Income-tax Act is constitutionally valid – Interpretation of taxing statutes.**

Interpretation of taxing statutes – Legislative powers – Retrospective legislation – Recovery of tax – Firm – Dissolution – Recovery in respect of income earned prior to dissolution of firm but received after dissolution – Legislature cannot directly overrule the decision but Legislature cannot directly overrule the decision but they have power to amend the law retrospectively – Legislature cannot directly overrule the decision or make a direction as not binding on it but has power to make the decision ineffective by removing the base on which the decision was rendered, consistent with the law of the Constitution and the legislature must have competence to do the same. [Karnataka Agricultural Income-tax Act, 1957 [S. 26(4), 27]

The Supreme Court had to consider the validity of an Explanation added retrospectively to Section 26(4) of the Karnataka Agricultural Income-tax Act. The said Explanation was inserted to supersede the judgment in *L. P. Cardoza and Others v. Agricultural Income Tax Officer and Others [(1997) 227 ITR 421*. On the validity of the retrospective amendment, the High Court held, following the judgment in *D. Cawasji and Co., Mysore v. State of Mysore and Another [1984 (Supp) SCC 490],* that the amending Act of 1997 suffered from the vice that was found in Cawasji's case, namely that it interfered directly with the judgment of a High Court and would therefore, have to be struck down as unconstitutional on this score alone. This the Division Bench found, because in the statement of objects and reasons for the 1997 amendment, it was held that the object of the amendment was to undo the judgment of the High Court of Karnataka in Cardoza's case. On appeal by the revenue to the Supreme Court HELD reversing the High Court:

(i) In exercising legislative power, the legislature by mere declaration, without anything more, cannot directly overrule, revise or override a judicial decision. It can render judicial decision ineffective by enacting valid law on the topic within its legislative field fundamentally altering or changing its character retrospectively. The changed or altered conditions are such that the previous decision would not have been rendered by the court, if those conditions had existed at the time of declaring the law as invalid. It is also empowered to give effect to retrospective legislation with a deeming date or with effect from a particular date. The legislature can change the character of the tax or duty from impermissible to permissible tax but the tax or levy should answer such character and the legislature is competent to recover the invalid tax validating such a tax on removing the invalid base for recovery from the subject or render the recovery from the State ineffectual. It is competent for the legislature to enact the law with retrospective effect and authorise its agencies to levy and collect the tax on that basis, make the imposition of levy collected and recovery of the tax made valid, notwithstanding the declaration by the court or the direction given for recovery thereof.

(ii) The consistent thread that runs through all the decisions of this Court is that the legislature cannot directly overrule the decision or make a direction as not binding on it but has power to make the decision ineffective by removing the base on which the decision was rendered, consistent with the law of the Constitution and the legislature must have competence to do the same. (Civil Appeal Nos. 8617-8635 of 2003, dated 17-3-2015)

ACIT of Agricultural Income-tax Act v. Netley "B" Estate (2015) 372 ITR 590 / 276 CTR 27 / 117 DTR 65 / 231 Taxman 760(SC)

Editorial : Refer, Netley "B" Estate vs. ACIT Ag. IT Act (2002) 257 ITR 532 (Karn.) (HC)

Right to Information Act, 2005

2720 **S.8 : Copies of income tax return of five parties – Denial of information by the Information authorities was held to be justified.**

Dismissing the petition the Court held that The information asked for by the petitioner pertains to private parties. The petitioner asked for copies of Income-tax returns together with the annexures of the said parties for the period from 1980 to 2010. The said information was demanded by the petitioner on the plea that the private parties had conducted themselves illegally and fraudulently. They had acquired status of agriculturists for themselves on the basis of a Will of one 'L' which was not genuine. They had raised different pleas in different proceedings initiated by them before the different authorities for asserting and claiming the status as agriculturists. The petitioner's say while demanding the information in question before the information authorities was that disclosure of the information demanded would help to ascertain whether those parties had shown any agriculture income in their Income-tax returns and thereby avoided paying the income-tax. Section 8 enlists categories of information which are exempted from disclosure and for which the authorities are not under obligation to part with. Clause (j) of section 8 is with regard to the information which is personal information in nature. From a reading of section 8(1)(j), it is clear that the information which is personal information having no relationship with any public activity and having no nexus with public interest, the information which would result into unwarranted invasion of privacy, are not liable to be disclosed, the caveat being if the Information Officer/Appellate Authority is satisfied that in disclosure of such information larger public interest would be served. In other words, if larger public interest justifies the disclosure of personal information, the same may be allowed to be disclosed and the same may be furnished. In the instant case, it is evident that the kind and nature of the information demanded by the petitioner clearly falls within the expression personal information. The personal character of the information demanded in the nature of Income-tax returns of the private parties to get disclosure about the payment of tax by them which was again in order to know about their status as agriculturists declared to be so by the authorities in the legal proceedings, could be indeed said to be personal. This information being personal in nature, could not be claimed as a matter of right by the petitioner, rather it was clearly exempted information under section 8(1)(j). In disclosing the said information, there was no element of public interest to be sub-served. The information was personal information which was asked for by the petitioner for his own personal interest and private purpose. In view of the aforesaid, the Central Information Commissioner was eminently justified in taking a view that there was no public interest present in the information claimed to be supplied and accordingly denying the same by dismissing the appeal.

Vinubhai Haribhai Patel (Malavia) v. ACIT (2015) 235 Taxman 467 (Guj.)(HC)

S.8 : Disclosure of information – Return of Income – Individual and unincorporated assessees – Corporate assessee – Exemption – All records cannot be made available to informer. [S.138, I.T. Act] 2721

The respondent, who was stated to be an informer to the department, filed an application under the Right to Information Act, 2005 with the PIO *inter alia* seeking information and all the records available with the department in respect of assessees for various assessment years.

Since the information sought by the respondent was third party information, the Deputy Commissioner issued separate notices under section 11(2) of the 2005 Act to the assessees. The assessees objected to the inspection and furnishing of the information. PIO considered the objections of the assessees and rejected the RTI application of the respondent, on the ground that the respondent failed to substantiate the public interest involved in disclosing the information relating to third parties.

The respondent preferred an appeal before the CIC. By the impugned order, the CIC allowed the appeal and directed PIO to provide inspection of the records and also other information sought for by the respondent.

On petition the Court held that, return of income filed by assessee and information necessary to support same, would be exempt under section 8(1)(j) of 2005 Act in respect of individual and unincorporated assessees. In case of widely held companies though most information relating to their income and expenditure would be in public domain yet their confidential information would be exempt from disclosure under section 8(1)(d) of 2005 Act. However, information furnished by corporate assessees that neither relates to another party nor is exempt under section 8(1)(d) of 2005 Act, can be disclosed.

Where respondent, an informer to department, sought information relating to assessee available with department, since respondent wanted to process information to assist and support role of an Assessing Officer and it had a propensity of interfering in assessment proceedings, same could not be considered to be in larger public interest and, thus, respondent's prayer was to be rejected. Accordingly, the petitions are allowed and the impugned order is set aside.

NareshTrehan v. Rakesh Kumar Gupta (2015) 228 Taxman 119 (Delhi)(HC)

S.8 : Return – Income tax returns constitute personal information which is exempted from disclosure under section 8(1)(j) and said personal information can only be divulged if CPIO or State Public Information Officer reaches a conclusion that it would be in larger public interest to reveal such information. [S.6, 11] 2722

Representation of People Act, S.33A]

The petitioner made an application under section 6 to the CPIO of the Income-tax Department *inter alia* requesting certain information and more particularly the income tax returns and balance sheets of the respondent No. 3 for the preceding three years on the ground that there was a larger public interest in disclosing this information to compare his affidavit given to the Election Commission with his income-tax returns.

Since the information related to the respondent No. 3 who was a third party, in terms of section 11 a letter was addressed by the CPIO to the respondent No. 3. The respondent No. 3 opposed the disclosure of any information.

Thereafter, the CPIO denied the said information sought by the petitioner observing that the information sought for had no relationship to any public activity or interest and, therefore, did not qualify in view of the provisions of section 8(1)(j). Appeal of petitioner was dismissed. On writ against the said order dismissing the petition the Court held that when Parliament has deemed it appropriate to limit information in respect of candidate to extent mentioned in section 33A of Representation of People Act, it is not open for a citizen to seek information relating to income tax returns of a candidate to cross check information which has been revealed by him at time of filing of his nomination more so when disclosure of such information would not serve any public interest. There are adequate provisions in Representation of People Act under which information sought is to be provided to Parliament to extent mentioned in said provisions and, therefore, reliance cannot be placed on proviso to section 8(1)(j) to contend that exemption provided in said section would not operate.

Shailesh Gandhi v. CIC (2015) 232 Taxman 783 (Bom.)(HC)

Prevention of Corruption Act, 1988

S.7 : Mere possession and recovery of currency notes from an accused is not sufficient to establish an offence under the Prevention of Corruption Act. Proof of demand of illegal gratification is essential. Its absence is fatal to the complaint. [S. 13, 20] 2723

The prosecution claimed that a complaint was lodged against the accused (then the Assistant Director, Commissionerate of Technical Education), that he demanded illegal gratification ₹ 1,000 for renewing of the recognition of the complainant's typing institute. A trap was laid pursuant to which phenolphthalein powder was applied on currency notes which were handed over by the complainant to the accused. The accused was intercepted and apprehended with the money in his hands. The currency notes tallied with those which had been decided to be used in the trap operation. The fingers of the hands of the accused, when dipped in the sodium carbonate solution, also turned pink. The pocket of the shirt of the accused also turned pink when rinsed in sodium carbonate solution. The trial court and the High Court convicted the accused. Before the Supreme Court the accused claimed that even assuming without admitting that the recovery of the tainted notes from the appellant had been established, sans the proof of demand which is a *sine qua non* for an offence both under Sections 7 and 13 of the Act, the appellant's conviction is unsustainable. HELD by the Supreme Court allowing the appeal:

(i) The statutory prescription of Sections 7 and 13(1)(d) of the Prevention of Corruption Act, 1988 is that the prosecution has to prove the charge thereunder beyond reasonable doubt like any other criminal offence and that the accused should be considered to be innocent till it is established otherwise by proper proof of demand and acceptance of illegal gratification, which are vital ingredients necessary to be proved to record a conviction. The mere recovery by itself, would not prove the charge against the accused and in absence of any evidence to prove payment of bribe or to show that the accused had voluntarily accepted the money knowing it to be bribe, conviction cannot be sustained.

(ii) Mere possession and recovery of currency notes from an accused without proof of demand would not establish an offence under Sections 7 as well as 13(1)(d)(i) & (ii) of the Act. In the absence of any proof of demand for illegal gratification, the use of corrupt or illegal means or abuse of position as a public servant to obtain any valuable thing or pecuniary advantage cannot be held to be proved. The proof of demand is an indispensable essentiality and of permeating mandate for an offence under Sections 7 and 13 of the Act. *Qua* Section 20 of the Act, which permits a presumption as envisaged therein, it has been held that while it is extendable only to an offence under Section 7 and not to those under Sections 13(1)(d)(i) & (ii) of the Act, it is contingent as well on the proof of acceptance of illegal gratification for doing or forbearing to do any official act. Such proof of acceptance of illegal gratification, it was emphasized, could follow only if there was proof of demand. Axiomatically, in absence of proof of demand, such legal presumption under Section 20 of the Act would also not arise.

(iii) The proof of demand of illegal gratification, thus, is the gravamen of the offence under Sections 7 and 13(1)(d)(i) & (ii) of the Act and in absence thereof, unmistakably the charge therefore, would fail. Mere acceptance of any amount allegedly by way of illegal gratification or recovery thereof, *de hors* the proof of demand, *ipso facto*, would thus not be sufficient to bring home the charge under these two sections of the Act.

(iv) As a corollary, failure of the prosecution to prove the demand for illegal gratification would be fatal and mere recovery of the amount from the person accused of the offence under Section 7 or 13 of the Act would not entail his conviction thereunder.

(v) On facts, *qua* the aspect of demand, when the complainant did hand over to the appellant the renewal application, the latter enquired from the complainant as to whether he had brought the amount which he directed him to bring on the previous day, whereupon the complainant took out ₹ 500/- from the pocket of his shirt and handed over the same to the appellant. Though, a very spirited endeavour has been made by the learned counsel for the State to co-relate this statement of PW1- S to the attendant facts and circumstances including the recovery of this amount from the possession of the appellant by the trap team, identification of the currency notes used in the trap operation and also the chemical reaction of the sodium carbonate solution *qua* the appellant, we are left unpersuaded to return a finding that the prosecution in the instant case has been able to prove the factum of demand beyond reasonable doubt. Even if the evidence of PW1- S. Udaya Bhaskar is accepted on the face value, it falls short of the quality and decisiveness of the proof of demand of illegal gratification as enjoined by law to hold that the offence under Section 7 or 13(1)(d)(i) & (ii) of the Act has been proved (Criminal Appeal No. 31 of 2009, dt. 14-9-2015)

P. Satyanarayana Murthy v. Dist. Inspector of Police (SC); www.itatonline.org

2724 **S.13 : Criminal misconduct by public servant – Where public servant had given testimony about amounts received by him and same had been duly intimated and reflected in IT returns, there was no violation of section 13 – The appellant was to be acquitted – Expression 'known sources of income' [Madhya Pradesh Civil Services (Conduct) Rules, 1965 R. 14, 17, 19]**

The appellant joined the services of Public Health Engineering Department of the State of Madhya Pradesh as Assistant Engineer and served in various capacities. According to the prosecution, during the period of 15-7-1978 to 9-2-1994, the appellant had earned total amount of ₹ 3,86,966 as public servant but he was found to be in possession of assets worth ₹ 7,97,243 at the end of that period and as such he was in possession of assets disproportionate to his known sources of income to the tune of ₹ 4,08,077.

Accordingly, crime was registered by the Special Police Establishment, Lokayukta Sanghathan for the offence punishable under section 13(1)(e), read with section 13(2). After conducting appropriate investigation, chargesheet was filed and the appellant was accordingly charged and tried.

The appellant had intimated the department on every occasion that he received any advance or gifts or share in partition or entitlement by way of bequest. These facts

were spoken to by various prosecution witnesses. Moreover, the appellant had filed his Income-tax Return on 28-9-1992, which clearly reflected the details of the loan transactions and the amounts that he had received. High Court affirmed the view taken by the Trial Court and confirmed the sentence. On appeal allowing the petition the Court held that Since amounts in question were duly reflected in Income-tax return, there was no violation of section 13(1)(e), read with section 13(2) and appellant was to be acquitted.

Kedari Lal v. State of M. P. (2015) 231 Taxman 264 (SC)

S.17 : Investigation – Persons authorised to investigate – Invalidity of investigation does not vitiate result unless a miscarriage of justice has been caused thereby. 2725

Sub-Inspector, CBI on basis of permission accorded by Magistrate proceeded with investigation and finally submitted charge-sheet. Thereafter, said order of Magistrate was challenged by respondent by filing a criminal petition in High Court stating that order passed by Magistrate permitting Sub-Inspector of Police to investigate case was without jurisdiction and against mandatory provisions of section 17, However, respondent had not made out a case that by reason of investigation conducted by Sub-Inspector a serious prejudice and miscarriage of justice had been caused. Court held that since no case of prejudice or miscarriage of justice by reason of investigation by Sub-Inspector of Police was made out, order of High Court setting aside permission granted by Magistrate to investigate matter by Sub-inspector could not be sustained in law. Appeal was allowed and the order of High Court was set aside. (C.A. Nos. 2512-2513 of 2014 dated 1-12-2014)

UOI v. T. Nathamuni (2015) 54 taxmann.com 136 / 229 Taxman 129 (SC)

Service Tax – Finance Act, 1994

2726 **Refund – Order giving effect – When the Stay Application of the revenue had been rejected, the order of Appellate Authority directing grant of refund ought to have been implemented.**

After a long-drawn litigation, the CCE(A) allowed the assessee's appeal to refund the service tax amount deposited. Challenging the said order, the CST filed an application to the Tribunal staying the CCE's Order of refunding the amount of service tax. The Tribunal rejected the said application. Despite the rejection of the application, the refund was not granted to the assessee.

On appeal to the High Court, it held that Revenue was fully aware that it was liable to refund the service tax deposited by the assessee and for that reason it had filed a stay application, which has been rejected. Further, the mere fact that the stay application has been rejected by the Tribunal, would mean that the order of the Appellate Authority was to be given effect to.

Madura Coats (P) Ltd. v. UOI (2015) 126 DTR 253 (2016) 283 CTR 233 (Karn.)(HC)

2727 **Export of services – Rendering of services to foreign clients paying consideration in convertible foreign exchange would not attract service tax liability.**

The Assessee was a steamer agent to its overseas clients, receiving consideration in convertible foreign exchange. Notification No. 6 of 1999 dated 19-4-1999 exempted services receiving consideration in convertible foreign exchange from service tax. This exemption was withdrawn under Notification dated 1-4-2003 and was reinstated under Notification No. 21 of 2003 dated 20-11-2003. The Service-tax authority sought to recover service tax along with interest and penalty for the interim period when service tax was leviable. It was held that service tax could not be levied on services rendered to foreign clients paying consideration in convertible foreign exchange since service tax was a destination based consumption tax. Further, reliance was placed on circular dated 25-4-2003 which clarified that exemption in respect of export of services would continue even after withdrawal of original notification.

CST v. Maersk India (P) Ltd. (2015) 116 DTR 353 / 275 CTR 5261 / 38 STR 1121 / 51 GST 247 (Bom.)(HC)

2728 **S.65 : Levy of service tax on Advocates – Interim stay of the operation and implementation of the judgment of the Bombay High Court upholding the constitutional validity of service tax on lawyers granted. [S. 66, 66B]**

In *P. C. Joshi v. UOI,* a Writ Petition was filed in the Bombay High Court to challenge the levy of service tax on advocates. It was claimed that an advocate renders services which cannot be said to be commercial or business like. They cannot be equated with the service providers mentioned in the Finance Act, 1994. It was also contended that advocacy is not a business but a profession and a noble one. An advocate is a part and parcel of the administration of justice and which is a sovereign or regal function and hence providing for a Service Tax on advocates would mean that their services will no longer be available or accessible to those seeking justice from a Court of law.

That would defeat the constitutional guarantee of free, fair and impartial justice. The High Court dismissed the Petition and held that levy of service tax on lawyers is valid. On appeal to the Supreme Court HELD by an interim order (SLP No. 13944/2015, dated 10-8-2015)

Bombay Bar Association v. UOI (SC); www.itatonline.org

Editorial : Refer P. C. Joshi v. UOI (2015) 273 CTR 113 / 113 DTR 41 (Bom.)(HC) / Advocates Association of Western India v. UOI (2015) 273 CTR 113 / 113 DTR 41 (Bom.)(HC) / Bombay Bar Association v. UOI (2015) 273 CTR 113 / 113 DTR 41 (Bom.) (HC)

S.65(105)(n) : Taxable service – Tour operator services – valuation – Liable to service tax. [S. 65(115), 67] 2729

Amount received for supplementary services is transport services also to be included in the gross amount received and therefore, for entire amount is liable for service tax.

Touraids (I) Travel Services v. CCE (2014) 47 GST 300 / (2015) 273 CTR 200 (All.)(HC)

S.84 : Revision – Penalty – Adjudicating authority had correctly granted to the assessee the benefit of the provisions of S.80 by deleting the penalty. Exercise of revisional jurisdiction under S.84 by the CCE was not in accordance with law. [Ss. 73, 77, 78, 80 & 84] 2730

The question of law before the HC was applicability of S.80 vis-a-vis proviso to S.73(1) where the Tribunal has dismissed the appeal filed by the assessee against the order of CCE, Meerut-I passed in exercise of the revisional power conferred by S.84 of the Finance Act, 1994 imposing penalties on the assessee u/s. 76, 77 & 78 of the Finance Act, 1994. The HC allowed the Writ Petition and held that proviso in S.80 overrides S.78 as well by virtue of the non-obstante clause. Non-obstante provision of S.80 must obviously be given a meaning. If the view of the revenue, which was accepted by the Tribunal, were to be affirmed, that would render the non-obstante provision of S.80 otiose. Consequently, the Tribunal was in error on coming to the conclusion that there would be no occasion to establish period of limitation had been validly invoked under the proviso to s.73(1). Adjudicating authority had correctly granted to the assessee the benefit of the provisions of S.80 by deleting the penalty. Exercise of revisional jurisdiction under S.84 by the CCE was not in accordance with law.

Daurala Organics Ltd. v. CET (2015) 273 CTR 192 (All.)(HC)

West Bengal Taxation Laws (Second Amendment) Act, 1989

2731 **Validating provisions – Refund – Interest – Rural employment cess and education cess – Charging provisions declared void by court. Retrospective substitution by Amendment Act with validation provision. No refund of cess paid for period before amendment notwithstanding interim order or final judgment of court to contrary. Judgment upholding validity of amended provisions. Interest on cess payable chargeable from date of assessment. [West Bengal Rural Employment and Production Act, 1976, S.4B – West Bengal Primary Education Act, 1973 S. 78C]**

The charging sections of the West Bengal Rural Employment and Production Act, 1976, and the West Bengal Primary Education Act, 1973, which were struck down by the court in *Buxa Dooars Tea Co. Ltd. v. State of West Bengal [1989] 179 ITR 91 (SC)* as invalid being violative of Article 301 of the Constitution were substituted with retrospective effect by the West Bengal Taxation Laws (Second Amendment) Act, 1989, which was subsequently held valid in *Goodricke Group Ltd. v. State of West Bengal [1995] 98 STC 32 (SC).* The High Court, based on interim orders passed in both cases, held that for the period prior to the Amendment Act, 1989, the assessee was entitled to a refund of the cess paid by it together with interest at 12 per cent per annum, and that in so far as the interest payable after the Amendment Act was concerned, such interest would only be payable after the assessment orders were passed. On appeal by the Department contending that the interim order in *Buxa Dooars Tea Co. Ltd.'s case [1989] 179 ITR 91 (SC)* to the effect that if the assessee succeeded in the writ petition, the State would refund the amount of cess collected with interest thereon at 12 per cent per annum from the date of collection, did not survive and had no independent existence as it was substituted by the final order in which there was no separate order as to payment of interest :

Held,

(i) That the interim order in *Buxa Dooars Tea Co. Ltd.'s case [1989] 179 ITR 91 (SC)* was self-operative. The final order in that case did not say anything to the contrary, and when both the judgments and the interim orders were read together, it was clear that the refund would have to be made together with 12 per cent interest. However, in view of section 4B of the West Bengal Rural Employment and Production Act and section 78C of the West Bengal Primary Education Act, whatever might have been the subject-matter of *Buxa Dooars Tea Co. Ltd.'s case [1989] 179 ITR 91 (SC),* i.e, the subject-matter of the two Acts as originally enacted, would now, notwithstanding the interim order or the final judgment in that case, be deemed to have been validly levied, collected and paid as rural employment cess and education cess under the Amendment Act, 1989. Therefore, sections 4B and 78C had changed the basis of the law as it existed when *Buxa Dooars Tea Co. Ltd.'s case [1989] 179 ITR 91 (SC)* was decided and consequentially, the judgment and interim order passed in that case, would cease to have any effect. Also, what would have been payable under the Act as unamended, was now payable only

under the 1989 Amendment Act which had come into force with retrospective effect.

(ii) That the High Court was right in holding that by virtue of *Goodricke Group Ltd.'s case [1995] 98 STC 32 (SC),* the interest on the amount of cess payable would only be payable from the respective dates of assessment for the various relevant periods till recovery. *Goodricke Group Ltd.'s case [1995] 98 STC 32 (SC)* made it clear that the assessee shall pay cesses stayed by an order of the court along with interest at 12 per cent per annum. The expression "cesses stayed" had reference to the interim order in *Goodricke Group Ltd.'s case [1995] 98 STC 32 (SC)* which had stated that there would be no enforcement of demand under the Act or Rules and in the meanwhile, assessment might be made. The assessments were made with effect from July, 1993, onwards and consequential demands had been made with effect from 1995 onwards. On the facts, no question arose as to whether interest would become payable from the date of demand or from the date of the assessments inasmuch as the assessee supported the judgment of the High Court in question on this score and was not aggrieved thereby.

[Interest paid by the assessee from time-to-time to the State would be adjusted against any sum that would become payable as a result of the judgment.]

Appeal from the judgment and order dated May 8, 2003 of the Calcutta High Court in WPTT No. 3 of 2003.

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